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National Reporter System—United States Series

THE

FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 222

PERMANENT EDITION

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND
DISTRICT COURTS OF THE
UNITED STATES

JUNE—JULY, 1915

ST. PAUL
WEST PUBLISHING CO.
1915

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

JOHN DEERE PLOW CO. v. MOWRY.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1915.)

No. 2579.

1. CHATTEL MORTGAGES ⟸82—RECORDING—NECESSITY—LAW GOVERNING.

If a contract between a manufacturer of farm implements and a retail dealer in Michigan, approved by the manufacturer in Indiana, amounted to an absolute sale whereby the title passed, accompanied by a pledge or lien in the nature of a chattel mortgage given the manufacturer to secure the purchase price, the necessity for recording the contract and the effect upon creditors of a failure to record were to be determined by the law of Michigan.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 151; Dec. Dig. ⟸82.]

2. CHATTEL MORTGAGES ⟸2—SALE OR MORTGAGE—RECORDING—NECESSITY—LAW GOVERNING.

Where a controversy as to whether a contract between an Indiana manufacturer and a Michigan retail dealer was one of conditional sale, not required or permitted by the state law to be recorded, or one of absolute sale accompanied by a pledge or lien in the nature of a chattel mortgage, required to be recorded, arose in Michigan, there was no statute in Indiana purporting to declare the character of such a contract, and the decisions of the two courts were to the same effect, except that the Michigan cases went further in attempting to differentiate between the two classes of contracts, the nature of the contract would be determined as if the contract had been made in Michigan, though the contract provided that it should be construed under the law of Indiana.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 2; Dec. Dig. ⟸2.]

3. SALES ⟸454—CONDITIONAL SALES—CONSTRUCTION OF CONTRACTS.

Where a contract of sale contains inconsistent provisions, some of which indicate that the title is reserved by the seller and some that the title passes, the dominant thought must be ascertained and given effect, regardless of any contrary statement.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. ⟸454.

What constitutes a contract of conditional sale, see note to Dunlop v. Mercer, 86 C. C. A. 448.]

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4. SALES ⊂464—CONDITIONAL SALES—VALIDITY OF RESERVATION OF TITLE.
In Michigan a reservation of title in a contract for the sale of goods by a manufacturer to a retail dealer, which authorizes a resale by the dealer, can be sustained as a conditional sale only on the theory that the resale is made by the dealer as the agent or consignee of the manufacturer by an agency or consignment which underlies the executory sale, and which is a continuing one until it is terminated either by the resale or by the dealer's personal performance of the conditions, which then for the first time vest title in him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1352; Dec. Dig. ⊂464.]

5. COURTS ⊂368—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION.
It is only to a settled rule of a state court applicable to the precise facts disclosed by the record that a federal court should yield its own judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 951; Dec. Dig. ⊂368.

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

6. CHATTEL MORTGAGES ⊂6—RECORDING—NATURE OF INSTRUMENT.
A contract between a manufacturer of farm implements and retail dealers provided that all implements ordered thereunder were bought subject to the usual manufacturer's warranty to do good work when properly operated; that under no circumstances would goods be returned without direction from the manufacturer; that no countermand of the order should be made, except on payment of a specified part of the purchase price; that in the event of death, failure, insolvency, loss by fire, or if the dealer should sell, dispose of, or discontinue its business, all obligations thereunder were to become due and payable at once; that notes for the purchase price of goods were to be given on receipt of the invoice or upon monthly balances at the manufacturer's option; that in consideration of $1 it was thereby agreed that the title to and ownership of all goods ordered thereunder should remain in, and their proceeds in case of sale should be the property of, the manufacturer, subject at all times to their order until full payment in cash for the goods. *Held* that, in the absence of a controlling decision by the state courts, the contract could not be upheld as one of conditional sale, under which title did not pass, and which by the state law was not required to be recorded, but that the provisions regarding title amounted to a chattel mortgage, which under the laws of the state should have been recorded.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 23–41; Dec. Dig. ⊂6.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Proceeding by the John Deere Plow Company to reclaim from Leon D. Mowry, trustee in bankruptcy of Miller Bros., certain property. From a judgment dismissing the intervening petition of the Plow Company, it appeals. Affirmed.

W. N. Choate and Harvey D. Scott, both of Detroit, Mich., for appellant.

C. L. Robertson, of Adrian, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The District Court dismissed the intervening petition by which the John Deere Plow Company sought to reclaim from the bankruptcy trustee of Miller Bros. a spreader, a sulky, a silo filler, a hay loader, a side delivery rake, and about 50 plow points and shares. The whole controversy turns upon whether the contract between the Deere Company, manufacturer, and Miller Bros., retail dealers, was one of conditional sale, so that the title did not pass out of the manufacturer so long as the goods remained unsold by Miller Bros., or was one of absolute sale, whereby the title did pass, accompanied by a pledge or lien given back to the seller to secure the purchase price. If the former, the contract was not, by any applicable statute, required or permitted to be recorded, and the reservation of title is good as against the trustee; if the latter, the contract amounts to a chattel mortgage, and, under the June, 1910, amendment of section 47a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557, as amended Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [Comp. St. 1913, § 9631]), it is invalid against the trustee, because not filed. The solution of the question depends so far upon the exact terms of the contract that all material parts are reproduced in the margin.[1]

[1] Morenci, Mich., October 14, 1912.

John Deere Plow Company of Indianapolis, Indianapolis, Indiana:

Please enter my order for goods specified in the following list at the following prices and terms, and ship (see page 3) on or about 1/14 * * * for which we agree to pay according to prices and terms as stated in the list hereto attached.

The prices named herein apply to this order only, and are subject to change without notice.

I expressly agree to give notes on receipt of invoice, or upon monthly balances, at your option, drawn with exchange on Chicago or New York, and with interest at the highest permissible rate after maturity, and all goods ordered hereafter for this season's trade shall be subject to the same conditions as to time and manner of payment as indicated herein.

The notices and conditions of sale on pages 2, 3, 4, 5 and 6, are made a part of this contract, the same as if set out herein in full, and this order is given subject to the conditions mentioned therein, and "the undersigned" referred to on said pages means the purchaser.

Territory, Morenci and vicinity * * * on the classes of goods herein ordered. The law of the state of Indiana to govern the provisions of this contract.

G. H. Miller.

Accepted subject to approval of John Deere Plow Company of Indianapolis.

Howard Seely.

Approved by John Deere Plow Company, at Indianapolis, Ind., February 6, 1912.

Conditions of Sale.

It is understood and agreed between the parties hereto:

First. That no claim shall be made or allowed for breakage of hardened molds, shares, shovels or landsides.

Second. That no claim shall be made or allowed for alleged defective material or workmanship, unless the article is produced and the defect is plainly apparent.

Third. The John Deere Plow Company of Indianapolis shall not be held responsible for the performance of a plow after it has been heated or radically changed by any one away from the factory.

Fourth. If, in case of fire, labor troubles, strikes, inability to obtain cars, inability to secure sufficient amount of goods to fill all orders taken, John Deere Plow Company of Indianapolis are delayed in filling this order, or for

[1, 2] When once it is determined whether the contract in question evidences a conditional sale or a chattel mortgage, the necessity for recording and the effect upon creditors of a failure to record are to be determined by Michigan law. Potter Co. v. Arthur (C. C. A. 6) 220 Fed. 843, 136 C. C. A. 589, opinion filed March 2, 1915. In view of the express contract provision that it should be construed and interpreted under the laws of Indiana, defendants claim that the under-

any of said causes, or if from any unavoidable cause said John Deere Plow Company of Indianapolis are unable to entirely comply with this order and ship all the goods, then and in either of such events said John Deere Plow Company of Indianapolis shall not be held liable or accountable for damage or loss for failure to fully supply the goods ordered, and all claims on account thereof are herein and hereby released and waived.

Fifth. That all implements hereby ordered are bought subject to the usual manufacturer's warranty—"to do good work when properly operated"—and failing to do this after the undersigned has used his best efforts, he will give immediate notice to John Deere Plow Company of Indianapolis, and allow time for instructions to be given, or, if necessary, the sending of a person to put it in order; failing then to make the implement work, it may be held subject to the order of John Deere Plow Company of Indianapolis; but under no circumstances will the undersigned return goods without direction from John Deere Plow Company of Indianapolis. In case the fault is with the purchaser, through his neglect to follow directions, or carelessness in using, the undersigned agrees to pay for the time and expenses of the person sent to put it in order.

Sixth. That no countermand of this order shall be made except on payment of twenty per cent. of the net amount of the goods purchased of John Deere Plow Company of Indianapolis as liquidated damages.

Seventh. It is further agreed that in the event of death, failure, insolvency, loss by fire, or should the second party sell, dispose of or discontinue its business, then all obligations arising under this contract are to become due and payable at once in cash.

Eighth. In consideration of one dollar in hand paid the undersigned by John Deere Plow Company of Indianapolis, the receipt whereof is hereby acknowledged, it is hereby further agreed that the title to and ownership of all the goods which may be shipped as herein provided or upon the terms, and during the life of this contract, and which shall embrace and include any and all goods that may hereafter be ordered shipped, shall remain in, and their proceeds, in case of sale, shall be in law and in equity the property and moneys of said John Deere Plow Company of Indianapolis, and subject at all times to their order until full payment in cash shall have been made to and accepted by said John Deere Plow Company of Indianapolis for said goods. It is further stipulated and agreed that the taking of a note or notes of the undersigned or the taking of sale notes in settlement and the rendition of a judgment on such note or notes in favor of John Deere Plow Company of Indianapolis, shall in nowise be deemed or construed a waiver of title to the property. Nothing in this clause, however, is to release the undersigned from making payment as provided for in this contract, and this contract shall be construed as having been entered into in the state of Indiana, and construed and interpreted under the laws of said state, said state being the place of acceptance.

Ninth. That party of the first part reserves to itself the right to revoke this contract, and all orders under same, at any time it may see fit, without any liabilities for loss or damages.

Tenth. That all notes of the undersigned are to be secured by farmers' notes, proceeds of sale, of an equal amount and * * * per cent. in addition, as collateral security to his or their notes whenever so requested by John Deere Plow Company of Indianapolis. * * * No cash discounts allowed after dates named in contract.

lying question as to the character of the contract is a matter of Indiana law. We do not find it necessary to pass upon this question. So far as has been pointed out, or so far as we find, there is no statute in Indiana purporting to declare the character of such a contract; and the decisions of the Indiana courts have gone no further than to hold that the existence in the vendee of the right to sell and give good title is not inconsistent with a reservation of title in the vendor, good and valid as against the vendee's creditors, so long as the property remains in the vendee's hands unsold. The Michigan rule is to the same effect, but the Michigan cases have gone much further in attempting to differentiate between the two classes of contracts. The Indiana courts not having passed on these nicer distinctions, and the controversy having arisen in Michigan, it is at least to be presumed that the Indiana law is the same as that of Michigan; accordingly (for this reason, if not also for the reason that the Michigan recording law is being applied), we must consider the question just as if the contract had been made in Michigan.

[3, 4] This court had occasion, in Mishawaka Co. v. Westveer, 191 Fed. 465, 112 C. C. A. 109, to consider a closely analogous question and to review some of the Michigan decisions. Others, not mentioned in that review, are now brought to our attention. It seems natural to divide into two classes the cases which have been decided in Michigan upon this general subject. In one class may be put articles like machinery, somewhat permanently installed, intended for use by the vendee, and not intended for resale by him. These cases present no inherent difficulty in sustaining the vendor's reserved title as fully as the seemingly very liberal policy of the state in this respect may justify. There is usually nothing in the contract or in the surrounding conditions inconsistent with the expressed reservation of title, and so nothing to interfere with its natural full effect. In the other class are the cases where it is clear, either by express words or by necessary implication, that both parties intended the vendee should resell the property to others, and should give to such second purchaser a perfect title. Here, at once, we have an inconsistency. How can the vendee sell that which he does not own? It goes without saying that if there are, in the contract, inconsistent provisions, some of which indicate that the title was reserved, and some that the title passes, the dominant thought must be ascertained and given effect, regardless of any formal contrary statement. By a review of the Michigan cases and the principles which must control, we are led to the conclusion that a reservation of title can be sustained (as a conditional sale) as against a declared right of resale only on the theory that the resale is made by the vendee as the agent or consignee of the vendor, by an agency or consignment which underlies the executory sale and which is a continuing one until it is terminated either by the resale or the vendee's personal performance of the conditions, which then, for the first time, vest title in him. We do not find that the respective force of these superficially conflicting features of the contract, or the reasons which induce the conclusion that one or the other is dominant, have ever been stated or discussed by the Michigan Supreme Court. The decisions content themselves with stating one or the other conclusion. It is not easy to reconcile all the cases

by our suggested test as to whether the theory of pro tem. agency or consignment will fit the facts. Perhaps some of them cannot be reconciled; but we see no other means of extracting a principle of decision.

In Brewery Co. v. Merritt, 82 Mich. 198, 46 N. W. 379, 9 L. R. A. 270, and Pratt v. Burhans, 84 Mich. 487, 47 N. W. 1064, 22 Am. St. Rep. 703, stocks of goods had been placed by manufacturers with retail dealers for the purpose of retail sale, but a reservation of title had been declared. In both cases, the reservation was sustained. In neither case do the facts stated disclose anything inconsistent with what would be, in substantial effect, a consignment or an agency to resell—up to the time when the vendee became obliged to pay the price and take the title. In the Mishawaka Case, we gave this interpretation to these two cases.

Then came Choate v. Stevens, 116 Mich. 28, 74 N. W. 289, 43 L. R. A. 277, and Van Den Bosch v. Bouwman, 138 Mich. 624, 101 N. W. 832, 110 Am. St. Rep. 336. Each of these cases belonged in the class of articles not intended for resale; but in each an intent to pass title to the vendee was found with sufficient certainty to overcome the expressed declaration that title should not pass; and, of course, such cases become all the stronger against the passing of title when applied to instances of the other class, where the existing right of resale must be given due effect.

[5] It is to be noted, however, that these two cases were not, by the Michigan Supreme Court, given any broad effect, but were distinguished, on perhaps rather narrow grounds, in Bunday v. Columbus Co., 143 Mich. 10, 106 N. W. 397, 5 L. R. A. (N. S.) 475; and that Choate v. Stevens was again distinguished, and was not followed, in Worden v. Blanding, 161 Mich. 254, 126 N. W. 212, 20 Ann. Cas. 1332. The latter case involved a stock of groceries sold to a retailer, and, obviously, the right of resale was contemplated; nevertheless the sale was held a conditional one. Here, too, we see no more difficulty in finding the idea of what was (temporarily and pending the maturing of the sale) a mere consignment or agency than in Brewery Co. v. Merritt and Pratt v. Burhans. In American Harrow Co. v. Deyo, 134 Mich. 639, 96 N. W. 1055, we have a case not easily distinguishable from the one at bar; and reclamation was approved. The contract is given in full in 134 Mich. on pages 640, 641, and in 96 N. W. on pages 1055, 1056. In most respects, it is as favorable to the absolute sale theory as is the Deere contract; but it requires the proceeds of sale to be remitted at once to the vendor, while the Deere contract is at least consistent with the vendee's right to retain the proceeds until the vendee's purchase price obligation matured. There are other distinctions which, while singly not impressive, have some force in the aggregate. There is considerable discussion in Wasey v. Whitcomb, 167 Mich. 58, 132 N. W. 572; but the contract is clearly classified as one of consignment. Upon the whole, we are not satisfied that this Deyo Case, or the others named, have the effect of overruling Choate v. Stevens and Van Den Bosch v. Bouwman. This comes to saying, when taken in connection with the other cases cited, that we think there is no settled rule in Michigan applicable to the precise facts disclosed by this record; and it

is only to such settled rule that we should yield our own judgment. Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359.

[6] Our general view of such a situation was disclosed and sufficiently discussed in Mishawaka Co. v. Westveer, and it is to the effect that, where goods are intended for resale, the reservation of title cannot stand (as a conditional sale), unless, taking the entire contract and circumstances together, it is clearly dominant over the right of resale and the other inconsistent features of the contract; in other words, the facts as a whole must be consistent with the theory that the resale is to be made by the vendee as agent or consignee, and not as owner. It is true that, in the Mishawaka Case, there was special reliance on the fact that the contract did not attempt to preserve to the vendor a substituted title to the proceeds when the goods were sold, and that, in the present case, this reservation is, in terms, made; but we are not satisfied, taking all the conditions together, to treat this as a controlling distinction. To observe where the loss would have been if the goods had been destroyed in transit before reaching Miller Bros., or if they had been destroyed by fire while in Miller Bros.' possession, will furnish useful tests. It is quite clear that in either of these contingencies Miller Bros. would have been obliged to pay the full purchase price just the same. It is true, also, as to each one of the conditions which seems to indicate that the contract was intended to pass title, that a Michigan decision is to be had showing that this condition or an equivalent one does not neutralize the express reservation of title; but the real intent of the parties is to be drawn from the full contract and from the joint effect of all the conditions. The provisions as to the manufacturer's warranty; that no goods can be returned to the vendors; that no countermand of the order can be made; that the full purchase price matures at once in case of death, insolvency, fire loss or selling out the business; that the vendee gives at once purchase-price notes which must be secured; and that the reservation of title is in form based upon a separate consideration—all these conditions tend to support the conclusion that the contract is really one of sale, that the provisions regarding title amount to a chattel mortgage, and that the instrument should have been recorded. While we regret that it is not entirely clear what disposition of the present case is required by the Michigan rule, yet, in the absence of a clearly controlling decision by that court, we are better satisfied to adopt the analogy of this case to Mishawaka Co. v. Westveer than its analogy to American Harrow Co. v. Deyo; and accordingly the judgment below is affirmed.

See, also, Coweta Co. v. Brown (C. C. A. 6) 163 Fed. 162, 165, 89 C. C. A. 612; Flanders v. Reed (C. C. A. 1) 220 Fed. 642, 136 C. C. A. 250.

NOTE.—The opinion of the Circuit Court of Appeals for the Eighth Circuit in John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422, seems to depend upon the agency or consignment contract involved, rather than upon the order for the goods; and this contract is so essentially different from the Miller Bros. contract that there is no inconsistency between that opinion and the result in the present case."

WELLS v. NATIONAL SURETY CO.

(Circuit Court of Appeals, Third Circuit. April 17, 1915.)

No. 1923.

PRINCIPAL AND SURETY ⇐117—DISCHARGE OF SURETY—CHANGE IN CONTRACT —ANTICIPATION OF PAYMENTS.

Where a subcontractor under a contract providing that, when payments were received by the principal contractor, the proportionate amount thereof should be paid to the subcontractor, applied to the principal contractor before any payment was due, and before any considerable amount of the work had been done, for financial aid to carry out the work, and the principal contractor thereupon executed his accommodation note to the subcontractor, with the understanding that he should protect himself out of payments due the subcontractor, and hold back the amount of the note therefrom, and that as between him and the subcontractor the note was payable only if the subcontractor should faithfully and properly perform the contract, the transaction was not an independent loan of the contractor's credit to the subcontractor, secured by the subcontractor's rights in the contract, but was an anticipation of the payments due under the subcontract, the effect of which was to reduce the subcontractor's incentive to continue work until the payments regularly became due, and the surety on the subcontractor's bond to the contractor was therefore discharged.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 283–285; Dec. Dig. ⇐117.

Discharge of surety on building contract by change in obligation or duty of principal, see notes to United States v. Walsh, 52 C. C. A. 427; O'Neill v. Title Guaranty & Trust Co., 113 C. C. A. 214; United States Fidelity & G. Co. v. United States, 116 C. C. A. 196.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by Mark P. Wells against the National Surety Company. Judgment for defendant, and plaintiff brings error. Affirmed.

A. L. Moise, of Philadelphia, Pa., for plaintiff in error.

T. R. White, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an action against a surety on a subcontractor's bond. Mark P. Wells, the plaintiff below and the plaintiff in error, was the principal contractor, and was engaged in the construction of a convention hall for the city of Philadelphia. The E. E. Wells Contracting Company was a subcontractor, and E. E. Wells, who was in no way related to the plaintiff, was its president. The defendant was the surety on the subcontractor's bond. The undertaking of the surety was that E. E. Wells Contracting Company "shall well and truly perform the terms and provisions of" a contract between it and Mark P. Wells for the excavation, reinforced concrete, cement work, etc., in connection with the erection of the structure. The contract provided, with respect to payments to be made to the Contracting Company, that:

"When payments are received by the said M. P. Wells, proportionate amount of same to be paid to said E. E. Wells Contracting Company in proportion to the amount of work done, reserving therefrom 20 per cent. until the final payment shall be made to said M. P. Wells by said city of Philadelphia."

It is averred that the Contracting Company defaulted in the performance of its contract, and discontinued work, whereupon the plaintiff was obliged to complete the same at a cost of about $5,000 in excess of the contract price, for which recovery is sought against the surety. The defense is that the plaintiff, the principal contractor, materially varied the terms of his contract with the Contracting Company by making a payment to the Contracting Company before payments were due, thereby releasing the surety on its bond. The circumstances which constitute the alleged anticipated payment are as follows:

After the Contracting Company had entered upon its work, and had performed an inconsiderable part thereof, and before any payments were made by the city to Mark P. Wells, the principal contractor, and therefore before any payments were due to the Contracting Company, that concern found itself in need of money with which to prosecute its work. E. E. Wells, its president, called upon Mark P. Wells, the principal contractor, for assistance, with the result that Mark P. Wells gave the Contracting Company his note for $4,000, which, upon indorsement by the Contracting Company, was discounted for its account. Shortly thereafter the Contracting Company discontinued work.

As the nature of the transaction and the intent of the parties control the principle of law to be applied to this case, a recital of the testimony is necessary. Mark P. Wells testified as follows:

"Q. What, if anything, had taken place between you and the E. E. Wells Contracting Company prior to that time with respect to a payment? A. They came to me about the 22d of March and wanted me to lend them my note, to help them finance the job, which I did, an accommodation to them, *understanding* that when the payments came due for his part of the work I was to *protect myself.* * * * Q. You may state what Wells said and what you said at that time. A. Wells asked me for the note. I told him there was no money due him. He said he knew that, but he did not get as much out of these houses as he thought he would get, and he would be short of money, and if I would lend him the money he thought he could get it discounted. Q You mean lend him your credit? A. Lend him the credit, yes. Q. You do not mean to give him the money, do you? A. No; I did not give him the money. I gave him the note. He did not ask me for money. He asked me for a note. Q. What did you say with respect to protecting yourself? A. I told him as soon as he got that note discounted—it was a third party note—I had no defense to it. He told me *he would have a lot of payments due before the note matured, and I could protect myself out of the funds that would come into my hands, to protect that note.* Q. Then upon that agreement you let him have the note? A. Yes, sir. Q. What did he do with the note? A. He went down to the Union National Bank and had it discounted. * * * When he got that note discounted, *my agreement was that I was to protect myself out of that money.* I had 16 men who threatened to break my head off because Wells owed them money. I did not employ them any more than you did. I did not know them. Q. In other words, you were not to pay the note unless he did his work. Is that it? A. No; I say that I lent him that note, and after he had it discounted *I was to protect myself out of the proceeds of that note, or out of the proceeds of the vouchers coming to E. E. Wells.* Q. *In other words, you were to hold back $4,000?* A. *Yes, sir.* * * * Q. Before you leave the stand, Mr. Wells, did you pay that note of

$4,000? A. No, sir. Q. Why didn't you pay it? A. Because it was given as an accommodation to Wells. Q. That is not an answer. Why didn't you pay it? A. Because Wells quit the work, and ran off, and had me stuck for $16,000."

Another witness testified as follows:

"A. I remember Mr. E. E. Wells coming down. I was in the same room with Mr. Wells, and Mr. E. E. Wells and he wanted some money, and Mr. Wells said that there was no money due him. There might have been other conversation, which I do not remember. Mr. Wells said he would give him a note as an accommodation for to carry on the work, and Mr. Wells gave him a note for $4,000."

There was introduced in evidence the record of a suit brought by the Union National Bank against Mark P. Wells upon the note in question, in which Mark P. Wells filed an affidavit of defense containing the following:

"That the said note was given by defendant without consideration, and without value received, and as an accommodation to the payee, and that the payee had entered into a contract with the defendant whereby the payee was to perform certain work for defendant as above set forth, and would be entitled to receive from defendant payment of the said note *only* in the event of the payee faithfully and properly performing its contract with the defendant."

Evidently following the law of the case of Fidelity & Deposit Co. v. Agnew, 152 Fed. 955, 82 C. C. A. 103, decided by this court at its March term, 1906, and approved by this court in Justice v. Empire State Surety Co., 218 Fed. 802, 134 C. C. A. 490, decided at the October term, 1914, the District Court found, as a matter of law, that the transaction was an anticipation of payments, and therefore directed a verdict for the defendant.

The directed verdict constitutes the one error assigned, and raises two questions: First, whether the giving of the note and the provision made for its payment constituted an anticipated payment on account of the subcontract, and therefore released the surety, or whether the giving of the note was an entirely independent transaction in the nature of a loan, which, together with the provision for its payment, was wholly separate from and in no way tied up with the future performance of the subcontract and the rights of the parties thereunder; and, second, whether the trial court should have decided that question as a matter of law.

In determining the character of the note transaction, we will consider: (1) The application for assistance made by the subcontractor to the principal contractor; (2) the note which passed between them; and (3) the provision for its payment.

1. The testimony leaves it uncertain whether E. E. Wells applied for a payment on account of work not done, or asked for help in the shape of a note. At all events, no money was paid by the principal contractor to the subcontractor, but a note was given by the former to the latter. Very little information is to be had from the conversations preliminary to the giving of the note, beyond the fact that the subcontractor needed money with which to carry on its work, and that it solicited financial aid from the principal contractor.

2. In rendering the financial aid requested, the principal contractor

gave his own note to the subcontractor for an amount of money not then due the subcontractor under the contract. The note was given with the understanding on the part of both that the subcontractor, the payee, should have the note discounted and with the proceeds continue its work. If the transaction had stopped here, there would have been no case.

3. There was, however, an understanding between the parties as to the manner in which the note should be paid, which in effect was that the contractor should "protect" himself "out of the proceeds of the vouchers coming to E. E. Wells," the subcontractor, for work done under the contract, and that when money under the contract became due the subcontractor, Mark P. Wells, the principal contractor, was "to hold back $4,000," the amount of the note. In that way, as testified by Mark P. Wells, he was to protect himself out of the funds that would come into his hands and which would be due the subcontractor under the contract. It was further shown by the statement of Mark P. Wells:

> "That the payee [the Contracting Company] had entered into a contract with [him], whereby the payee was to perform certain work for [him], * * * and would be entitled to receive from [him] payment of the said note *only* in the event of the payee faithfully and properly performing its contract with" him.

It thus appears by the agreement of the parties that the obligation into which Mark P. Wells entered when he made and delivered his note to the Contracting Company was, as between them, payable only in the event that the payee should faithfully and properly perform the contract with respect to which the defendant Surety Company's obligation related. The note, therefore, was not an absolute promise to pay in any event, such as would have existed were the transaction purely a loan. The obligation was for payment in a particular event, which was the faithful performance by the Contracting Company of its contract The transaction, therefore, to this extent, was tied up with the contract.

The understanding that the maker of the note was to "protect" himself "out of the proceeds of the vouchers coming to E. E. Wells," being moneys coming first into his hands, and out of the same "to hold back $4,000," the amount of the note, does not suggest that Mark P. Wells looked to the future payments due the Contracting Company as "security" for the note which he made and delivered, but as the one certain and stipulated means of payment of the note. This apparently was the one circumstance which induced Mark P. Wells to make and deliver his note, for in his testimony he repeatedly refers to the understanding that when the payments to the Contracting Company became due he was to protect himself out of them. The effect of the note transaction was to anticipate payments as completely as though Mark P. Wells had paid the Contracting Company $4,000 in money, with the understanding that, when payments became due the Contracting Company, he was to hold back an amount equal to the sum advanced. The effect of the transaction upon the Contracting Company was to reduce its *incentive* to continue work until the payments regularly became due,

and the effect upon the surety of the Contracting Company was to deprive it of the safeguard which the presence of such an incentive affords.

The subcontract between Mark P. Wells and the Contracting Company was made on February 24, 1912. The note transaction occurred on March 22d following. Having acquired $4,000 by this means before any payments were due under the contract, and having performed work under the contract for which it thereafter received but $875 out of a contract price of $11,847, the Contracting Company quit work on May 4th, leaving the principal contractor to complete its work and the defendant Surety Company to pay for it. May it not be said that, when the subcontractor became possessed of $4,000 in advance of work done and payments due, he lost an incentive to continue, and the Surety Company was deprived of the protection which such incentive normally assures?

The case of Museum of Fine Arts v. American Bonding Co., 211 Mass. 127, 129, 97 N. E. 633, 635, is the principal one of a line of cases relied upon by the plaintiff as authority for his contention that the transaction in question was not an anticipated payment, but was a loan of credit secured by the borrower's rights in the contract. The case cited is readily distinguished from the case at bar, and by express language it distinguishes itself from Fidelity & Deposit Co. v. Agnew, 152 Fed. 955, 82 C. C. A. 103. The action was upon a contract of indemnity similar to the one under consideration. The owner of the building under construction loaned the contractor $5,000, and received from him his note for that amount, accompanied with a written agreement that the owner might apply to the payment of the note any sum of money that should thereafter become payable to him under the contract. The court found that the transaction did not amount to an anticipated payment because:

"The note was not made payable out of future installments to become due to Stannard [the contractor]; his agreement went no further than to authorize the application of such installments 'as security' for the note. There is no finding that either party intended or expected that the note *should be paid out of such future installments to come due to Stannard.* Much less is there anything to indicate an agreement or understanding that the plaintiff should look *only* to his future earnings for the payment of the note. It was negotiable in form, and, as we have seen, was payable absolutely, *and not upon any contingency* or *out of any particular fund.* If the plaintiff had chosen to do so, it could have put the note in suit the next day after it was taken, and Stannard would not have been allowed to set up in defense any agreement or understanding that it was to be paid only out of the fund designated as security. Torpey v. Tebo, 184 Mass. 307 [68 N. E. 223]; Wooley v. Cobb, 165 Mass. 503 [43 N. E. 497]. This was a private loan, like the ones discussed in Bateman Brothers v. Mapel, 145 Cal. 241 [78 Pac. 734], and St. John's College v. Ætna Indemnity Co., 201 N. Y. 335 [94 N. E. 994]. *It was not tied to Stannard's future rights under the contract,* as was the case with the note dealt with in Fidelity & Deposit Co. v. Agnew, 152 Fed. 955 [82 C C. A. 103], and the reasoning of that case is not applicable."

In the case cited the note was given *by* the contractor as a borrower, *to* the owner, who made the loan, and from whom payments to the contractor, though not then due, would some day be due. The payee then held both the note and the security. Here the situation was re-

versed. The note was given *by* the principal contractor *to* the subcontractor; that is, by the man who some day would owe money to the man to whom the note was given. In the Museum Case there was an agreement that the future payments, when due under the contract, should be held by the *payee* "as security" for the note. There was no understanding that the note should be paid out of such future installments when due. Much less was there anything to indicate an agreement that the Museum should look *only* to the contractor's future earnings for payment of the note. In the case under consideration there was no agreement that future payments should be held by the principal contractor as "security" for the note, but there was an agreement that the principal contractor should look to the subcontractor's future earnings for the payment of the note, and that the note was to be paid out of those particular earnings, in order to do which the principal contractor was authorized to "hold back" from the subcontractor an amount equal to the face of the note when such an amount became due it under the contract. By this agreement we believe that the payment of the note became so tied up with the payments provided by the contract that the transaction amounted to a departure from the contract upon which the undertaking of the surety was based.

The defendant relies upon the case of Fidelity & Deposit Co. v. Agnew, 152 Fed. 955, 82 C. C. A. 103, followed by Justice v. Empire State Surety Co. (D. C.) 209 Fed. 105, decided by this court, as announcing the law which governs this case. The facts of the case of Fidelity & Deposit Co. v. Agnew are somewhat similar to those of this case. The subcontractor, being short of funds, went to the contractor at a time when he had done but little on his contract, asking for an advance payment. Not being in funds, the contractor indorsed the note of the subcontractor, which was discounted; the proceeds being credited to the contractor and by him turned over to the subcontractor. Before the note fell due, the contractor owed the subcontractor more than the amount of the note. In making payment to the subcontractor he held back enough to meet the note, and deposited the same with the bank. This transaction was repeated several times, notes being given prior to payments due and being paid out of the proceeds of payments when due, until eventually the last note was paid. The court found, as a matter of law, that the transactions were anticipated payments, and released the surety of the subcontractor. In the opinion, the court said:

"The learned trial judge was of the opinion that these note transactions were merely accommodation loans having no other significance; Mr. Van Houten simply lending the security of his name by indorsing the notes of the marble company and the parties who succeeded it, which with the several renewals and extensions the bank discounted for them. But the case is not so simple; nor is the transaction able to be separated from the existing agreement between the parties with regard to the delivery of material. As already observed, the money obtained was obtained in direct response to an application by the marble company for an advance on account of the agreement and the delivery of material to be made under it, and by the arrangement which was made for its repayment it was expressly tied up to this. No doubt as to the bank it was a loan; but as to the others it was essentially an advance of money upon the agreement, to be repaid by delivery of the material there contracted for. * * * The point is that, instead of being

paid as marble and granite were delivered, as provided in the agreement, the marble company had put in its hands by the transaction a large sum of money in advance and anticipation of this. Thereafter it was not a question of payment according to deliveries, where the agreement puts it, but a repayment by deliveries outside of it. This deprived the surety of the protection and the incentive of restricted payments, and was just as prejudicial as if the advance were less disguised."

The principles of law adopted and applied by this court in the case of Fidelity & Deposit Co. v. Agnew we believe apply with equal force to the case under consideration, and control and direct our judgment.

The judgment below is therefore affirmed.

UNITED STATES v NORRIS et al.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1915.)

No. 4089.

1. APPEAL AND ERROR ⟸877—REVIEW—ERRORS AGAINST PARTY NOT APPEALING.

On an appeal by the government in a suit to cancel a patent to land, from a decree confirming the title of a purchaser from the patentee and granting a money recovery against the patentee, the decree could not be disturbed because of the meagerness of the evidence as to the patentee's fraud in procuring the patent; no testimony to the contrary having been offered, and no appeal having been taken by either defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560–3572; Dec. Dig. ⟸877.]

2. PUBLIC LANDS ⟸120—CANCELLATION OF PATENTS—BURDEN OF PROOF.

In a suit by the government against a patentee and his grantee to cancel a patent to land, when it was shown that the patentee procured the patent by fraud, the burden rested upon the grantee to show the good faith of his purchase by testimony other than the recitals of his deed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ⟸120.]

3. COURTS ⟸375—FEDERAL COURTS—LIMITATIONS—SUITS BY UNITED STATES.

A state statute of limitations does not bar suits by the United States brought in their own courts in their sovereign capacity to assert a public interest or to enforce a public right.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. ⟸375.]

4. PUBLIC LANDS ⟸120—CANCELLATION OF PATENTS—LIMITATION OF ACTIONS.

Act March 3, 1891, c. 559, § 1, 26 Stat. 1093, providing that suits by the United States to vacate and annul any patent theretofore issued shall only be brought within five years from the passage of that act, and that suits to vacate and annul patents thereafter issued shall only be brought within six years after the issuance of the patent, applies to all suits by the government to vacate and annul patents to public lands issued under any law of the United States.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ⟸120.]

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5. PUBLIC LANDS ⟸120—CANCELLATION OF PATENTS—LIMITATION OF ACTIONS.

Under Act March 3, 1891, § 1, a suit to cancel a patent to land, commenced within six years from the date of the patent, was not barred by limitations as against the patentee, though his grantee was not made a party to the suit until after limitations had run.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ⟸120.]

6. LIMITATION OF ACTIONS ⟸127—COMPUTATION OF PERIOD OF LIMITATION—COMMENCEMENT OF ACTION.

Where a suit to cancel a patent to land was brought against the patentee, and subsequently an amended bill was filed against the patentee and his grantee, upon which an order was issued and served on the grantee requiring him to appear and plead, the suit was not commenced as against the grantee until the filing of the amended bill and the issuance of the warning order, with the bona fide intent that it should be promptly served.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543–547; Dec. Dig. ⟸127.]

7. PUBLIC LANDS ⟸120—CANCELLATION OF PATENTS—LIMITATION OF ACTIONS.

A patent to land was issued December 31, 1903. On June 14, 1909, the patentee conveyed to a purchaser by a deed filed for record two days later. On August 16, 1909, the government filed a suit to cancel the patent for fraud, but the grantee was not made a party until 1911. *Held* that, as the grantee purchased within six years from the date of the patent, and placed his deed upon record before the suit was brought, and as there was no concealment of his purchase, or other fraud on his part to delay the commencement of the suit against him until limitations had run, the suit was barred as against him by Act March 3, 1891, § 1.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ⟸120.]

8. LIMITATION OF ACTIONS ⟸5—STATUTORY PROVISIONS—CONSTRUCTION.

Courts cannot insert in a statute of limitations an exception which the statute itself does not contain.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 13–15; Dec. Dig. ⟸5.]

9. LIMITATION OF ACTIONS ⟸11—AGAINST WHOM AVAILABLE—SUITS BY THE UNITED STATES.

The government is not bound by a statute of limitations, unless Congress has clearly manifested its intention that it shall be so bound.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35–39; Dec. Dig. ⟸11.]

10. APPEAL AND ERROR ⟸854—REVIEW—THEORY OF DECISION.

Where, in a suit to cancel a patent to land, a demurrer and answer by the patentee's grantee, setting up limitations, should have been sustained, but the court overruled the demurrer, and, on the hearing on the bill, answer, and proofs, confirmed the title to the land in the grantee, on the ground that there was no proof of his bad faith, though the grantee had offered no evidence to sustain the burden resting on him of proving good faith, the decree would not be reversed on the government's appeal, as a right decree or judgment will not be reversed because the trial court has given a wrong reason for it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408–3424, 3427–3430; Dec. Dig. ⟸854.]

11. PUBLIC LANDS ⟸123—FRAUDULENT ENTRY—MONEY JUDGMENT—AMOUNT OF DAMAGES RECOVERABLE.

In a suit by the government to cancel a patent for a homestead entry, commuted to a cash entry, where it appeared that the land could not be recovered because limitations had run in favor of the patentee's grantee, the government could not recover from the patentee the value of the land in excess of the amount it received therefor, especially in the absence of any evidence of such value, and, there being no competent evidence of the value of the land, a judgment for the minimum government price of the land was the utmost that it was entitled to; it having in fact suffered no actual damage from the patentee's fraud.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. ⟸123.]

12. CONTRACTS ⟸265—RESCISSION—INABILITY TO RESTORE STATUS.

A court of equity will not rescind a contract when the parties thereto cannot be placed in statu quo, unless the clearest and strongest equity demands such relief.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1187; Dec. Dig. ⟸265.]

13. EVIDENCE ⟸265—ADMISSIONS—EFFECT—PUBLIC LANDS—FRAUDULENT ENTRY.

In a suit to cancel a patent to land, in which, because of the intervening rights of a third party, a money judgment was rendered against the patentee, the admission in the patentee's answer that he received $3,000 or its equivalent for the land from his grantee was not an admission that the land was then of that value; it having been improved and sold with the improvements for that amount, and there being no evidence as to the value of the land without the improvements.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. ⟸265.]

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit by the United States against Edwin K. Norris and another. From a decree for insufficient relief, the United States appeals. Affirmed.

T. G. Chambers, Jr., Asst. U. S. Atty., of Oklahoma City, Okl. (Isaac D. Taylor, U. S. Atty., of Guthrie, Okl., on the brief), for the United States.

C. G. Horner, of Guthrie, Okl., for appellees.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

REED, District Judge. The United States brought this suit to cancel and set aside a patent issued by the government to the defendant Edwin K. Norris, December 31, 1903, in commutation of a homestead and settlement entry upon 160 acres of government land in Woodward county, Okl., to a cash entry, which patent it is alleged he obtained by false testimony produced by him before the local land office as to the time of his occupancy of the land and the improvements made thereon by him.

The original bill was filed August 16, 1909, and alleges that Norris was not then a resident of Oklahoma, but a citizen of and resident in the state of Texas. The suit was obviously brought under section 8,

c. 137, Act March 3, 1875 (section 738, Rev. St. U. S.), to establish an equitable title or claim to the land. Upon application of the complainant an order was issued by the court on the same day, August 16, 1909, requiring the defendant to appear and plead, answer, or demur to the bill on or before October 4, 1909. This order was served on Norris by the United States marshal at Ft. Worth, Tex., September 7, 1909. The record does not show what further was done under this order. On August 1, 1911, the complainant filed a second amended bill against Norris and A. L. Rounds as defendants, in which it is alleged that Norris fraudulently obtained the patent to the land December 31, 1903, as alleged in the original bill; that both defendants are nonresidents of Oklahoma and reside in Texas. It is then alleged that on June 14, 1909, Norris made a pretended conveyance of the land to the defendant Rounds for a pretended consideration of $3,000, for the purpose of preventing the complainant from recovering such land from him, and that defendant Rounds knew of the fraud perpetrated by Norris in obtaining the patent for and title to the land. What the first amended bill was, or what disposition was made of it, does not appear from this record. On August 2, 1911, upon application of the complainant, an order was issued by the court requiring the defendant Rounds to appear and plead, answer, or demur to said second amended bill on or before the 4th day of September, 1911; that being the September rule day, 1911. This order was served upon the defendant Rounds by the United States marshal August 12, 1911, at Ft. Worth, Tex.

Pursuant to this order Rounds appeared and filed a demurrer to the second amended bill for want of equity, and upon the further ground that as to him the cause of action alleged therein accrued more than six years prior to the filing of said amended bill and the issuance of said order, and was barred by the statute of limitations. On August 29, 1912, Norris moved to strike from the files the second amended bill, for the reason that the same is not *germane* to the original bill and not proper as an amended pleading. On the same day, August 29, 1912, this motion, and the demurrer of the defendant Rounds, were each overruled, to which the defendants severally excepted, and each was then granted until September 10th to answer the bill.

The defendants separately answered this bill—the defendant Norris admitting that he obtained the patent for the land on December 31, 1903, as alleged, but denying all fraud upon his part in procuring the same; and defendant Rounds answered, admitting the issuance of the patent to Norris on December 31, 1903, and alleging that he purchased the land of Norris on June 14, 1909, for $3,000, paid by him in good faith to Norris therefor, $500 of which was in cash, and $2,500 by note secured by a vendor's lien upon the property, without any knowledge or notice upon his part of the alleged fraud of Norris in obtaining the patent, and that Norris at the time of such purchase made and delivered to him a warranty deed of said land, which was duly recorded in the office of the register of deeds of Woodward county, Okl., on June 16, 1909, and again alleged that as to him the cause of action accrued more than six years prior to the filing of said amendment, and prior to the time he was made a party to the suit, and is barred by the

statute of limitations. The general replication was not filed, but no question is raised because of this.

The case then came on for hearing upon the testimony of the complainant alone, neither defendant offering any testimony, and the court, upon April 7, 1913, made and entered a decree as follows:

"First. That the plaintiff has established the allegations of the bill that the defendant Edwin K. Norris failed to reside upon or cultivate the tract of land in controversy as required by law prior to final entry.

"Second. That the plaintiff has failed to establish that the defendant A. L. Rounds had notice and knowledge thereof, or that the said defendant purchased and acquired title to said land from said Edwin K. Norris in bad faith, and that the title of the defendant A. L. Rounds to said land should be and it is hereby quieted and confirmed, to which the plaintiff excepted and excepts.

"Third. That the plaintiff have and recover of the said Edwin K. Norris the price at which said land may be sold to homestead claimants, to wit, the sum of two hundred dollars ($200), together with the costs of this suit, which are taxed to and against the defendant Edwin K. Norris, to which Edwin K. Norris at the time excepted and excepts, and to which the plaintiff also excepted and excepts."

From this decree the complainant appeals, and assigns as error that the court erred:

(1) In holding that it was incumbent upon appellant to establish by proof that defendant Rounds purchased and acquired title to the land from Norris in bad faith, and in confirming and quieting the title to the land in Rounds.

(2) In holding that appellant was entitled to recover from Norris only $200 upon finding that he procured the patent fraudulently, and in not holding that appellant was entitled to recover from Norris $3,000 as the value of the land, upon decreeing that Rounds was a good-faith purchaser thereof.

[1] The testimony in the record as to the alleged fraud of Norris in procuring the patent is quite meager; but in the absence of any testimony to the contrary, or of an appeal by either of the defendants, the decree cannot rightly be disturbed upon this ground.

[2] The appellant offered no proof as to the alleged bad faith of Rounds in his purchase of the land from Norris, and contends that, having shown that Norris procured the patent by fraud, as held by the trial court, the burden then rested upon Rounds to show the good faith of his purchase, and that this he must do by testimony other than the recitals of his deed from Norris. This contention of the appellant, we think, must be upheld. Smith v. Sac County, 11 Wall. 139, 147, 20 L. Ed. 102; Wright-Blodgett Co. v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. ——, and the cases there cited, wherein it is held that the recitals of a deed are insufficient to prove the payment of a valuable consideration without notice of the alleged fraud. The court therefore erred in confirming the title to the land in Rounds upon this ground, and unless the suit is barred by the statute of limitations, or appellant is otherwise estopped from maintaining the suit, the decree as to Rounds is erroneous.

[3] The state statute of limitations does not, of course, bar suits of the United States brought in their own courts in their sovereign capacity to assert a public interest or to enforce a public right. United States v. Thompson, 98 U. S. 486, 25 L. Ed. 194; United States v. Insley, 130 U. S. 263, 266, 9 Sup. Ct. 485, 32 L. Ed. 968.

[4, 5] But section 1 of the Act of March 3, 1891 (26 Stat. 1093, c. 559), provides:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

This section in terms applies to all suits by the government to vacate and annul patents to public lands issued under any law of the United States. United States v. Winona & St. P. R. R. Co., 165 U. S. 463, 475, 17 Sup. Ct. 368, 41 L. Ed. 789; United States v. Chandler-Dunbar Co., 152 Fed. 25, 28, 81 C. C. A. 221, affirmed 209 U. S. 447, 450, 28 Sup. Ct. 578, 52 L. Ed. 881. As to Norris the suit was commenced within six years from the date of the patent, and is not therefore barred by the statute of limitations. See Linn & Lane Lumber Co. et al. v. United States, 236 U. S. 574, 35 Sup. Ct. 440, 59 L. Ed. ——.

[6, 7] As to Rounds the suit was not commenced until the filing of the second amended bill, which was August 1, 1911, and the issuance of the warning order, so called, upon that bill August 2, 1911, with the bona fide intent that it be promptly served. United States v. American Lumber Co., 85 Fed. 827, 29 C. C. A. 431, and cases cited. This was seven years and seven months after the patent was issued. There is neither allegation nor proof of any concealment on the part of Rounds of his purchase of the property, nor of any other fraud on his part to delay the commencement of the suit against him until the statute of limitations had run. The bill avers that his purchase of the land from Norris was on June 14, 1909, and that the deed to him was filed for record in the office of the register of deeds for Woodward county, in which the land is situated; and it was so filed June 16, 1909. This was within six years from the date of the patent. In United States v. Winona & St. P. R. R. Co., above, Mr. Justice Brewer, speaking of the statute of limitations above cited, said (165 U. S. at page 476, 17 Sup. Ct. at page 371 [41 L. Ed. 789]):

"Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department. * * * It is true that these appellees cannot avail themselves of these limitations, because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the government, the grantor therein, should not be heard to question them."

The question of the concealment of the fraud from the land department until the statute had run, was not involved in that case. See United States v. Exploration Co., 203 Fed. 387, 121 C. C. A. 491. Nor is it involved in the case before us, for, as before stated, there is neither allegation nor proof of any concealment on the part of Rounds of his purchase of the land; in fact, he placed the evidence of his purchase upon the public record of land titles in the county where the land is situated before the suit was brought against Norris. In Wood v. Car-

penter, 101 U. S. 135, at page 139, 25 L. Ed. 807, Mr. Justice Swayne, speaking of statutes of limitation, said:

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together. * * * In this class of cases the plaintiff is held to stringent rules of pleading and evidence, and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made."

[8] Courts cannot rightly insert in the statute of limitations an exception which the statute itself does not contain. McIver v. Ragan, 2 Wheat. 24, 29, 4 L. Ed. 175.

[9] It is true that the government is not bound by a statute of limitations, unless Congress has clearly manifested its intention that it shall be so bound. United States v. Thompson, 98 U. S. 486, 25 L. Ed. 194; United States v. Nashville, etc., Ry. Co., 118 U. S. 120, 125, 6 Sup. Ct. 1006, 30 L. Ed. 81. But it is the clearly expressed intention of Congress that the government shall be bound by the statute in question. See United States v. Puget Sound Co. (D. C.) 215 Fed. 436. In United States v. Lee, Wilson & Co. (D. C.) 214 Fed. 630, 648, the suit was not to vacate or annul patents issued by the United States, but was a suit by the government to quiet its title to land that had never been surveyed by the government, and no certification or patent was ever issued, or could rightly have been issued by the land department. In the absence of any averment in the bill or proof showing specifically some reason why the suit was not brought within the six-year period, Rounds' demurrer and answer to the bill upon that ground should have been sustained, and the bill dismissed as to him.

[10] But it may be said that the case went to hearing in the trial court upon bill and answer and the proofs offered by the complainant, that Rounds has not appealed from the decree, and that it should be reversed because the trial court erred in confirming the title to the land in him. But Rounds challenged the right of the complainant to maintain the suit because not brought within the statutory period at the very threshold of the proceedings against him, and again in his answer. The ruling upon the demurrer was not final, but the final decree went in his favor. There was no occasion, therefore, for him to appeal, as the court only gave a wrong reason for a right decision. An appellate court will not reverse a right decree or judgment because the trial court has given a wrong reason for it. Smiley v. Barker, 83 Fed. 684, 687, 28 C. C. A. 9; Moffat v. Smith, 101 Fed. 771, 774, 41 C. C. A. 671; Buster et al. v. Wright, 135 Fed. 947, 959, 68 C. C. A. 505; Latting v. Owasso Mfg. Co., 148 Fed. 369, 370, 78 C. C. A. 183; White v. Railway Co., 122 Ind. 317, 23 N. E. 782, 786, 7 L. R. A. 257; Von Baumbach, Collector, etc., v. Sargent Land Co., 219 Fed. 31, 44, 134 C. C. A. 649.

Upon the argument of the case in this court counsel for defendant presented his own affidavit and that of the defendant Rounds, which were not disputed by counsel for the government in an affidavit filed by him in any material respect, which show that complainant is in no position to take advantage of the failure of Rounds to present evidence in support of his good faith purchase of the land; but as the decree in favor of Rounds must be affirmed for the reasons stated, we do not set forth or consider this showing. The decree as to Rounds should therefore be affirmed.

[11, 12] The appellant next complains of the decree because, on confirming the title to the land in Rounds, it awarded judgment in its favor against Norris for only $200, as the value of the land. That was the minimum government price of the land, and is what Norris was required to pay for it. Section 2301, Rev. Stats. U. S., as amended by Act March 3, 1891, c. 561, § 6, 26 Stat. 1098 (Comp. St. 1913, § 4589). When the suit was commenced, Norris had sold the land to Rounds, in whom the court confirmed the title. The appellant could not therefore, recover the land; but it had received from Norris the government price thereof, which presumptively was its then value, and in this proceeding seeks to recover from him the consideration he received from Rounds, without offering any evidence as to its value at any time up to the commencement of the suit. The appellant has in fact suffered no actual damage because of the alleged fraud of Norris, and it would be inequitable to permit it to recover the value of the land in excess, if any, of the amount it received therefor, especially in the absence of any evidence of such value. A court of equity is always reluctant to rescind a contract unless the parties thereto can be placed in statu quo. If this cannot be done, it will grant such relief only when the clearest and strongest equity demands it. Grymes v. Sanders et al., 93 U. S. 55, 62, 23 L. Ed. 798.

[13] The appellant contends, however, that the answer of Norris admits he received $3,000, or its equivalent, for the land from Rounds, and this is evidence of its then value. But see Wright-Blodgett Co. v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. ——, above. This may be an admission, of Norris that he received that amount for the property in June, 1909; but it is not an admission that the land was then of that value, for it had been improved, and with its improvements sold to Rounds for that amount. Admitting, without deciding, that appellant is entitled to recover the value of the *land* in excess of the minimum government price thereof, it would not be entitled to recover for the improvements, and there is nothing before the court upon which it can determine the value of the land without the improvements.

Section 2 of the Act of March 2, 1896 (29 Stat. 43, c. 39 [Comp. St. 1913, § 4902]), provides that if any person claiming to be a bona fide purchaser of any land erroneously patented to another is made party to a suit to vacate or annul a patent, and is found by the court to be a good-faith purchaser thereof, the court shall confirm the title in him and award judgment against the patentee for the value of the land, "which in no case shall be more than the minimum government price

thereof." Whether or not this section applies to a patent for a homestead entry, commuted to a cash entry, may admit of some doubt. The act of which it is a part is entitled:

"An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes."

This is broad enough to include all patents erroneously or fraudulently issued under any of the acts of Congress. The first section (Comp. St. 1913, § 4901), however, provides that:

"Suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant, shall only be brought * * * within six years after the date of the issuance of such patents, and the limitation of section 8, chapter 561, of the Acts of the Second Session of the 51st Congress and amendments thereto are extended accordingly as to the patents herein referred to."

The reference to section 8, c. 561, is to the act of March 3, 1891 (26 Stat. 1099 [Comp. St. 1913, § 5114]). Sections 2 and 3 of the act of March 2, 1896, above referred to, are within the title of this act, and are broad enough to include a bona fide purchaser of lands erroneously or fraudulently patented under any of the acts of Congress, and would therefore include a fraudulent entry under the homestead law. The act indicates the purpose of Congress that as to lands erroneously or fraudulently patented, for which nothing has been received by the government, it shall only recover the minimum government price thereof from the patentee upon the title being confirmed in a good faith purchaser from him; but, where the government has received the price fixed by it for the land, there seems to be no reason why it shall again recover its full value, including the excess, if any, above the government price. But, however this may be, and putting this section aside, we are of opinion that the appellant is not entitled to a judgment against Norris for more than $200, because there is no competent evidence in the record as to the value of the land. The appellant has recovered judgment against Norris for the utmost that it is entitled to upon this record, and the decree as to him should also be affirmed.

The decree as to both defendants is therefore affirmed.

In re ROCHESTER SANITARIUM & BATHS, CO.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 210.

1. JUDGMENT ⇐340—VACATING OR SETTING ASIDE—AUTHORITY TO VACATE.
The power to vacate or set aside judgments is a common-law power, inherent in courts of general jurisdiction and possessed by all courts of record as incident to their existence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 666; Dec. Dig. ⇐340.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. JUDGMENT ⊂⊃340—VACATING OR SETTING ASIDE—AUTHORITY TO VACATE.
The power to vacate or set aside judgments must be exercised by the court which rendered the judgment, and no other court can take cognizance of the application.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 666; Dec. Dig. ⊂⊃340.]

3. APPEAL AND ERROR ⊂⊃982—JUDGMENT ⊂⊃344—VACATING—DISCRETION—REVIEW.
A motion to set aside a judgment is addressed to the sound legal discretion of the court, and its determination will not be disturbed on appeal, unless it is plain that its discretion has been abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3877–3879; Dec. Dig. ⊂⊃982; Judgment, Cent. Dig. § 673; Dec. Dig. ⊂⊃344.]

4. MOTIONS ⊂⊃59—ORDERS—VACATING OR SETTING ASIDE.
The common-law rule is that a court has entire control over its own orders, and may vacate them at any time during the term at which they are made.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 73–81; Dec. Dig. ⊂⊃59.]

5. BANKRUPTCY ⊂⊃36—ORDERS—VACATING OR SETTING ASIDE.
There are no terms of court in bankruptcy, within the rule that orders may be vacated at any time during the term at which they are made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 36; Dec. Dig. ⊂⊃36.]

6. MOTIONS ⊂⊃59—ORDERS—VACATING—OPERATION AND EFFECT.
The general rule is that, where a court directs an order previously made by it to be stricken out, it is the same as if such order had never existed.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 73–81; Dec. Dig. ⊂⊃59.]

7. BANKRUPTCY ⊂⊃372—REOPENING ESTATE—EFFECT AS TO TRUSTEESHIP.
Under Bankr. Act, July 1, 1898, c. 541, § 2, subd. 8, 30 Stat. 545 (Comp. St. 1913, § 9586), giving courts of bankruptcy power to close estates when they have been fully administered, by approving the final account and discharging the trustees, and to reopen them whenever it appears they were closed before being fully administered, and subdivision 17, authorizing such courts, pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, to appoint trustees, and section 44 (section 9628), providing that the creditors at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after the estate has been reopened, etc., shall appoint one or three trustees, and that, if they do not appoint a trustee or trustees, the court shall do so, the vacating of an order closing an estate and discharging the trustee did not ipso facto restore the trustee to his trusteeship, and there was a vacancy in the office; the statute changing the rule that, where the court directs an order previously made to be stricken out, it is the same as if such order had never existed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 574; Dec. Dig. ⊂⊃372.]

8. BANKRUPTCY ⊂⊃ 372—REOPENING ESTATE—ELECTION OF TRUSTEE.
Under Bankr. Act § 2, subds. 8, 17, and section 44, upon the reopening of an estate after the discharge of the trustee, the court should not appoint a trustee; it being necessary to proceed as in the first instance for the election of a trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 574; Dec. Dig. ⊂⊃372.]

9. BANKRUPTCY ⟸372 — REOPENING ESTATE — APPOINTMENT OF TRUSTEE — "DE FACTO OFFICER."

Where, after an estate in bankruptcy was closed and the trustee discharged, the court reopened the estate and reinstated the old trustee, the appointment of the old trustee, though erroneous, was not void, and he was a "de facto officer," acting under color of title to the office, as where there is a de jure office and one is irregularly appointed to it, or is appointed by an authority not competent under the law to make the appointment, he is a de facto officer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 574; Dec. Dig. ⟸372.

For other definitions, see Words and Phrases, First and Second Series, De Facto Officer.]

10. BANKRUPTCY ⟸372—REOPENING ESTATE—APPOINTMENT OF TRUSTEE.

Where, upon the reopening of an estate in bankruptcy, the court erroneously reinstated the old trustee, and certain creditors subsequently petitioned the court to vacate so much of the order as reinstated such trustee, and for such a modification of the order as would provide for a meeting of the creditors to elect a trustee, it was not error for the court, in providing for such a meeting, to provide that the old trustee should continue to act until the election and qualification of his successor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 574; Dec. Dig. ⟸372.]

Petition to Revise Order of the District Court of the United States for the Western District of New York.

Hugh J. O'Brien, of Rochester, N. Y., for petitioner.

Ernest B. Millard, of Rochester, N. Y. (Isaac Adler, of Rochester, N. Y., of counsel), for trustee and creditors.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. It appears that the Rochester Sanitarium & Baths Company, organized as a corporation under the laws of the state of New York, was adjudicated a bankrupt, in the United States District Court for the Western District of New York, on March 4, 1909. In due course Simon L. Adler was appointed trustee of its estate. Thereafter, and on or about November 21, 1911, the estate of the bankrupt was closed, and the trustee was discharged, and his bond canceled. Subsequently, and on or about June 18, 1913, two of the creditors of the bankrupt petitioned the court to reopen the estate, and the court without notice to the other creditors made an ex parte order vacating and setting aside its former order discharging the trustee, and thereupon reinstated the said Adler as trustee. It appears that prior to his discharge Adler had brought an action as trustee in the Supreme Court of New York against Weis & Fisher and obtained a verdict in favor of the estate for $2,800. A new trial was granted, and the order granting it had been affirmed in the Appellate Division of the Supreme Court. As the opinion of the Appellate Division had been adverse to the trustee, no further steps had been taken by the trustee, and at the time of his discharge it had been assumed that he could gain nothing by a prosecution of the suit. But after his discharge, and in June, 1913, the Court of Appeals in New York rendered a decision in Crowe v. Liquid Carbonic Co., 208 N. Y. 396, 102

N. E. 573, which was regarded by some of the creditors as practically overruling the previous decision of the Appellate Division in the case brought by the trustee, and they called to the attention of the court below the fact that the action against the Weis & Fisher Company was still pending and undetermined. The court's order reopening the estate was as follows:

"Ordered, that the estate of said Rochester Sanitarium & Baths Company, bankrupt, be and the same is reopened; that the order discharging the said Simon L. Adler as trustee herein be and the same hereby is vacated and set aside; and it is further ordered, that the said matter of Rochester Sanitarium & Baths Company, a corporation, bankrupt, be referred to Hon. Quincy Van Voorhis, one of the referees in bankruptcy of this court, to take such further proceedings therein as may be proper, and the said Simon L. Adler be and he hereby is reinstated as such trustee, and authorized to continue the administration of said estate, upon filing with the referee in bankruptcy herein such bond as may be directed and approved by such referee. It is further ordered, that upon filing such bond as may be directed and approved by the said referee in bankruptcy, the said Simon L. Adler, as trustee, be and hereby is authorized to continue the prosecution of said action brought by himself as trustee against Weis & Fisher Company, and to take such steps as may be proper in the administration of said estate."

The trustee at once qualified and brought the action against the Weis & Fisher Company to trial a second time and again obtained a verdict in his favor. This time the Appellate Division sustained the verdict, and judgment was entered for $4,030.30. An appeal has been taken to the Court of Appeals of the state of New York, which was pending at the time of the argument of this cause. This judgment against the Weis & Fisher Company is said to be the only asset of the bankrupt estate.

On July 20, 1914, five creditors of the bankrupt estate petitioned the court to vacate so much of the order of June 18, 1913, as reinstated Adler as trustee and authorized him to continue the administration thereof, and that it be modified, so as to provide for the calling of a meeting of the creditors for the purpose of electing a new trustee. The court accordingly on November 4, 1914, modified its former order entering the following order:

"First. That an election for trustee be held at the instance of the referee in bankruptcy for Monroe county, and that the reinstated trustee continue to act until the election and qualification of his successor, who shall thereupon be subrogated to the rights of the former.

"Second. That, except as above modified, the order herein of this court of June 18, 1913, be approved and confirmed."

The petitioner seeks a revision of the order as thus modified, claiming it to be erroneous in matter of law in the following particulars:

(1) In that it failed to adjudge and declare null and void as of date thereof so much of the order of June 18, 1913, as reinstated the trustee of the above-named estate and authorized him to continue the administration thereof; and

(2) In that it provided that the reinstated trustee should continue to act until the election and qualification of his successor, "who shall thereupon be subrogated to the rights of the former"; and

(3) In that it further provided that, except as above modified, the order of June 18, 1913, be approved and confirmed.

[1-5] The power to vacate or set aside judgments is a common-law power inherent in courts of general jurisdiction. All courts of record possess the power as incident to their existence. But the power is to be exercised by the court which rendered the judgment, and none other can take cognizance of the application. And a motion to set aside a judgment is addressed to the sound legal discretion of the court, and its determination of the matter is not disturbed on appeal, unless it is plain that its discretion has been abused. The greater power includes the less, and the common-law rule is that a court has entire control over its own orders, and may vacate them at any time during the term at which they are made. Born v. Schneider (C. C.) 128 Fed. 179 (1904); Killian v. State, 72 Ark. 137, 78 S. W. 766 (1904); Seiter v. Mowe, 182 Ill. 351, 55 N. E. 526 (1899); State v. Gabriel, 88 Mo. 631 (1886); Servatius v. Pickel, 30 Wis. 507 (1872). See 29 Cyc. 1518. There are no terms of court in bankruptcy, so that an adjudication of bankruptcy, it is held, may be vacated after the expiration of the term wherein it was entered. As the Supreme Court of the United States declared in Sandusky v. National Bank, 23 Wall. 289, 293, 23 L. Ed. 155 (1874):

"The District Court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. Its proceedings in any pending suit are therefore at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation."

[6-8] The general rule is that where a court, in the exercise of its jurisdiction, directs an order previously made by it to be stricken out, it is the same as if such order had never existed. Williams v. Floyd, 27 N. C. 649 (1845). If that principle governed the vacating of the order discharging a trustee in bankruptcy, then Adler would have been reinstated as trustee of the bankrupt corporation by the order of June 18, 1913, even though that order had not in express terms declared him to be reinstated. But the principle we are discussing is not applicable in such cases, as the matter is governed by the express language of the Bankruptcy Act. That act confers jurisdiction upon the District Courts as courts of bankruptcy, and provides in section 2, subdivision 8, that they shall have power "to close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered." It then provides in subdivision 17 of the same section that the court shall have power "pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them." And in section 44 it is provided that:

"The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of the trustee, *or after an estate has been reopened*, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, ap-

point one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so."

We think the language of this section makes it plain that, when an order is vacated which discharges a trustee in bankruptcy, it does not have the effect usually given to vacating orders, and the old trustee is not ipso facto restored to his trusteeship, but there is a vacancy in the office which cannot be filled by the court. It is necessary to proceed as in the first instance, and the law is so interpreted by the text-writers.

Mr. Remington states in section 2314 of his work on Bankruptcy that:

"Upon the reopening of the estate a trustee must be elected, the old trusteeship not being revived by the reopening. And the court may not appoint a trustee unless the creditors have first been given an opportunity to do so and have failed to make choice. The reopening of the estate effects no more than the putting of the estate back into process of administration. Steps must be taken just as if the estate had never been closed."

And Mr. Collier's statement is similar on page 530 of his work:

"Where an estate is reopened the office of trustee is vacated, and the court cannot appoint unless the creditors have failed to do so."

The Circuit Court of Appeals in the Eighth Circuit had occasion to pass upon this matter (In re Newton, 107 Fed. 429, 431, 46 C. C. A. 399, 401 [1901]), and said:

"This section, in our opinion, confers upon the creditors of the estate the same authority and power with respect to the appointment of a trustee, after an estate once closed has been, by order of court, reopened, as is conferred upon them at the first meeting held after the adjudication. It confers upon the creditors, as the parties chiefly interested, the right in either case to select their own trustee. When they fail to do so, either at the first meeting, or afterwards, in case of a reopening of the estate, and not till then, power is conferred upon the court to make such appointment."

The District Judge in the case at bar took the same view of the matter when the petition was presented asking him to vacate his order of June 18, 1913, in which he reinstated Adler as trustee. In disposing of that petition he said:

"Hence I hold that under section 44 of the Bankruptcy Act it devolves upon the creditors, where it is desired to reopen the estate of a bankrupt after it has been closed and the trustee discharged, to appoint a new trustee, and that accordingly the order reinstating trustee Adler should not have been made."

[9, 10] Thereupon the court directed that the referee should call a meeting of the creditors for the selection of a new trustee, but continued Adler as trustee until the new trustee could be appointed who was then to succeed to the rights of the former. It is insisted that the appointment of Adler was void and without effect. We cannot concur in that view of the matter, and we think that the action of the District Judge in continuing Adler as trustee until his successor could be appointed in the manner provided for in the act was not improper or unwarranted, but, on the contrary, was the wisest course the court could adopt under the circumstances of the case.

In Scofield v. United States, 174 Fed. 1, 98 C. C. A. 39 (1909) the Circuit Court of Appeals in the Sixth Circuit held that, where a trustee

in bankruptcy absconded and was removed, the appointment of a new trustee by the court, without calling a meeting of the creditors for an election, was at most an irregularity, and that the legality of the appointment could not be questioned collaterally by persons who were not creditors. The court said:

"The whole matter of appointing trustees is subject to the power and superintendence of the court. If the court ought to have summoned the creditors to elect a trustee, its failure to do so was a mere irregularity, and cannot be taken advantage of collaterally, certainly not by those who are not creditors or otherwise interested in the appointment."

In our opinion the reinstatement of Adler as trustee was an act within the court's jurisdiction, but mistakenly made. The act was not void and without effect. It made Adler a trustee de facto. Where there is a de jure office, and one is irregularly appointed to it, or is appointed by an authority not competent under the law to make the appointment, he is a de facto officer and under color of title to the office. The leading case in this country on the subject of de facto officers is that of State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409, decided by the Supreme Court of Connecticut in 1871. In that case the court defines an officer de facto as follows:

"An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:

"First. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

"Second. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.

"Third. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

"Fourth. Under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

We are not called upon to consider the validity of the acts done by the de facto trustee. They are not involved in this proceeding. But the law gives effect to acts of officers de facto. See Norton v. Shelby County, 118 U. S. 425, 441, 6 Sup. Ct. 1121, 30 L. Ed. 178 (1886); Clinton v. Engelbrecht, 80 U. S. (13 Wall.) 434, 20 L. Ed. 659 (1871); People v. White, 24 Wend. 520 (1840); Dolan v. Mayor, 68 N. Y. 274, 282, 23 Am. Rep. 168 (1877). It was therefore proper, in the order providing for the election of the new trustee, to provide, as the court did, that the reinstated trustee should "continue to act until the election and qualification of his successor, who shall thereupon be subrogated to the rights of the former."

The petition to revise is dismissed.

WOODRUFF v. YAZOO & M. V. R. CO.

(Circuit Court of Appeals, Fifth Circuit. April 7, 1915. Rehearing Denied April 27, 1915.)

No. 2740.

APPEAL AND ERROR ⊂=1099—LAW OF THE CASE—SUBSEQUENT APPEALS.

The ruling, on an appeal in an action for injuries to an employé, that the evidence made questions for the jury as to the defendant's negligence and the employé's assumption of the risk, was the law of the case on a subsequent appeal, the essential facts being the same on the second trial as on the first trial, with the exception of the testimony of one witness, whose testimony tended rather to strengthen than weaken plaintiff's case, since whatever has been decided on one writ of error cannot be re-examined on a subsequent writ in the same suit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370–4379; Dec. Dig. ⊂=1099.]

Pardee, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action by Mrs. Elise H. Woodruff, administratrix, against the Yazoo & Mississippi Valley Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

This case is here upon a second writ of error. Upon the first trial in the District Court, the jury, upon peremptory instructions of the court, returned a verdict in favor of the defendant in error. Judgment was duly rendered on the verdict, and, the case having been brought to this court by writ of error, the judgment was reversed, and the cause remanded for a new trial. The opinion of this court, which contains a clear statement of the case, will be found reported in 210 Fed. 849, 127 C. C. A. 411 et seq. Upon a second trial in the court below, the court again instructed a verdict for the defendant in error, and judgment was rendered in accordance therewith. To revise this judgment the present writ of error is brought.

Marcellus Green and Garner Wynn Green, both of Jackson, Miss., for plaintiff in error.

Edw. Mayes and Robt. B. Mayes, both of Jackson, Miss., and Charles N. Burch and H. D. Minor, both of Memphis, Tenn., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge (after stating the facts as above). With the exception of the testimony of Charles Linstrum, master mechanic of the defendant in error at Vicksburg, the essential facts of the present case are the same as those involved on the former hearing. Without expressing an opinion of the force and effect of Linstrum's testimony, it may with propriety be said that it did not weaken, but tended rather to strengthen, the case made by the plaintiff in error. Upon the former hearing this court, after referring to the facts, used the following language:

"It was open to the jury to infer from this evidence, recited from the record, that the explosion of the indicator tube was due to lack of sufficient ten-

sile strength to resist the steam pressure the defendant knew it was required to encounter in the ordinary daily operation of the engine, namely 150 pounds, since it is shown to have exploded under a pressure of but 145 pounds; that it should have had a tensile strength of 300 pounds, according to manufacturers' standard, but did not, in fact, have one-half that amount; that the defendant, having furnished the tube to intestate for the purpose for which it was used, must either have known of its insufficiency in this respect, if the tubes were tested by it, or have been in negligent ignorance of it, if no test was made, since its duty would have been to make a test before furnishing it to the intestate for use on his engine. The issue of the negligence or the absence of negligence in this respect was an issue of fact, which should have been submitted to the jury. It is clear that the evidence in the record was of a character that required the submission to the jury of the issue of assumption of risk on intestate's part of the insufficiency of the tube in tensile strength, if there was any evidence of such assumption on his part. The sufficient and insufficient tubes in this respect were of the same appearance, and a test was required to tell of the insufficiency. The intestate had no means of making the test, and had the right to assume the tensile sufficiency of the tube that was furnished by his employer, until he acquired knowledge to the contrary. The record does not show such knowledge on his part. His knowledge of the likelihood of an explosion of the tubes, even when of sufficient tensile strength, would not be an assumption of the risk of an explosion of a tube which was of insufficient tensile strength, of which fact he was unaware. For these reasons, we think the case should have been submitted to the jury, and that the court below erred in directing a verdict for the defendant."

The foregoing ruling of the court must stand as the law of the case upon the present hearing, since it is well settled "that whatever has been decided here on one writ of error cannot be re-examined on a subsequent writ brought in the same suit." Clark v. Keith, 106 U. S. 465, 1 Sup. Ct. 568, 27 L. Ed. 302; Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260; Bell v. Arledge, 219 Fed. (C. C. A. 5th Cir.) 675, 135 C. C. A. 347, citing numerous authorities.

It was intimated by counsel that the peremptory instruction to the jury, on the second trial, was based upon the case of Seaboard Air Line Railway Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, decided subsequent to the first hearing of the present case in this court. Upon a careful examination of the opinion in the Horton Case, we are unable to discover any conflict between it and the opinion rendered by Judge Grubb as the organ of this court upon the former hearing. The views of the two courts are in complete harmony, so far as they affect the issues involved in the present controversy.

We are therefore of the opinion that the judgment should be reversed, and the cause remanded, with instructions to the trial court to submit the issues to the jury in conformity with the views expressed by this court on the first writ of error.

Ordered accordingly.

PARDEE, Circuit Judge (dissenting). In this case, when heretofore before this court, two important questions affecting the proper decision of the same were involved, both arising under the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]), to wit: (1) As to the assumption of risk by the employé; and (2) the degree of care required of the employer in furnishing tools and appliances for the employé to use. In the opin-

ion handed down (210 Fed. 849, 127 C. C. A. 411) the assumption of risk was discussed, but not decided; but it was held that the employer's duty in the premises required him to make a test of certain indicator tubes furnished to the intestate engineer to use on his engine.

Since our decision in that case, and before the trial in the court below, the Supreme Court of the United States, in the case of Seaboard Air Line Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062 (which it may be noted was, as to facts causing injury, very like the instant case), decided that under the Employers' Liability Act, when an employé knows of a defect in appliances used by him, and appreciates the resulting damages, and continues in the employment without objection, or without obtaining from the employer an assurance of reparation, he assumes the risk, even though it may arise from the employer's breach of duty, and also that under the Employers' Liability Act a defect in an appliance which is not covered by any of the federal Safety Acts, does not leave the employer absolutely responsible for the defect, but that the common rule with regard to negligence applies, which is that an employer is not a guarantor of the safety of the place of work or machinery and appliances of the work, and the extent of its duty to its employé is to see that ordinary care and prudence are exercised, to the end that the place at which the work is to be performed and the tools and appliances of the work are safe for the workman.

On the second trial of the instant case in the court below, the evidence submitted was not entirely the same as on the previous trial. Additional evidence was taken, showing the care and prudence exercised by the employer, and, among other things, that the tube that exploded, which had been furnished by the employer and put in place by the plaintiff's intestate, was obtained from, and guaranteed by, reputable manufacturers, and that the same was subjected by the deceased engineer to a test of eight days' actual service before there was an explosion; that from the nature of things tubes of glass originally sound and standing all reasonable tests through change of weather and depending upon use and handling are all liable to explode sooner or later.

As to whether an actual test of the indicator tube was made by the railroad company, prior to furnishing it to the engineer, does not appear. So that now it seems an entirely different case is presented to the court at the second trial from that presented on the first.

It is contended in this present case that the burden of proof is on the plaintiff to show that no sufficient test was made by the railroad company and that such test was necessary, and some very respectable authority is cited in support thereof. See Pennsylvania Railroad Co. v. Knox, 218 Fed. 748, 753, 134 C. C. A. 426; Patton v. Texas & Pacific R. Co., 179 U. S. 663, 21 Sup. Ct. 275, 45 L. Ed. 361; Westinghouse Electric & Mfg. Co. v. Heimlich, 127 Fed. 92, 62 C. C. A. 92; Petroleum Iron Works v. Boyle, 179 Fed. 434, 102 C. C. A. 579; Bush v. Traction Co., 192 Fed. 242, 112 C. C. A. 499.

As to the duty of an employer who furnishes guaranteed appliances and machinery procured from a reputable manufacturer of recognized

standing, it is said by the Supreme Court in Richmond & Danville Railroad Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728:

"If he purchases from a manufacturer of recognized standing, he is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the machinery, and that as delivered to him it is in a fair and reasonable condition for use. We do not mean to say that it is never the duty of a purchaser to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested. It may be, and doubtless often is, his duty when placing the machine in actual use to subject it to ordinary tests for determining its strength and efficiency."

In Westinghouse Electric Mfg. Co. v. Heimlich, supra, Judge Lurton, for the Circuit Court of Appeals for the Sixth Circuit, laid down the following:

"The master is not a guarantor of the safety of machinery or implements furnished his employés, and is only bound to use ordinary care, diligence, and skill for the purpose of protecting them, and it is not negligence to use and employ such machinery or implements as the experience of trade and manufacture sanction as reasonably safe. Hough v. Railway Co., 100 U. S. 213, 25 L. Ed. 612; Washington Rd. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; Union Pacific Ry. Co. v. Daniels, 152 U. S. 684, 689, 14 Sup. Ct. 756, 38 L. Ed. 597; Texas, etc., Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; Shearman & Redfield on Negligence (5th Ed.) § 195. * * * The defect in this chain was one which could not have been discovered by anything short of a test which would develop its existence by putting upon it a greater strain than the chain so defective would stand. In other words, in order to determine whether the iron was in fact crystallized, it was necessary to break or cut into each link, for it was altogether possible that, if one link was made from crystallized iron, the others were also defective. This defect might not exist to the same extent in every link. Was it, then, the duty of the plaintiff in error to subject this chain to a test for latent defects before allowing it to be used, or might the purchasers rely upon the reputation of the maker, and his representation as to the quality of the material used, and as to the results of the manufacturer's tests? In the selection of machinery, tools, or material the master is responsible to his servants for only ordinary care; that degree of care which a man of ordinary prudence in the same line of business would be expected to exercise to secure his own safety were he doing the work. Shearman & Redfield on Negligence (5th Ed.) § 195; 20 Am. & Eng. Ency. Law, 78, 79; De Graff v. New York Cent. Rd., 76 N. Y. 125; Marsh v. Chickering, 101 N. Y. 390, 5 N. E. 56; Carlson v. P. B. Co., 132 N. Y. 273, 30 N. E. 750; Railway Co. v. Aiken, 89 Tenn. 245, 14 S. W. 1082; Smith v. N. Y., etc., R. Co., 164 N. Y. 491, 58 N. E. 655; Service v. Shoneman, 196 Pa. 63, 46 Atl. 292 [69 L. R. A. 792, 79 Am. St. Rep. 689]. * * * The burden is upon the plaintiff to prove the negligence of the defendant. If the chain broke by reason of some defect, it devolves upon him to show that by reasonable care this defect might have been discovered. Texas & Pacific Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; L. & N. Rd. Co. v. Campbell, 97 Ala. 147, 151, 12 South. 574. The evidence showed that purchasers or users of such chains ordinarily relied upon the reputation of the maker and upon his representation as to the quality of the iron and strength of the chain. Neither was there any evidence tending to excite suspicion as to the soundness or strength of this chain, such as having been a long time in use. The chain had been many times examined for external evidences of defects, injury, or wear. In such circumstances there was no reason to apprehend a latent defect, and the purchaser is not required to make so extraordinary a test as that indicated by the court. A purchaser of such an article from a reputable manufacturer, with representations as to its tested strength and quality of material, is not responsible for hidden defects, which cannot be discovered by a careful ex-

ternal examination. Ladd v. New Bedford Rd., 119 Mass. 412, 20 Am. Rep. 331; Spicer v. South Boston Iron Co., 138 Mass. 426; Roughan v. Boston Block Co., 161 Mass. 24, 36 N. E. 461."

In the present state of the record, our former decision ought not to control, and in my opinion it is the duty of the court to take up and decide the case on its merits.

UNITED STATES v. FLORIDA EAST COAST RY. CO.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1915.)

No. 2741.

1. MASTER AND SERVANT ⇐13—STATUTORY REGULATION—HOURS OF SERVICE —CONDUCTOR.

Under Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1913, § 8678), providing that it shall be unlawful for an interstate carrier to require or permit employés subject to the act to remain on duty for more than 16 consecutive hours, with certain periods of rest thereafter, provided that no operator, train dispatcher, or other employé, who by the use of the telegraph or telephone dispatches, reports, receives, or delivers orders pertaining to train movements shall be required or permitted to remain on duty more than 9 hours in any 24 in towers or offices continuously operating night and day, nor for a longer period than 13 hours in towers or offices operated only during the daytime, the 9 or 13 hour proviso does not apply to a train conductor, who as an incident to his official duties was required to use the telephone to report movements of his train and receive orders, since he has no fixed place to perform such work, and it could not be determined whether the 9 or 13 hour proviso should apply to him, and it will be presumed that Congress did not intend to include such employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⇐13.]

2. MASTER AND SERVANT ⇐13—STATUTORY REGULATION—HOURS OF SERVICE —"EJUSDEM GENERIS."

Under the doctrine of "ejusdem generis," which is the rule that where, in the enumeration of particulars, general terms are used, the general terms must be restricted to things of a like nature and description with the particulars among which they are found, a train conductor is not included within the proviso of Act March 4, 1907, § 2, relating to hours of service of operators, train dispatchers, or other employés who use the telegraph or telephone to dispatch, report, receive, or deliver orders pertaining to train movements (quoting Words and Phrases, "Ejusdem Generis").

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⇐13.

Hours of service of employés, see note to United States v. Houston Belt & Terminal Ry. Co., 125 C. C. A. 485.]

Walker, Circuit Judge, dissenting.

In Error to the District Court of the United States, for the Southern District of Florida; Rhydon M. Call, Judge.

Action by the United States against the Florida East Coast Railway Company. From a judgment sustaining demurrers to the dec-

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laration and dismissing the declaration, the United States brings error. Affirmed.

The following statement of the case, appearing in the brief for the government, is substantially correct:

"This case was brought by the United States attorney, upon suggestion of the Attorney General, at the request of the Interstate Commerce Commission, and upon information furnished by the Commission. The action is based upon the act of Congress known as 'An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon,' approved March 4, 1907, contained in 34 Stat. at page 1415, the action being based on sections 2 and 3 of said act. Each of the four counts are practically identical; the only difference being a change of dates, names, and the time or interval of time within which the alleged violation took place, also the change of the number of the train and the station. However, the principle of law as applicable to each count is identical. The argument, therefore, will be confined to the first count, which alleges that E. M. Little, on January 10, 1914, at and between the offices of New Smyrna and Ft. Pierce, in the state of Florida, being an employé of the defendant, was required and permitted to remain on duty for a longer period than 13 hours in 24 hours, to wit, from 7 a. m. to 11 p. m. on said date; that said E. M. Little was an employé, regularly and generally engaged in and connected with the movement of its trains, said trains being used in the movement of interstate traffic, and was regularly and generally required and permitted by defendant to use the telephone in the several offices and stations of the defendant to report, transmit, receive, and deliver orders pertaining to and affecting the movement of trains, and that said E. M. Little, while required and permitted to remain on duty as aforesaid, used said telephone in defendant's office at Quay and Lyrata and reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains."

The declaration filed by the government contains four counts, and in order to render more definite the allegations of the several counts, and to present with greater clearness the precise question for decision, counsel for the parties entered into the following stipulation:

"It is further stipulated and agreed between the counsel for the respective parties herein that the employé mentioned in each of the counts of the declaration, and who is alleged therein to have been required or permitted to use the telephone in the movement of trains after the expiration of 13 hours of service was a conductor of the particular train mentioned in the respective count, and that the declaration shall be so construed and understood for all the purposes of this writ of error; it having been so understood and considered by the judge of the District Court upon the argument of the demurrer. Plaintiff in error hereby withdraws from its brief heretofore filed in said cause all reference to any question which may have been raised in said brief with reference to any omission in said declaration as to the particular duties of the employé mentioned in each of the several counts, and requests that such references in said brief shall be disregarded by the court."

Demurrers were interposed by the railway company to each count, which being sustained, and the declaration dismissed, the government excepted, and has brought the case here for revision of the judgment.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C., H. S. Phillips, U. S. Atty., of Tampa, Fla., and Fred Botts, Asst. U. S. Atty., of Jacksonville, Fla., for the United States.

A. V. S. Smith and Egford Bly, both of Jacksonville, Fla., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge (after stating the facts as above). [1] The question submitted for consideration involves the construction of the

first proviso of section 2 of the act approved March 4, 1907, commonly known as the "Hours of Service Act"; the second proviso not being pertinent to the present inquiry. 34 Stat. pt. 1, p. 1415 (Comp. St. 1913, § 8678). The precise question may be thus stated: Is the conductor of an interstate railway train, who is required or permitted during his run to stop at stations to report, transmit, receive, or deliver orders pertaining to or affecting his train, embraced within the terms of the proviso? The entire section is in the following words:

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employé who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the day time, except in case of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week: Provided further, the Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case."

It will be observed that the first part of the section refers to employés generally, subject to the act, and renders it unlawful for a carrier to require or permit any employé to be or remain on duty for a longer period than 16 consecutive hours, etc. The proviso, however, excepts operators, train dispatchers, and other employés, who by the use of the telegraph or telephone transmit, report, etc., orders pertaining to or affecting train movements, from the general language thus employed and provides for them a special rule. For reasons deemed wise by the Congress, it was thought that telegraph operators, train dispatchers, and other employés of that class should have shorter hours for work and longer intervals of rest; and hence the provision directly applicable to them, that their work hours should be limited to 9 and 13, respectively, accordingly as they might be employed in towers, offices, places, and stations continuously operated night and day, or in towers, offices, etc., operated only during the daytime.

The purpose of adding the proviso was to prescribe shorter hours for work for telegraph and telephone operators, and other employés, whose primary and principal duty require them to operate telegraphic instruments and telephones for transmitting, etc., orders affecting train movements generally. And that such construction is correct is evidenced by the requirement that such employés must perform their duties at a fixed place and that their hours of service at such place shall

not exceed those named in the proviso. In this connection it is well to recall the language of the proviso:

"Provided, that no operator," etc., "shall be required or permitted to be or remain on duty for a longer period," etc., "*in* all towers, offices, places and stations," etc.

—thus evidencing the intention that such employés must have a fixed place for work, and at such place they should not be required or permitted to work a longer time than the number of hours prescribed. If the proviso be construed to include a conductor, what number of hours, it may be asked, shall he be permitted to work during the 24-hour period? Shall it be 16, 13, or 9 hours? Having regard for the language of the proviso, it will be scarcely possible to give a satisfactory reply to the question—a difficulty which affords additional ground for holding that as to such employé the proviso is altogether inapplicable.

It seems to us that it would plainly violate accepted canons for construing statutes to include in the proviso a train conductor, having no fixed place for work except on a moving train, and who, under the first clause of section 2, may be required or permitted to work for the period of 16 hours. His primary and chief duty requires him to look after his train, and stopping at a station to transmit or receive an order, affecting his immediate train, is a mere incidental service, which cannot operate to classify him as a telegraph or telephone operator or train dispatcher. The contention of counsel for the government is that train conductors are included in the words of the proviso, "or other employé," who by the use of the telegraph or telephone dispatches reports, etc. We have endeavored to show that it was not the intention of the lawmakers to so include them.

[2] But for another reason the construction insisted upon by the government is thought to be erroneous. The words "or other employé," evidently refer to employés charged with duties similar to those performed by telegraph operators and train dispatchers, in accordance with the following recognized rule for the construction of statutes:

"In the enumeration of particulars, general and comprehensive terms are sometimes used, in the construction of which reason and good sense require that, if you would not violate the intention of the writer, their meaning must be restricted to things of a like nature and description, with the particulars among which they are found." 3 Words and Phrases, 2328.

Or, to state the rule in somewhat different language:

"Ejusdem generis means of the same kind or species. The words are used to designate a rule of construction that: 'When an author makes use, first, of terms, each evidently confined and limited to a particular class of a known species of things, and then, after such specific enumeration, subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import, yet when thus used, embraces only things ejusdem generis'—that is, of the same kind or species with those comprehended by the preceding limited and confined terms." 3 Words and Phrases, 2328.

This proviso of section 2 of the Hours of Service Act, was construed by the Circuit Court of Appeals for the Eighth Circuit in Missouri Pacific Railway Co. v. United States, 211 Fed. 893–897, at page 897, 128 C. C. A. 271, at page 275, where it was said by the court:

"As the word 'employé' in the proviso of section 2 includes 'operator' and 'train dispatcher,' for the latter are both employés, the conclusion here is irresistible that Congress intended by the use of the words 'other employé' to mean an employé engaged primarily in the same class of service as would be performed by an operator or train dispatcher."

In our construction of the statute we have steadily kept in view the beneficent purpose of the law. If we have construed it properly, the Congress may enact such further legislation as may be deemed best for the public interests.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

WALKER, Circuit Judge, dissents.

THE J. N. GILBERT.†

THE SPINDLE TOP.

(Circuit Court of Appeals, Fifth Circuit. March 22, 1915.)

No. 2681.

1. COLLISION ⇐71—MOVING AND MOORED VESSELS—NEGLIGENT MANEUVERS.
A collision in the turning basin at Port Arthur, Tex., between a barge in tow alongside of a tug and a steamship lying at a dock, *held* due to the fault of the tug, in that it unnecessarily proceeded directly toward the steamship until so close that collision could only be avoided by reversing, which could not be done because of the breaking of a bolt in the reversing machinery.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⇐71.]

2. COLLISION ⇐22—INEVITABLE ACCIDENT—DEFECTIVE MACHINERY.
The breaking of a bolt in the reversing machinery of a tug, by reason of which a collision occurred, will not relieve the tug from liability on the ground of inevitable accident, where it appeared that the bolt had not been inspected for six years.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 19; Dec. Dig. ⇐22.

Inevitable accident as cause of collision, see note to Wright & Cobb Lighterage Co. v. New England Nav. Co., 125 C. C. A. 130.]

Appeals from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Suit in admiralty by the Hoyle Bank Steamship Company, Limited, owner of the steamship Hoyle Bank, against the steam tug J. N. Gilbert and the barge Spindle Top; the Higgins Oil & Fuel Company, claimant. From a decree, both parties appeal. Affirmed.

F. D. Minor and F. D. Minor, Jr., both of Beaumont, Tex., for appellant and cross-appellee.

Stuart R. Smith, of Beaumont, Tex., for appellee and cross-appellant.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied April 20, 1915.

PARDEE, Circuit Judge. This suit is for damages caused by a collision of the tug J. N. Gilbert and barge Spindle Top with the steamship Hoyle Bank in the harbor of Port Arthur, Tex. The libel charges as follows:

"Second. That on Wednesday, the 20th day of September, in the year nineteen hundred and eleven, the said steamship Hoyle Bank, with her steam engine, boilers, fixtures, apparel, and furniture on board thereof, was safely moored and lying in a usual and customary berth for such vessels, alongside the Texas Company's dock at Port Arthur, in Jefferson county, Texas, and in said Eastern district of Texas, and within the Beaumont division thereof, where she had a perfect right to be; the said steamship being then and also at the time when she was run into as hereinafter mentioned, tight, staunch, strong, and in every respect well-manned, tackled, appareled, and appointed, and having the usual and necessary complement of officers and men, and that the master and crew engaged on board were on the lookout for the protection and safety of said vessel.

"Third. That at about 12:30 o'clock p. m. of the said day, and while the said steamship was safely moored as aforesaid, the said tug J. N. Gilbert and barge Spindle Top in tow thereof, whereof ——— was master, while engaged in the attempt to turn around in the turning basin at the Port Arthur docks for purposes unknown to libelant, and while so attempting to turn, and while said steamship Hoyle Bank was moored as aforesaid alongside the docks facing said turning basin, and fully loaded and ready for sea, the said barge Spindle Top in tow of the said tug J. N. Gilbert, then and there with great force and violence ran into and upon the said steamship Hoyle Bank, and did thereby cause great damage and injury to the said Hoyle Bank, her guards, hull, and particularly her plates on the starboard side, where she was violently struck and rammed as aforesaid by the said barge Spindle Top, and her bulwark strake, shear strake, and two strakes below buckled, were indented, twisted, and displaced, and the rivets holding the same in place were loosened and dislodged, the angle iron forming waterways was buckled, twisted, and bent, and the rivets holding same in place were loosened and dislodged, and the waterway deck plate was bent, indented, and buckled, and her cargo, consisting of case oil, was greatly damaged.

"Fourth. That the said tug J. N. Gilbert and barge Spindle Top, before and at the time of the said collision, were attempting to make a turn in said basin for the apparent purpose of passing the said steamship Hoyle Bank, and berthing the said barge alongside the Guffey Company's loading racks, the said tug and barge being at the time inward bound, and that from the improper and unskillful management of the persons navigating said tug and barge, and on account of insufficient and defective machinery and gear wherewith the said tug was then and there being navigated, so that she was suddenly and with great violence driven upon and into the said steamship as aforesaid."

And it claimed damages in the sum of $10,500 on account of demurrage, loss of time, and damages to the vessel and cargo.

The answer of the claimant admits the collision, denies unskillful navigation, and asserts that the collision was caused by inevitable and unavoidable accident, which could not have been avoided by any care, caution, or nautical skill in—

"that a part of the equipment of the engine and gear of the tug was a valve rod stem connected with the reversing gear by a bolt or pin of approved metal. Said valve rod stem was of approved steel. It was, as was said bolt or pin, when installed in the tug, and apparently was at the time of said collision, such as a prudent and cautious owner might safely put into and employ upon his vessel, and no test thereof, save that of the hand and eye, was possible. It was, as was said bolt or pin, such as was adapted to the purpose for which it was used, and was such as was customarily used by prudent men engaged in the same business. It was, as was said bolt or pin, before and up to the oc-

currence of said collision, apparently sound and sufficient, and had been found by repeated experience and use, immediately prior to said accident, to be equal to, and adequate for, the purpose for which they were designed, constructed, and used. It, as well as said bolt or pin, had no defect which was known to the persons in charge of said tug and barge, or which could have been discovered by a person of competent skill and judgment acting with that degree of care and vigilance amounting, in all the circumstances, to ordinary care and prudence. That the cause of the failure to check the headway of the tug and barge was that said pin in the valve rod stem of the reversing gear connecting the valve rod stem with the cross head or beam on the piston rod to the valve of the reversing ram, had broken so that the engine did not reverse. That the breaking of said pin was not due to any patent defect therein, or in said valve rod stem, or in the connections therewith, nor to any mismanagement of the steering engine or gear, but was due to and caused by one or both of the following causes: Some unaccountable caprice of steam or a latent defect in the material of which the pin or rod was manufactured, which defect was not of such a character as that by such examination as it was possible, with an ordinary degree of prudence, foresight, care, and caution, to make, could be anticipated or discovered."

The fifth article of the answer is as follows:

"Fifth. The claimant admits, in respect to the sixth article of the libel, that it has refused to pay or secure the demands made by the libelant for the repair of the damages suffered by the steamship Hoyle Bank and for the alleged damage to its cargo; but claimant says, though, as it is informed and advised and believes, in no manner liable for any such damages, it did pay the sum of fifty ($50.00) dollars for temporary repairs to the steamship Hoyle Bank, in order that said steamship might obtain a certificate of seaworthiness; $15.70 for other expenses of said steamship arising out of said collision; $83.00 for surveys, certificate of seaworthiness, protests, etc., amounting in the aggregate to $148.70; which claimant says was paid by it and received by or for account of said steamship Hoyle Bank through a mutual mistake, and prays may be adjudged to be recovered by plaintiff from said libelant, or, in the event the libelant recovers any sum herein against this claimant, may be set off against and deducted from any such recovery."

Voluminous evidence was taken on the hearing before the District Court, and decree was rendered in favor of the libelant for the sum of $6,777.44 and all costs against the claimant and its surety.

The gist of the facts found by the court, as shown by the opinion of Judge Russell presiding, is as follows:

"I am not prepared to say that there was any improper maneuvering of the vessel. The testimony upon that subject is conflicting. There is evidence that the speed at which the tug approached the Hoyle Bank was too high a rate of speed. Upon the other hand, there is testimony to the effect that at the rate of speed at which it approached the steamship it could have been easily stopped, and could have been made to clear the steamship, without damage, but for the breaking of the bolt in question. In the state of the evidence, I am not prepared to find, and do not find, that the tug was improperly maneuvered, or that the rate of speed at which it approached the Hoyle Bank was too great under the circumstances. I believe I would be warranted in reaching the conclusion that, had the machinery not broken, the master of the tug would have been able to have cleared the Hoyle Bank without inflicting the damage. It is in evidence that the cause of the accident was the breaking of the bolt which was necessary for the master and those in charge of the tug to have reversed the engine of the tug and cause it to take the backward motion; that when the attempt was made to reverse the engine a bolt in that particular part of the machinery which the witnesses have described broke and put it out of the power of the master to reverse the engine of the tug, and thereby clear the steamer Hoyle Bank. It is contended by the libelant in the case that there was no inspection of the bolt,

and that an inspection of it would have discovered the defect in it and thus have avoided the injury. My recollection of the testimony is that the tug was built in 1902, and one of the witnesses testified that either two or three years after the tug was built it was taken to Mobile and overhauled, and he testified that this bolt was taken out and replaced. Whether it was the same bolt or another that was put back is a matter that is unimportant, because if he took the bolt out to examine it, and concluded it was sufficient for the purposes, it would not make a particle of difference whether he put in a new bolt or replaced the old one. I do not recall any other occasion when the bolt was taken out and examined. If the tug was built in 1902, and the examination and inspection was had three years afterwards, that would be 1905, and the collision occurred in September, 1911, thus leaving the bolt for six years without inspection. The evidence is attended with a great deal of uncertainty as to the amount of damage growing out of the demurrage charges and the surveys. It shows, for instance, that a survey was made at Rosario which cost $35 in Argentine gold, and no basis is made by which I can discover how much American money $35 in Argentine gold would represent. The amount of demurrage charges paid by the libelant at Pensacola, New York, and Port Arthur is left in a state of such uncertainty that I could not determine how much they amount to."

Both parties appealed to this court; the claimant assigning as error the incorrect finding in regard to the broken bolt, and the libelant assigning as error the failure to allow claims for surveys and demurrage.

The case shows that the Hoyle Bank, a British steamship, loaded and headed seaward, was tied up at the Texas Company dock, south bank of the turning basin in Port Arthur. Her length over all was 340 feet, breadth 47 feet, and her gross tonnage 5,300 tons. The turning basin had a width of 451 feet. The tug J. N. Gilbert, a screw steamer, was built in 1902, with a keel length of 74 feet, length over all of 83 feet, about 42 gross tonnage, drawing 9 feet 3 inches aft, and about 6 feet forward. The barge Spindle Top was wooden built, with a length of keel and over all of about 152 feet, a breadth of 31 feet, 389 gross tonnage, draft 3 feet aft, and 2 to 3 feet forward. This barge lay at the coal dock, on the north side of the turning basin, to be moved to the Guffey dock, on the south side of the turning basin, and nearly opposite and a short distance ahead of where the Hoyle Bank lay. To make such movement the tug Gilbert was securely lashed to the starboard side of the barge, so that the tug at her bow was about 12 or 15 feet abaft the mainmast of the barge, and her stern extended about 20 to 25 feet astern. Being thus attached, the tug proceeded with the barge along the north side of the turning basin until fully abreast of the Hoyle Bank, and then, turning, swung round in the general direction of the steamer Hoyle Bank, and, having turned, proceeded at a speed of not less than four miles an hour directly towards the Hoyle Bank, and approached so near that a collision with the Hoyle Bank could not be avoided by changing the course, and then the helms of both tug and tow were put hard-a-port, and on the tug one bell was given to stop, and two bells to back, the engine of the tug was stopped, but the backing failed; the reversing machinery would not work, because a certain bolt upon which its operation depended broke at the strain put upon it, and the barge collided with the Hoyle Bank, inflicting damage as charged in the libel.

As the Hoyle Bank was tied up at the landing, and the tug and barge had a clear field in the turning basin, the Hoyle Bank was with-

out fault in the premises, and the tug and barge must be held responsible for the collision, unless excused upon the ground that it was an unavoidable and inevitable accident. The Virginia Ehrman, 97 U. S. 309, 24 L. Ed. 890. In The Merchant Prince, [1892] L. R. Prob. Div. 179, the rule with regard to inevitable accident is declared as follows:

"The burden rests on the defendants to show inevitable accident. To sustain that, the defendants must do one or other of two things: They must either show what was the cause of the accident, and show that the result of that cause was inevitable, or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident."

See The Olympia, 61 Fed. 123, 9 C. C. A. 393; The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552.

The libelant's contention is (1) that the tug and barge were improperly maneuvered in proceeding from the coal dock to the Guffey dock, in that (a) they should not have been moved head on towards the ship; (b) that they were put to too great speed in approaching the ship; (c) that they approached too close to the ship before an attempt was made to reverse the motion, going at the speed they were. (2) That if the pin in the reversing machinery broke, and contributed to the causes of the collision, the claimant was negligent in operating with an old, broken pin, the condition of which would have been discovered by the use of ordinary care.

The trial court, as stated above, found that the collision was not chargeable to improper maneuvering of the tug and barge, but was due to negligence in respect to the reversing machinery, in that the bolt which broke and rendered the machinery inoperative had been in use and not inspected for six years. In our view of the evidence the claimants failed to exonerate the tug and barge from want of due care either as to maneuvering or as to the broken bolt, and we attribute the collision to both.

With a field practically clear in the turning basin, the tug and barge had no right nor even occasion to shape their course so as to run head on towards the Hoyle Bank, and thus approach so close and under such speed and full headway as to render a collision, not only probable, but unavoidable, by the ordinary use of the steering machinery, and only possibly avoidable by the use of the reversing machinery to overcome the headway of the tug and barge.

As to the broken bolt, we concur with the trial judge in his finding of negligence in respect thereto. See The Edmund Moran, supra.

On the cross-appeal, we concur with the trial judge in his reasons for disallowing the charges for demurrage. In collision cases the usual rule, after settling the question of responsibility of the parties, is to refer the case to a commissioner for proof of damages. In this case the libelant made insufficient proof as to its damages, and submitted the same to the judge, and he correctly ruled on the evidence presented.

The decree of the District Court is affirmed on both appeal and cross-appeal, each party to pay his own costs.

STERN et al. v. FERNANDEZ et al.

(Circuit Court of Appeals, Ninth Circuit. March 18, 1915.)

No. 2409.

1. SHIPPING ⟸132—LIABILITY FOR LOSS OF CARGO—CAPSIZING OF SAILING SCOW.

The capsizing of a scow schooner on the Sacramento river, and the loss of her cargo, when, owing to a sudden puff of wind, she sheered against the bank and struck a snag, which made a hole below the water line, *held*, on the evidence, not due to incompetency of the master, unseaworthiness, or improper stowage, but to a peril of navigation, for which the owner was not liable.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. ⟸132.]

2. ADMIRALTY ⟸118—REVIEW ON APPEAL—FINDINGS OF FACT.

On appeal in admiralty, when questions of fact are dependent on conflicting testimony, the decision of the District Judge, who heard and saw the witnesses, will not be reversed, unless it clearly is against the evidence.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758–775, 794; Dec. Dig. ⟸118.]

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Libel in personam by J. Stern and B. Fleischer, partners as J. Stern & Co., against Carlotta C. Fernandez and Thomas B. Fernandez, executrix and executor of the will of B. Fernandez, deceased, for loss of cargo. Decree for respondents, and libelants appeal. Affirmed.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for appellants.

H. W. Hutton, of San Francisco, Cal., for appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

MORROW, Circuit Judge. The libel filed in the court below named one B. Fernandez as respondent, and it is alleged that on the 17th day of October, 1904, the libelants shipped on board the schooner Francis E. M. Bernard, then lying in the Sacramento river, in the state of California, bound on a voyage to the port of San Francisco, 1,008 sacks of beans; that owing to the unseaworthy condition of the vessel, and to the insufficient manning thereof, and to the negligence and carelessness of the respondent, the merchandise was, on the 17th day of October, 1904, totally lost and destroyed, whereby the libelants suffered damage in the sum of $2,377.05. Subsequent to the filing of the libel, Fernandez died, and the present appellees, Carlotta C. Fernandez and Thomas B. Fernandez, as executrix and executor of the last will and testament of B. Fernandez, were substituted as respondents.

[1] The Francis E. M. Bernard was a vessel of the type known as a scow schooner, about 45 feet long and 4 feet deep, with a beam of

about 18 feet. She had a flat bottom, with round bilges, and a sharp bow. She carried two masts and three sails—a foresail, a mainsail, and a jib. It appears from the testimony that the beans were loaded on the Bernard at two different points on Minor's Slough, a tributary of the Sacramento river. The beans averaged about 85 pounds to the sack, making in all approximately 42.8 tons. Of this cargo, 125 sacks, or 5.62 tons, were stowed in the hold of the vessel in tiers or layers three sacks high, and the remainder, 37.18 tons, or 983 sacks, were stowed or piled on the deck in tiers or layers five sacks high. The vessel was manned by the captain, one Paul Ewald, and a deckhand. After all of the cargo had been loaded, the sails were hoisted and the Bernard proceeded down Minor's Slough on the return trip to San Francisco. The vessel had reached the mouth of the slough, distant about 200 yards from the point of making sail, when there came a change of wind. The vessel sheered off, ran into the bank of the stream, and in a few minutes capsized. Subsequent examination revealed a hole on the starboard side of the hull, below the water line, about three or four inches in diameter. The cargo was a total loss.

The libelants claim that the accident was due to the incompetency of the master, the incapacity of the vessel to answer her helm, or that the cargo was improperly stowed, and, if the accident was due to either of these causes, the vessel was unseaworthy, and the respondents liable for the loss. The respondents claim that the master was competent, that the failure of the vessel to answer her helm was due to the unusual condition of the wind, that the cargo was properly stowed, and that the accident was caused by a peril of navigation for which they were not responsible.

The captain's version of the accident was as follows:

"We set sail on Monday morning. We pulled across the river, and there was a westerly wind blowing. We set the mainsail and jib, and we started off for home, and I told the man to go forward and hoist the foresail, and a puff of wind came up from the northwest. The winds are pretty uncertain up the river. I had the helm hard down, and she sheered, and went into the bank there, and struck a snag there, or a rut, and she made a hole in her starboard bow. * * * After she struck, I know she acted funny right away, and I says to this man there must be something the matter with her. He says, 'I cannot see nothing the matter with her.' I tried to get her across the river to see what the trouble was with the boat, and before we got halfway she turned turtle, and I had just time enough to lower down the mainsail, foresail, and jib. Of course, at that time the man and I was overboard; the deck load shifted; the beans shifted—dumped over into the water. Of course, we was spilled into the water, and the man and I—we swam for the shore."

The contention of the libelants that the master was incompetent is based partly on the fact that the voyage during which their merchandise was lost was the first voyage of the Bernard in which Ewald had acted as captain or master; that he had not procured a license to act as such captain; that he had never theretofore acted in the capacity of captain of any vessel, but, on the contrary, had been employed on the Bernard as a deckhand, which according to his own statement was one who, on vessels of the type of the Bernard, acted as "mate, cook, bottle washer, and deckhand." It appears from the testimony of the

agent of the Bernard that, when the time arrived for the vessel to start from San Francisco on the voyage in question, the captain did not report for duty; that thereupon the agent told Ewald, who, as we have stated, was then employed on the Bernard as deckhand, to get a man and make the trip, and he (the agent) would make him captain when he came back; that it was late in the evening, and the wind was blowing, and he wanted to get the vessel away from the wharf. In the light of all of the testimony on the subject, we are not impressed with the claim of the libelants that the master of the Bernard was incompetent, because that was his first experience as master. The question must be considered in connection with the fact that the Bernard was a small scow schooner, carrying but two men as crew, and operating only on the Bay of San Francisco and the rivers tributary thereto. Ewald had been employed on her for two years theretofore as a deckhand. As stated by counsel for the respondents, if the libelants' claim with respect to the incompetency of Ewald were sound, then all captains would have to be adjudged incompetent on their first trip. We think the fact that it was Ewald's first trip as master is not sufficient to support a claim that the master was incompetent.

The libelants contend, further, that the incompetency of the master is shown by the fact that the schooner, when struck by a puff of wind, sheered and ran into the bank. It is stated that this was a usual and ordinary incident, and not a peril of navigation. But the evidence is that the vessel carried a mainsail, foresail, and jib, that the wind suddenly changed from the west to the northwest and that the winds are uncertain on the river. The wind filled the mainsail, and the vessel took a sheer right into the bank. Tietjan, the agent for the owner of the schooner, who had been a navigator and master of vessels of this character running on the Sacramento river, testified as follows:

"Q. With respect to a scow or these river vessels, or any sailing vessel, when they get in the river, where they are liable to get a puff of wind from among the trees, or around there, what effect does it have on them? A. You have to manage them quick; sometimes you cannot do it; there is not room enough. Q. Is not that the case with all sailing vessels, whether they are scow schooners, or ocean vessels, or anything else? A. Yes; but especially on the Sacramento river, because you have not much time there. * * * Q. Supposing the wind changes quickly, captain, can you always hold her then? A. No; that is just where it comes in; when the wind is quick, sometimes she comes back and jibes over quick."

We cannot say, in view of this uncontradicted testimony, that the evidence showed that the master was incompetent. The most that can be said is that possibly there was some undisclosed fault or error in navigation, or in the management of the vessel; but this is not established, either by the evidence or by inference, and, even if it was, it is excused under section 3 of the Harter Act. Act Feb. 13, 1893, c. 105, 27 Stat. 445 (Comp. St. 1913, § 8031).

Upon running into the bank, the schooner struck a snag under the water, which made a hole in the bow of the vessel below the water line, through which the water entered and by its weight capsized the vessel. The puff of wind was sudden and strong enough to cause the

mainsail to jibe. The jibing of the sail caused the vessel to sheer and strike the bank and encounter a snag. The snag pierced the vessel below the water line, and the water rushed into the hold of the vessel, causing the vessel to capsize. The efficient and proximate cause of the capsizing of the vessel was the snag. Had there been no snag, no injury would have resulted from the schooner running into the bank. There is no evidence of incompetency on the part of the master in the management of the vessel under these conditions.

With respect to the charge that the schooner was unseaworthy, because she did not answer her helm, the only substantial evidence we find upon this subject is the testimony of the master that he put the helm hard up, but she would not sheer up—she just kept on going; and, being asked, "And you think the accident really happened this time because she would not answer her helm?" he answered, "Yes." But the agent, Tietjan, testified as follows:

"Q. Did you ever see the rudder on the Bernard? A. Yes. Q. Was it large enough for her? A. Yes, sir. Q. Was it a small rudder, or a large rudder, or an average rudder? A. It was a good, large rudder for her."

The only inference to be drawn from this testimony, and the other testimony referred to, is that the reason the vessel did not answer the helm was because of the force of the wind causing the mainsail to jibe and the vessel to sheer, and not because of any unseaworthy condition arising from the size of the rudder.

With respect to the charge that the cargo was not properly stowed, it appears from the evidence that 125 sacks of beans, 5.62 tons, or approximately one-eighth of the entire cargo, were stowed in the hold of the vessel in layers or tiers three sacks high; the balance, 983 sacks, 37.18 tons, were stowed on the deck in layers or tiers five sacks high. The agent of the original respondent, and the captain, testified that in their opinion the Bernard, loaded in the manner indicated, was properly loaded for the purpose of making the trip back to San Francisco, and that the manner in which the cargo was loaded was the usual way of loading cargo of that nature. The only testimony tending to show that the cargo was improperly stowed was that of John Erickson, a witness for the libelants. He testified that as a rule scow schooners ought to carry about one-third of the cargo in the hold. But this witness also testified that:

"Some vessels are different from others. * * * Some of them carry everything on deck; some of them are built so they carry nothing in the hold. * * * They are so shallow that they put hardly anything in the hold; they carry it mostly on deck."

Admittedly the Bernard had a shallow hold—not exceeding four feet. This witness also testified that he had never been aboard the Bernard, but had simply seen her alongside the wharf.

[2] The learned judge of the court below, before whom all of the testimony was taken, with the exception of that of Ewald, found by his decision that the cargo was properly stowed. This decision, under such circumstances, is entitled to great weight, and we concur therein.

"The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evidence, the decision of the

District Judge, who had the opportunity of seeing the witnesses and judging their appearance, manner, and credibility, will not be reversed, unless it clearly appears that the decision is against the evidence." The Alijandro, 56 Fed. 621, 6 C. C. A. 54.

It follows that in our opinion the evidence fails to establish the claim of the libelants that the loss was caused either by the incompetency of the master or the incapacity of the vessel to answer her helm or the improper stowage of the cargo. We are of opinion that the respondents have shown by clear proof, leaving no reasonable doubt for controversy, that the loss was caused by a peril of navigation. This conclusion is in accordance with the requirements of the maritime law. The Mohler, 88 U. S. (21 Wall.) 230, 233, 22 L. Ed. 485; The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688; The Medea, 179 Fed. 781, 784, 103 C. C. A. 273.

The decree of the court below is affirmed.

SOUTHERN PAC. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1915.)

No. 2463.

1. TRIAL ⟸177—MOTION FOR DIRECTED VERDICT BY BOTH PARTIES—EFFECT.
The rule that a motion by each party for a directed verdict in his favor is equivalent to a request for findings of fact by the court, and that, if the court directs a verdict for one party, both parties are concluded on the findings of fact, was not applicable, where defendant's motion was accompanied by a request for leave to go to the jury if the motion was denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. ⟸177.]

2. TRIAL ⟸139—DIRECTED VERDICT—WHEN WARRANTED.
The validity of a peremptory instruction for plaintiff depends upon whether the evidence was so undisputed, or was of such a conclusive character as would have made it the duty of the court to set aside a verdict for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. ⟸139.]

3. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—RELEASE FROM DUTY.
Under Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1913, § 8677–8680), providing that it shall be unlawful for any common carrier subject to that act to permit any employé subject thereto to remain on duty for longer than 16 consecutive hours, that whenever any such employé shall have been continuously on duty for 16 hours, he shall be relieved, and not permitted to again go on duty until he has had at least 10 consecutive hours off duty, and that no such employé who has been on duty 16 hours in the aggregate in any 24-hour period shall be permitted to continue or again go on duty without having had at least 8 consecutive hours off duty, where a train is delayed en route to its destination, and the members of the train crew are laid off and released from duty during the period of the delay, the lay-off or release breaks the continuity of the service, and the period of such lay-off should be deducted in de-

termining whether there has been a violation of the act, if the release is for a substantial and opportune period of rest.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⊂⊃13.

Hours of service of employés, see note to United States v. Houston Belt & T. Ry. Co., 125 C. C. A. 485.]

4. MASTER AND SERVANT ⊂⊃17—HOURS OF SERVICE—QUESTIONS FOR JURY.

In an action for penalties for permitting a train crew to remain on duty for more than 16 consecutive hours, evidence *held* to make a question for the jury as to whether releases of the train crew from duty while the train was delayed were for substantial and opportune periods of rest, and hence the court erred in directing a verdict for the government.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. ⊂⊃17.]

In Error to the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Action at law by the United States against the Southern Pacific Company to recover penalties for alleged violations of the act of Congress entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," approved March 4, 1907. Reversed.

Francis M. Hartman, of Tucson, Ariz., and Charles J. Heggerty and Knight & Heggerty, all of San Francisco, Cal., for plaintiff in error.

Thomas A. Flynn, U. S. Atty., of Phœnix, Ariz., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The complaint filed in this case contains 12 counts. The first 6 only are involved in the present controversy. It is charged in the complaint that the defendant is a common carrier; that in violation of the act of Congress, entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," approved March 4, 1907 (34 Stat. 1415), the defendant, beginning at the hour of 5:30 a. m. on December 21, 1912, upon its line of railroad between the stations of Lordsburg, in the state of New Mexico, and Benson, in the state of Arizona, required and permitted the conductor, B. T. Sullivan, the engineer, Billy F. Eaker, the fireman, Frank H. Kempf, and three trainmen, W. E. Brown, H. F. Peacock, and C. G. Harrison on regular local freight train extra west, drawn by locomotive engine No. 2813, engaged in interstate traffic, to be and remain on duty for a longer period than 16 consecutive hours. The defendant's answer denied any violation of the act of Congress.

[1, 2] The case was tried before the court and a jury. At the close of the evidence the plaintiff moved for a directed verdict in its favor upon each of the causes of action here involved. A similar motion was made by the defendant, with the further request that, in case such motion be denied, it have leave to go to the jury. The motion of the plaintiff was granted, and that of the defendant, including the motion for leave to go to the jury, was denied. The rule that, where each

party asks the court for a peremptory instruction for a directed verdict in his favor, the proceeding is equivalent to a request for a finding of facts by the court, and, if the court directs the jury to find a verdict for one of the parties, both are concluded on the findings of fact (Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654), is not applicable here, in view of the additional motion of the defendant that in case its motion for a directed verdict in its favor be denied it have leave to go to the jury. Empire State Cattle Co. v. Atchison Ry. Co., 210 U. S. 1, 8, 9, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70. The validity of the peremptory instruction in favor of the plaintiff must therefore depend upon whether the evidence was so undisputed, or was of such a conclusive character as would have made it the duty of the court to set aside the verdict, if the case had been given to the jury and a verdict returned in favor of the defendant. Empire State Cattle Co. v. Atchison Ry. Co., supra, 210 U. S. 1, 10, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70.

"A case cannot properly be withdrawn from the consideration of the jury simply because, in the judgment of the court, there is a preponderance of evidence in favor of the party asking a peremptory instruction. If the facts are entirely undisputed or uncontradicted, or if, upon any issue dependent upon facts, there is no evidence whatever in favor of one party, or, what is the same thing, if the evidence is so slight as to justify the court in regarding the proof as substantially all one way, then the court may direct a verdict according to its view of the law arising upon such a case." Smith-Booth-Usher Co. v. Detroit Copper Mining Co., 220 Fed. 600, 136 C. C. A. 58.

[3] Whether in the present case there was any testimony tending to show that the defendant had not in fact required or permitted the employés named to be and remain on duty for a longer period than 16 consecutive hours depends in part upon the construction of the statute. Section 2 of the act of March 4, 1907 (34 Stat. 1415), provides as follows:

"That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted to again go on duty until he has had at least ten consecutive hours off duty; and no such employé who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty."

There are two separate and distinct periods of duty provided for in this section. The first period is that referred to in the first clause of the section, and that period is designated as "sixteen consecutive hours." The second period is that referred to in the second clause of the section, and that period is designated as "sixteen hours in the aggregate." The purpose of the distinction in the two periods of duty is found in the following provision requiring succeeding periods of rest. When an employé has been *continuously* on duty for 16 hours, he must be relieved, and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty; and when he has been on duty 16 hours in the *aggregate* in any 24-hour period, he

must not be required or permitted to continue or again go on duty without having at lease 8 hours off duty.

It is not charged that, after the periods of duty or service between Lordsburg and Benson, the employés were required or permitted to continue or again go on duty without having had the period of rest provided for in the statute. The complaint is that between these two stations, and between the hours of 5:30 a. m. December 21, 1912, and 12:40 a. m. December 22, 1912, there was a continuous duty for the employés, and in the performance of that duty they were required and permitted to be and remain on duty for a longer period than 16 consecutive hours. The defense is that, by reason of unavoidable delays in operating the train, the conductor and trainmen were released from duty at Bowie, an intermediate station, from 9:15 a. m. until 11:40 a. m. December 21st, and again from 1:20 p. m. to 2:20 p. m. on that date, and that the engineer and fireman were released from duty at the same station from 1:30 p. m. to 2:30 p. m., and again at Cochise at 10:29 p. m., when the release was final, and they were carried deadhead to Benson. It is claimed that the two periods of release of the conductor and trainmen at Bowie, aggregating 3 hours and 25 minutes, should be deducted from the total time, reducing the aggregate of the two periods of actual duty to 15 hours and 45 minutes, and that the release of the engineer and fireman of one hour at Bowie and their final release and discharge at Cochise at 10:29 p. m. should be deducted from the total time, reducing the aggregate of their periods of actual duty to 15 hours and 59 minutes.

The government contends that these deductions, other than the final release and discharge of the engineer and fireman at Cochise, cannot be made; that when a train crew starts with a train to a designated terminal, and has the duty of taking that train to such terminal, it remains on duty within the meaning of the statute, notwithstanding any temporary delays, and regardless of any releases en route, unless the duty to perform services on that trip is finally released and discharged. It is also contended that a duty of 16 hours in the aggregate is only permitted where there is more than one unit of service during the 16 hours, as, for example, where there are assignments of duty for one or more periods on different trains, and the aggregate of such periods does not exceed 16 hours. In other words, the claim is that the operation of a train from its point of origin to its point of destination is a unit, that the duty to operate such train by employés from its point of origin to its point of destination is also a unit, and that delays with corresponding releases along the road are merely incidental, and do not in law affect the continuous duty for the unit of service, whatever that may be. In the present case the freight train in question was being operated between Lordsburg and Benson. The regular time schedule for this run was 10 hours; the distance was 115 miles. It is contended on the part of the government that this was a unit of duty, and, whatever delays the train might encounter in making the run, there could be no release for such delays, except the final release, relieving the employés from the 16 hours of continuous duty.

We find no authority for this construction of the statute. In our opinion the statute means what it says, and is not limited otherwise than by its own terms. In this conclusion we are supported by the decision of the Supreme Court of the United States in the case of United States v. Atchison, Topeka & Santa Fé Ry. Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361. In that case the court had under consideration the provision of the same act and section relating to the hours of service of telegraph operators. That provision is as follows:

"No operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period. * * *"

The operator in that case went on duty at 6:30 a. m. and worked until 12 m. He was then given an intermission until 3 p. m., and then worked until 6:30 p. m., making in all 9 hours' actual service, but 12 hours from the beginning to the end of the service. It was contended on the part of the government that this was a service of 12 hours, notwithstanding the intermission of 3 hours, and that the statute had been violated. The trial court so held in a trial before a jury. But the Supreme Court ruled otherwise. Mr. Justice Holmes, for the court said:

"The proviso does not say 9 'consecutive' hours, as was said in the earlier part of the section, and if it had said so, or even 'for a longer period than a period of 9 consecutive hours,' still the defendant's conduct would not have contravened the literal meaning of the words. A man employed for 6 hours, and then, after an interval, for 3, in the same 24, is not employed for a longer period than 9 consecutive hours. Indeed, the word 'consecutive' was struck out, when the bill was under discussion, on the suggestion that otherwise a man might be worked for a second 9 hours after an interval of half an hour. In order to bring about the effect contended for, it would have been necessary to add, as the section does add in the earlier part, a provision for the required number of consecutive hours off duty. The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied. The government suggests that, if it is not implied, a man might be set to work for 2 hours on and 2 hours off alternately. This hardly is a practical suggestion. We see no reason to suppose that Congress meant more than it said. On the contrary, the reason for striking out the word 'consecutive' in the proviso given, as we have mentioned, when the bill was under discussion, and the alternative reference in section 2 to 'sixteen consecutive hours' and 'sixteen hours in the aggregate,' show that the obvious possibility of two periods of service in the same 24 hours was before the mind of Congress, and that there was no oversight in the choice of words."

This construction of the statute is applicable here, and determines that as a matter of law there may be periods of duty with intermissions between, providing the aggregate of such periods do not exceed 16 hours, and providing, further, that thereafter there are at least 8 consecutive hours off duty in any 24-hour period. But whether these intermissions are such as the law will recognize depends upon their character as periods of substantial rest. The purpose of the law is declared in its title to be "to promote the safety of employés and travelers." An overworked employé is a distinct menace to such safety, and to provide against it the hours of service are limited by periods

of rest wherein the employé may be relieved from the fatigue and the strain of work. In the case of United States v. Chicago, M. & P. S. Ry. Co. (D. C.) 197 Fed. 624, before Judge Rudkin, of the Eastern district of Washington, the question at issue was substantially the same as in the present case. The trial was by the court without a jury, and the judgment of the court was in effect a finding of facts, with conclusions of law. The court held that a lay-off of 30 to 45 minutes for breakfast, and a lay-off of about one hour each for the midday and evening meals, did not break the continuity of service. The court also held that an indefinite lay-off of 3 hours, while the train crew was awaiting the arrival of an extra engine at a small way station, did not break the continuity of the service; but the court observed that, if the crew had been laid off for a definite period of 3 hours at a terminal or other place where the crew might have rested, such lay-off would no doubt break the continuity of the service. This decision was referred to approvingly by the Supreme Court in Missouri, K. & T. Ry. v. United States, 231 U. S. 112, 119, 34 Sup. Ct. 26, 58 L. Ed. 144, as was the case of United States v. Denver & R. G. Ry. (D. C.) 197 Fed. 629. In the latter case Judge Pope, of the district of New Mexico, without the aid of a jury, and finding the facts and conclusions of law, held that, when a train was held upon a siding at a station for 55 minutes to allow another train to pass, the exact time of arrival of the latter train being uncertain, and it being the duty of the crew of the former train to resume the work of moving their train immediately upon such arrival, the crew was on duty during the period of waiting. These cases were determined upon issues of fact as well as upon questions of law. With respect to the latter it was held that the release of the employé must be definite and certain as to the period of time, and substantial and opportune as to the period of rest. A release for meals, or to stand and wait for another train, is not sufficient. There must be a substantial and opportune period; otherwise, the duty is a continuous one.

[4] In the present case, with respect to the first period of release, from 9:15 a. m. to 11:40 a. m., the order of the train dispatcher at Tucson to the agent at Bowie was:

"As you have to use the local engine, there will be no engine for local crews to work with. Release the local crews, and call for when can give them an engine. Advise time released and recalled. See it is as much as an hour, so we can get credit for it."

This order appears to be uncertain as to time, and made only for the purpose of claiming credit for the time of the release as a period of time when the crew was off duty. The train dispatcher testified with respect to this order:

"In case they [the crew] were wanted, it would have been necessary to send out and notify them. I could not have canceled that release until I had gotten word to the men. If I had found we wanted them at 10 o'clock, I had a right to call them; but I didn't need them."

On the other hand, Sullivan, the conductor, testified with respect to this period that he did not receive any message at Bowie that he was released, and that the operator told him he would be off duty until called; but he testified, further, that he spent the time sitting around the

hotel at Bowie, and reading; that he did not perform any duty for the company during that time; that both he and the trainmen could have gotten into an automobile and gone into the country until 11:40 a. m., had they so desired; that they were free and their time was absolutely their own.

With respect to the period of release from 1:20 p. m. to 2:20 p. m. there was a definite release for one hour. Sullivan testified that during that period his time, and the time of his trainmen, was absolutely their own; that they were free to come and go as long as they were back at 2:20 p. m. With respect to the period of release of the engineer and fireman at Bowie from 1:30 p. m. to 2:30 p. m., that was also a definite release of one hour. The engineer testified that during that time neither he nor his fireman was expected to work; that they could do as they pleased during that hour, and they did do as they pleased; that he ate and smoked a cigar, and laid down and took a nap, and got rested. Was this a substantial and opportune period of rest, under all the circumstances? The testimony clearly presented questions of fact for the jury, to be determined under appropriate instructions as to the law. It was not for the court to find the facts, when a jury had been impaneled for that purpose. It may be that this case came within the twilight zone, referred to by Judge Rudkin in United States v. Northern Pacific Ry. Co. (D. C.) 213 Fed. 539; and, if it does, we know of no better way of disposing of the issues than by submitting the facts to the determination of a jury. The motion of the defendant that the case be submitted to the jury should therefore have been granted.

Judgment reversed, with instructions to grant a new trial.

In re K. MARKS & CO.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 198.

1. BANKRUPTCY ⇐140—IMPORTATIONS UNDER LETTERS OF CREDIT—RIGHTS OF BANKERS ISSUING LETTER OF CREDIT.

A firm which became bankrupt was engaged in importing merchandise under a system whereby London bankers issued a letter of credit to the seller of the merchandise for the price thereof; the bill of lading, with the shipper's invoice and the consular invoice, being sent to the banker's agents, who delivered them to the bankrupts in exchange for a trust receipt, the remaining bills of lading being forwarded to the bankers, accompanied by a draft, which they accepted. By the application for the credit, the bankrupts bound themselves to furnish the bankers funds to meet the draft at maturity, and admitted and guaranteed the bankers' ownership of the merchandise or the proceeds thereof, and their right to the possession thereof, and to retake possession, if the merchandise should be intrusted to the bankrupts for sale or otherwise. By the trust receipt they agreed to hold the merchandise as the property of the bankers, with liberty to sell it for their account and to deliver the avails to the bankers' agent until their obligations to the bankers had been discharged, and to store and insure the merchandise, delivering the storage and insurance papers to the bankers' agents. *Held*, that it was the intention that title to the goods should remain in the bankers until they were reimbursed for paying the price to the seller, and they had at all times the right to

retake the goods or their proceeds, and the transaction did not constitute a chattel mortgage, void as to creditors, because not filed as required by the state law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⟸140.]

2. BANKRUPTCY ⟸140—IMPORTATIONS UNDER LETTERS OF CREDIT—RIGHTS OF BANKERS ISSUING LETTER OF CREDIT.

That the bankers occasionally delivered the shipping documents to the bankrupts before they received the trust receipt, or failed to insist upon immediate payment of the proceeds when the goods were sold, or to insist upon receiving the storage and insurance papers, was not an abandonment of their title or a waiver of their rights.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⟸140.]

3. BANKRUPTCY ⟸140—IMPORTATIONS UNDER LETTERS OF CREDIT—RIGHTS OF BANKERS ISSUING LETTER OF CREDIT.

That with respect to one shipment the shipping documents were delivered through mistake or otherwise to the bankrupts, instead of the bankers' agents, and the bankers never received a trust receipt therefor, did not defeat their rights, as the application for credit alone was sufficient to protect their rights.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⟸140.]

4. BANKRUPTCY ⟸155—IMPORTATIONS UNDER LETTERS OF CREDIT—RIGHTS OF BANKERS ISSUING LETTER OF CREDIT.

Where upon the bankruptcy of the importers the bankers were unable to trace into the hands of the trustee the proceeds of sales of certain of the merchandise, they were not entitled to have a similar amount paid them from the estate, under the rule that, where a person has under his control a fund whereof a portion belongs to him and a portion is held by him in trust, withdrawals by him from the fund will be charged against the portion belonging to him, as, while this rule applies to a single bank account or a separate fund, it could not be applied to the whole estate of the bankrupts, especially as the estate might be largely constituted of the proceeds of sales of goods covered by trust receipts belonging to other parties.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸155.]

Appeal from the District Court of the United States for the Southern District of New York.

Charles T. B. Rowe, of New York City (Edmund L. Mooney and Emanuel Eschwege, both of New York City, of counsel), for appellant.

Bigelow & Wise, of New York City (H. A. Wise, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is a reclamation proceeding by Smith & Schipper, agents of William Brandt's Sons & Co., bankers of London, for certain goods and proceeds of goods and uncollected accounts for sale of goods in the hands of the trustee in bankruptcy of K. Marks & Co. K. Marks & Co. were a firm of this city engaged in the importation of edibles from Europe. To raise the funds to pay for the same they followed the familiar system whereby bankers give a merchant here purchasing goods in foreign countries credit against the shipping documents and deliver the latter to him on or prior to their arrival in this

country against his trust receipts. Business to the extent of many millions of dollars is annually done at this port in this way.

The course of dealing between these parties was as follows: K. Marks & Co. signed an application to Brandt's Sons & Co., through Smith & Schipper, in the following form:

Messrs. Wm. Brandt's Sons & Co., London, per Messrs. Smith & Schipper, 138 Front Street, New York—Gentlemen: We hereby beg leave to open by mail / cable with you confirmed / unconfirmed credit for the amount of £.....
.....
in favor of.....
to be availed of by drafts on you at.....
for cost of.....
Bills of lading to be made out to order and shipments completed by.....
Drafts to be drawn and negotiated on or before.....

The marine insurance will be taken out by us.

One bill of lading, indorsed in blank, shipper's invoice and consular invoice, together with copy of advice of drafts drawn against this credit, are to be sent by the shippers forthwith to your agents, Messrs. Smith & Schipper, New York. Duplicate bills of lading and invoices are to be attached to the drafts.

In consideration of your opening the above credit, we hereby bind ourselves to furnish you with funds to meet the said drafts at the maturity thereof, in cash or in bills of exchange satisfactory to you and which we hereby guarantee, together with all expenses incurred and a commission of per cent. on all drafts drawn or accepted by you.

We hereby recognize, admit, and guarantee your ownership of the merchandise, or the proceeds thereof, represented by the bills of lading aforesaid, and your right and the right of your agents, Messrs. Smith & Schipper, to the possession and disposal of said merchandise and proceeds and of the bills of lading and policies of insurance covering the same, until such time as any and all indebtedness liability and obligation existing in your favor as against us under said credit or otherwise shall have been paid, discharged and fulfilled. In the event that the said merchandise, or the documents therefor, shall be intrusted to us for the purpose of sale or otherwise, we hereby consent that your right to repossess yourselves of the same or the proceeds thereof shall be exercised at any time in your or your said agents' discretion.

It is understood and agreed that you shall not be held responsible for the correctness or validity of the documents representing shipment or shipments, nor for the description, quantities, or quality of the merchandise declared therein, and, further, that the liability and obligation created hereunder are additional to any security, lien, or advantage which you may have, or which will or would otherwise arise or be implied from the course of business between us, and, finally, that this agreement is to continue in force, notwithstanding any change in the composition of our firm.

Smith & Schipper forwarded this application to Brandt's Sons & Co. in London, who, if they approved it, issued a letter of credit to the seller of the goods for the price in the following form:

Wm. Brandt's Sons & Co.
Letter of Credit.

No. London.

"We hereby authorize
to value on us at for account of
for any sum or sums not exceeding

Marine insurance is covered
Bills of lading to be made out to
Shipments to be completed

One bill of lading indorsed in blank and consular invoice, together with a copy of respective advice of drafts drawn against this credit, are to be sent direct by the shippers for our account to Messrs. Smith & Schipper, 138 Front Street, New York.

The bills must be drawn latest by
and be accompanied by remaining bills of lading,
invoice copies which are to be delivered
up to us on acceptance.

And we hereby agree with the drawers, indorsers, and bona fide holders of the bills drawn in compliance with the terms of this credit that the same shall be duly honored on presentation at our counting house.

All bills to be marked as drawn under Credit No.
dated and to be written off on the back hereof.
£ Sterling.

Thereupon the seller shipped the goods and forwarded the bill of lading, together with the invoice and consular invoice, to Smith & Schipper, and drew a draft, accompanied by the remaining bills of lading, for the price on Brandt's Sons & Co., who accepted the same. On the arrival of the shipping documents Smith & Schipper delivered them to K. Marks & Co. against a trust receipt in the following form:

Trust Receipt No.

New York.....

Received from Messrs. Wm. Brandt's Sons & Co., bankers, through their agents, Messrs. Smith & Schipper, New York, the following merchandise, their property, specified in the bill of lading per S/S..... shipped by.....whose draft against same for £.....has been accepted for our account by said bankers as due in London.....under their letter of credit No.....and in consideration thereof we hereby agree to hold the said merchandise as the property of the bankers above named, with liberty to sell the same for their account, and, in the event of the sale of the said merchandise or any part thereof, to hand the avails as soon as received to Messrs. Smith & Schipper, their agents, until our obligations under the above credit and all other our obligations and indebtedness to the said bankers shall have been discharged and paid.

We further agree, pending a sale, to store the said merchandise and fully to insure the same against fire (loss, if any, payable to Messrs. Smith & Schipper, agents as aforesaid), and to pay storage, insurance and all other charges and expenses which may be incurred in respect thereto; storage and insurance papers to be handed to Messrs. Smith & Schipper.

It is also understood and agreed that the said bankers, or their agents, Messrs. Smith & Schipper, may at any time cancel this arrangement and repossess themselves of the said merchandise or the avails thereof, wheresoever and in whatsoever condition their said property may then be found, and in the event of our suspension, failure or assignment for benefit of creditors, or of the nonpayment of any indebtedness or nonfulfillment of any obligation of ours to the said bankers or their agents, whether arising under the said credit or otherwise, then all obligations, acceptances, indebtedness and liabilities whatsoever shall thereupon, without notice, mature and become due and payable forthwith.

The intention of this arrangement is to protect and preserve unimpaired the right, title, and interest of the said bankers in and to the said merchandise and the avails thereof, as above declared, until we shall have fulfilled our obligations to them, whether arising under credit agreements or otherwise, whereupon the trusts hereby created shall cease and terminate.

Documents delivered:
Bills of lading,
Consular invoice,
Commercial invoice,
Insurance certificate.

.....

This course of business had continued between K. Marks & Co. and Smith & Schipper for several years. The latter never insisted upon

immediate payment of the proceeds of sale of the goods, nor upon delivery of storage and insurance papers; their concern being to be put in funds in time to meet the acceptance of Brandt's Sons & Co. when due in London.

[1, 2] The trustee contends that these documents and the conduct of the parties constituted a chattel mortgage upon the goods, which was void as to creditors because not filed as required by the Lien Law of New York. He regards the whole thing as a sham. We do not concur in this view at all. The plain intention of the parties was that title to the goods should remain in the bankers until they were reimbursed for paying the price of them to the seller. They had at all times the right to retake the goods from the merchant or their proceeds if they could be traced. The fact that the bankers occasionally delivered the shipping documents before they received the trust receipt, or that they failed to insist upon immediate payment of the proceeds when the goods were sold, or did not insist upon receiving the storage and insurance papers, we do not regard as an abandonment of their title or a waiver of their rights under the trust receipt. The subject has been so fully considered, both in this circuit and in the Third Circuit, that we shall do no more than refer to the decisions. Charavay & Bodvin Co. v. York Silk Co. (C. C.) 170 Fed. 819; In re Cattus, 183 Fed. 733, 106 C. C. A. 171; Century Throwing Co. v. Muller, 197 Fed. 252, 116 C. C. A. 614; In re Killian Mfg. Co. (D. C.) 209 Fed. 498; Assets Realization Co. v. Bank, 210 Fed. 156, 126 C. C. A. 662.

[3] There was one shipment of pimentos arriving by steamship St. Laurent immediately before the proceedings in bankruptcy were begun, the documents of which were delivered through either the fault or the mistake of the shipper to K. Marks & Co., instead of to Smith & Schipper. For these goods no trust receipt was ever delivered to Brandt's Sons & Co., but we agree with Judge Hough that the application for the credit alone is sufficient to protect the banker's rights.

[4] The trustee admits that goods in specie, or their proceeds, or uncollected accounts due for them, have been traced into his hands, as claimed by the petitioners, except in the case of negotiable paper to the amount of $1,500, which the special master and District Court ordered to be turned over to the petitioners, and also in case of the proceeds of goods sold, paid by one of the partners of K. Marks & Co. to the receiver in the amount of $13,082.29. The theory of the special master as to the negotiable paper is that, K. Marks & Co. having spent the proceeds of sale of goods covered by trust receipts to this amount, it must be presumed that a similar amount belonging to the petitioner remains in the estate. On this point he says:

"There is no evidence to indicate that the items remaining on the debit side, viz., August 5th, $404.81, August 10th, $1,735.98, August 26th, $328.86, did not represent sales of merchandise belonging to the bankrupts; wherefore petitioners claim that the cash payments, collected by the bankrupts and dissipated, were payments for the bankrupts' own merchandise, and are chargeable thereagainst, and that the unpaid notes in the hands of the receiver are applicable pro tanto to the debit items representing merchandise delivered by the petitioners to the bankrupts under trust receipts as aforesaid. For this proposition, the petitioners invoke the well-settled rule of law that, where a person has under his control a fund whereof a portion belongs to him

and a portion is held by him in trust, withdrawals by him from this fund will be charged against the portion of the fund belonging to him, and when such withdrawals exceed the amount of his personal share of the fund, all the balance of the fund, if any, is charged with the trust; this on the theory that no one is presumed to do a wrongful act. * * * The principle of law which I have followed in allowing the petitioners to trace their property into the hands of the receiver (whether it consists of merchandise or proceeds represented either by money or bills receivable or notes) is as follows: The modern rule applicable to all kinds of trust funds is that if the proceeds of such sales of the principal's goods have swelled the funds coming to the receiver in bankruptcy, and such funds have at all times equaled or exceeded the amount due to the principal, equity will follow the goods into their proceeds and decree his reimbursement. In re Northrup [D. C.] 152 Fed. 763; In re Kurtz [D. C.] 125 Fed. 992."

The above reasoning applies to a single bank account or a separate fund, but not to the whole estate of the bankrupts, especially where it may be largely constituted of the proceeds of sale of goods covered by trust receipts belonging to other parties. The award of $1,500 negotiable paper will be disallowed.

In respect to the sum of $13.082.29, Elkan B. Marks, one of the partners, collected the proceeds of sale of goods recovered by the petitioner's trust receipts to this amount and left the city with it in his possession shortly before the bankruptcy proceedings were instituted. After an absence of several weeks, he returned and paid these moneys over to the receiver. Counsel for the trustee contends that the testimony of this witness as to his intentions and his doings in the meantime is wholly incredible. It certainly cannot be believed in its entirety. Yet the special master and District Judge did believe it so far as this particular transaction is concerned, and we do not differ with them.

The order of the District Court, modified by striking out the award of $1,500 of negotiable paper, is affirmed.

BALLARD v. AUDUBON NAT. BANK.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 197.

1. CORPORATIONS ⟸426—OFFICERS—UNAUTHORIZED CONTRACTS—RATIFICATION.

Where a fraternal insurance corporation was governed by nine directors and three trustees, an instrument authorizing B. to sell any of its securities, signed by the trustees before their term of office had commenced, and a bill of sale to B., executed by two of the trustees after their term commenced, were wholly ineffectual, and incapable of ratification by the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. ⟸426.]

2. BANKS AND BANKING ⟸116 — KNOWLEDGE OF OFFICERS — IMPUTING TO BANK.

Where the president of a bank accepted, as collateral security for a loan to B. personally, securities which he knew belonged to a fraternal in-

surance corporation, and which he knew B. had no authority to use for his own personal purposes, his knowledge was imputable to the bank, though he had a standing arrangement with the brokers, through whom the securities were subsequently sold by the bank, for a division of commissions on all business brought them by him; this being a collateral and incidental contract, not bringing the case within the rule that an agent's knowledge will not be imputed to his principal, when the transaction is such as to compel the agent's concealment.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. ⊂⊃116.]

3. RECEIVERS ⊂⊃167—RIGHT TO SUE—CONVERSION—TITLE AND RIGHT TO POSSESSION.

An instrument, executed by the trustees of a fraternal insurance corporation, authorizing B. to sell any of the securities of the corporation and account therefor to the trustees, and a bill of sale subsequently executed by the trustees to B., even though valid, conferred on B. authority to act only as agent of the corporation, and his title and possession being the title and possession of the corporation, its receiver could maintain an action of trover for the conversion of securities by a bank to whom B. pledged them.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 320; Dec. Dig. ⊂⊃167.]

In Error to the District Court of the United States for the Southern District of New York.

Merle I. St. John, of New York City (Arthur Ofner, of New York City, of counsel), for plaintiff in error.

Peter Condon, of New York City (Anson McCook Beard, of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is an action by the receiver of the Keystone Guard, a fraternal insurance corporation of the state of Pennsylvania with headquarters at Athens, in that state, against the Audubon National Bank, to recover damages for the conversion of securities of the value of $100,000 belonging to the Guard.

One Joseph E. Blackburn conceived a plan of merging certain fraternal insurance companies, and in pursuance thereof set out to get control of the Keystone Guard. It was governed by nine directors and three trustees, whose terms of office were to expire June 30, 1910. The annual meeting of the Guard was to take place at Denver, Colo., June 21st and Blackburn agreed to distribute $50,000 among five of the directors, the three trustees, and certain other officers, upon condition that they would resign and permit persons nominated by him to be elected in their place at that meeting. This was done, and at the same meeting the constitution was amended so as to empower the trustees to sell the Guard's securities and to buy securities for the Guard, subject to the approval of the board of directors.

Subsequently, to raise the necessary funds, Blackburn arranged with D. S. Mills for a loan of $50,000, agreeing to give him $1,000 bonus and stock exchange collateral. Mills, who was president of the Audubon Bank, arranged that a loan of $25,000 should be made to each of two of the employés, because a single loan of $50,000 was

beyond the bank's powers. Their notes he discounted at the bank, promising them that he would not use the $50,000 until he got good collateral.

Subsequently he and Blackburn went to Athens, where, July 8, 1910, the outgoing treasurer and director, Haverly, delivered all the securities of the Guard to the incoming treasurer and trustees, who handed them to Mills, who thereupon handed the $50,000 in cash to Blackburn, who paid it over to Haverly. This fund of $50,000, after assurance from Blackburn and Mills that no part of the Guard's securities was to be used in any way in raising it, was distributed among the directors, trustees, and officers who had resigned in order to give Blackburn control of the Guard.

June 27, 1910, the incoming trustees, whose term of office had not begun, signed a letter as follows:

"Athens, Penna., June 27, 1910.

"Mr. J. E. Blackburn:

"You are hereby authorized to sell or exchange any or all of the securities of the Keystone Guard now held by us as trustees, and accounting to us therefor as such trustees.

Eugene C. May, Chairman.
"Harrison E. Hoyt,
"J. F. Gray."

July 8th two of these trustees, then in office, executed a bill of sale to Blackburn as follows:

"Know all men by these presents, that we, Eugene C. May, James F. Gray, and Harrison E. Hoyt, as trustees of the Keystone Guard, of Athens, county of Bradford, and state of Pennsylvania, in consideration of the sum of one dollar and other good and valuable consideration to us in hand paid by Joseph E. Blackburn, at and before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released, and confirmed, and by these presents do hereby grant, bargain, sell, release, and confirm, unto the said Joseph E. Blackburn all the goods, chattels, and articles of personal property mentioned and expressed in the schedule hereto annexed, and all our right, title, and interest in and to the same. To have and to hold, all and singular, the said goods and chattels and articles of personal property, and every of them, by these presents bargained, sold, released, granted, and confirmed unto the said Joseph E. Blackburn, to his only proper use and behoof, his heirs, executors, administrators, and assigns, forever.

"And we, the said Eugene C. May, James F. Gray, and Harrison E. Hoyt, as such trustees as aforesaid, do by these presents hereby promise, covenant, and agree for our successors to warrant and defend the title of the said goods, chattels, and articles of personal property against all and every person and persons whomsoever.

"In witness whereof, we have hereunto set our hands and seals this eighth day of July, A. D. one thousand nine hundred and two.

"Eugene C. May, [Seal]
"Trustee of Keystone Guard.
"Harrison E. Hoyt, [Seal]
"Trustee of Keystone Guard."

[1] On the same date a special meeting of the directors was held, but the notice of meeting did not cover any such business as a confirmation of the foregoing documents, nor is any such resolution produced and proved, though it is said that one was adopted. However, we think the documents wholly ineffectual, and incapable of ratification by the board, because the authority of June 27th was given by per-

sons not then trustees, and the bill of sale of July 8th was executed by only two out of the three trustees.

Upon his return to New York Mills deposited $100,000 of the Guard's securities with the Audubon Bank as collateral for the two loans of $25,000 each, which securities were subsequently sold, and the loans, with interest and a bonus of $1,000, paid out of the proceeds. What was done with the rest of the Guard's securities does not clearly appear, and it is not necessary to inquire.

[2] It is manifest that an outrageous fraud was practiced upon the Guard, but the trial judge directed a verdict for the defendant on the ground that the knowledge of Mills in connection with it was not imputable to the bank. He relied upon the case of Bank of Overton v. Thompson, 118 Fed. 798, 56 C. C. A. 554. In that case, however, the cashier was acting throughout on his own account, and therefore the well-established principle that an agent's knowledge will not be imputed to his principal, when the transaction is such as to compel the agent's concealment, applied. The defendant seeks to bring this case within the exception, because Mills had a standing arrangement with the brokers who sold the Guard's securities, that he was to divide commissions with them on all business brought by him. This was a collateral and incidental contract, which in no way prejudiced the bank, or was any reason for concealing from it the fraud practiced on the Guard in a transaction which Mills was making for the bank entirely within the scope of his authority as president. He accepted as collateral for the loan made by the bank to Blackburn personally collaterals which he knew belonged to the Guard, and which he also knew Blackburn had no authority to use for his own personal purposes. This knowledge was imputable to the bank.

[3] Finally, it is objected by the defendant that, whatever the receiver's rights may be in equity, he cannot maintain this action of trover at law, because he had not the title to or the right of immediate possession of the securities in question. It is said that the title and right of possession were in Blackburn by virtue of the documents executed June 27 and July 8, 1910. Taking them, however, at their face value, it is perfectly obvious that the authority conferred on Blackburn was to act as agent of the Guard. His title and possession was its title and possession, so that the receiver was fully qualified to maintain the action of trover. Thorpe v. Burly, 11 Johns. (N. Y.) 285.

The judgment is reversed.

STEINER, LOBMAN & FRANK et al. v. T. S. FAULK & CO. (two cases).

(Circuit Court of Appeals, Fifth Circuit. April 12, 1915. Rehearing Denied May 17, 1915.)

Nos. 2671, 2701.

1. PARTNERSHIP ⟸131—INVOLUNTARY BANKRUPTCY—AUTHORITY OF PARTNER.
The power vested in one member of a partnership to carry on the firm business without consulting his associate did not include the power of terminating the partnership by consenting that it be adjudged a bankrupt, and his consent did not estop the firm to contest the involuntary petition in bankruptcy.
[Ed. Note.—For other cases, see Partnership, Dec. Dig. ⟸131.]

2. APPEAL AND ERROR ⟸1195—PROCEEDINGS AFTER REMAND—LAW OF THE CASE.
The District Court could not require an alleged bankrupt to pay the costs and fees of a receivership prior to the adjudication as a condition of the bankrupt's right to contest the involuntary petition, where the decree of the Circuit Court of Appeals on a former appeal had taxed such costs and fees against the petitioning creditors.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. ⟸1195.]

In Error to, and Petition to Superintend and Revise from, the District Court of the United States for the Middle District of Alabama; Aleck Boarman, Judge.

Proceeding by Steiner, Lobman & Frank and others against T. S. Faulk & Co. to have the defendant adjudicated a bankrupt. Judgment in favor of defendant, and petitioners bring error, also filing a petition to superintend and revise. Judgment affirmed, and petition to superintend denied.

In No. 2671:

R. E. Steiner, B. P. Crum, and Leon Weil, all of Montgomery, Ala., and B. G. Farmer, of Dothan, Ala., for plaintiffs in error.

W. A. Blount, A. C. Blount, Jr., and F. B. Carter, all of Pensacola, Fla., Warren S. Reese, of Montgomery, Ala., and W. O. Mulkey, of Geneva, Ala., for defendants in error.

In No. 2701:

Leon Weil and B. P. Crum, both of Montgomery, Ala., for petitioners.

W. A. Blount, A. C. Blount, Jr., and F. B. Carter, all of Pensacola, Fla., and W. O. Mulkey, of Geneva, Ala., for respondents.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. [1] Before the submission to the jury of the issue made by the answer of T. S. Faulk & Co. to the involuntary petition to have that firm adjudged a bankrupt, the creditors who had instituted the proceeding filed a petition, which, after alleging in substance that said T. S. Faulk, acting for and in behalf of said firm of T. S. Faulk & Co., and being authorized to do so, requested

that petitioners file a petition in bankruptcy against said firm, and obtain the appointment of a receiver to take charge of the firm's assets and property for the benefit of its creditors, and that but for such request and consent of the said T. S. Faulk & Co. said original petition in bankruptcy would not have been filed, prayed that the court, before having a jury determine the issue of insolvency, and of acts of bankruptcy, raised by the answer of the alleged bankrupt, determine from evidence to be adduced whether or not the said original petition in bankruptcy was filed at the instance and request of the said T. S. Faulk & Co., and whether or not said T. S. Faulk & Co., by their conduct, have estopped themselves from defending against the said original petition and adjudication thereon, and that if, upon a hearing of such issue, the same should be determined in favor of the petitioners, such orders in the premises be made as will protect petitioners' rights and as in equity they are entitled to.

After hearing the arguments of counsel representing the respective parties, the court stated that it did not think that the views of the attorneys representing the petitioning creditors and those of the court as to the petition were far apart, and directed that the case proceed to a trial and that a jury be impaneled. In the statement to the jury which was impaneled of the issues submitted to them, attorneys for the petitioning creditors stated the facts expected to be proved as showing an estoppel against the alleged bankrupt substantially as those facts were stated in the petition above mentioned, and in reply to this statement attorneys for the alleged bankrupt denied the existence of the facts so stated. Evidence was adduced on the issue thus made. In reference to that issue the court said in its charge to the jury:

"It is contended on behalf of the petitioning creditors that T. S. Faulk & Co. consented or agreed that Mr. Frank should put them into bankruptcy. Now, under that consideration, I invite your attention to the law. Under the law it is not competent for one partner, without the knowledge or consent of the other partners, if there be several, one or more, to consent or agree that the commercial firm shall be put into bankruptcy, or acquiesce in the putting of the firm into bankruptcy, and any such agreement or acquiescence does not bind the commercial firm, or prevent it from denying the existence of any act of bankruptcy, or of its insolvency."

An exception to this instruction was duly reserved by the petitioning creditors. The jury could not, without disobeying this instruction, have found in favor of the petitioning creditors on the estoppel issue, as the only evidence adduced which had a tendency to prove that the petitioning creditors, in filing the involuntary petition in bankruptcy, acted at the instance or request of any one other than themselves, was that tending to prove that they instituted the proceeding at the instance and request of T. S. Faulk, one of the members of the firm of T. S. Faulk & Co. Whether it was the purpose of the court, in permitting the evidence on the issue to be adduced before the jury, to obtain a verdict which was to be conclusive, or one that was to be merely for the aid of the court in itself finally passing on the issue so raised, the instruction may be regarded as a ruling to the effect that the evidence adduced did not support the asserted claim to an estoppel.

We are not of opinion that the court was in error in so ruling. The evidence tending to prove that the conduct of the business of the firm was left entirely with T. S. Faulk, and that the other partner had nothing to do with the management of the business, had no tendency to prove that T. S. Faulk was authorized to bind the partnership by his consent that it be adjudged bankrupt. The power which that evidence tended to prove was vested in T. S. Faulk was that of carrying on the firm business without consulting his associate, and did not include that of terminating the partnership by consenting that it be adjudged a bankrupt. Parker v. Brown, 85 Fed. 595, 29 C. C. A. 357; Osborne v. Barge (C. C.) 29 Fed. 725; In re Carleton (D. C.) 115 Fed. 246; In re Murray (D. C.) 96 Fed. 600; 30 Cyc. 520; Bates on Partnership, § 338. The conclusion is that there was an absence of evidence to support the averment of the estoppel petition to the effect that T. S. Faulk was authorized to bind the partnership by a request that a petition to have it adjudged a bankrupt be filed. The ruling in the case of Paul v. Cullum, 132 U. S. 539, 10 Sup. Ct. 151, 33 L. Ed. 430, is not opposed to this conclusion. In that case the court held that a special power of attorney was broad enough in its terms to confer on one partner the power to make in behalf of the firm an assignment for the benefit of creditors.

[2] It is to be observed that, in so far as the estoppel petition is to be regarded as an appeal to the court to require T. S. Faulk & Co. to pay the costs and fees of the receivership as a condition of their exercising the right of contesting the involuntary petition in bankruptcy, the relief was not grantable, as that matter was finally disposed of by this court on the former appeal by the decree taxing those items against the petitioning creditors. T. S. Faulk & Co. v. Steiner, Lobman & Frank, 165 Fed. 861, 91 C. C. A. 547.

It is not necessary to determine whether the action of the court with reference to the estoppel claim could properly be sustained upon a ground other than the one above mentioned. We are not of opinion that there was any reversible error in any ruling of which complaint is made.

The judgment of the District Court is affirmed, and the petition to superintend and revise the same proceedings is denied.

BOLLES et al. v. KELLEY et al.

(Circuit Court of Appeals, First Circuit. April 16, 1915.)

No. 1106.

1. BANKRUPTCY ⊂=381—COMPOSITION IN BANKRUPTCY—OBJECTIONS.

An objection by creditors to approval of a composition in bankruptcy, on the ground that the bankrupt obtained property on credit from several creditors on materially false statements made to the creditors to obtain the property on credit, may be of such a general character and may have such small connection with the real merits of the composition that the objecting creditors should be held to strict rules.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. ⊂=381.]

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. BANKRUPTCY ⇐381—COMPOSITION IN BANKRUPTCY—OBJECTIONS.

The rule applied that creditors, opposing a decree approving a composition in bankruptcy, must, to obtain relief on appeal, furnish evidence sufficient to contravene the result reached by the special master and the District Court, sustaining the bankrupt on the points involved.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. ⇐381.]

Appeal from the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Judge.

Proceedings between T. J. Bolles and others and Thomas A. Kelley and others for approval of a composition in bankruptcy. From a decree of approval, T. J. Bolles and others, opposing creditors, appeal. Affirmed.

J. Butler Studley, of Boston, Mass. (Brandeis, Dunbar & Nutter, of Boston, Mass., on the brief), for appellants.

Lee M. Friedman, of Boston, Mass., and James H. Sisk and Sisk Bros., all of Lynn, Mass. (Swift, Friedman & Atherton, of Boston, Mass., on the brief), for appellees Kelley and others.

Stuart C. Rand, of Boston, Mass. (John L. Hall, of Boston, Mass., on the brief), for appellee Oelrichs & Co.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. There has been so much said in the proceedings in this case in the District Court we have no occasion to state the facts at length. The question before us is merely one of confirming the decree of the District Court, approving a composition in bankruptcy. The opposing creditors had two general grounds of opposition: one is that the composition is not for the best interests of the creditors. It is clear that this objection was not followed up, and we will not enlarge upon it.

[1] The other objection is based upon the claim that the bankrupt obtained property on credit from several creditors, duly named, upon materially false statements in writing made to said several creditors for the purpose of obtaining such property on credit. This ground of objection, of course, may be of such a general character, and may have so small connection with the real merits of the proposed composition, that the objecting creditors must be held to strict rules, proving strictly what is required to be proved, and carrying the burden throughout of sustaining the grounds of objection.

At the hearing three specific grounds of objection were brought to our attention. One was that, while the bankrupt had a schedule of sundry securities, known as "investment securities," and described by him as such, and said to be worth $60,286.05, some of them had been pledged for a note of $15,000, and the transaction had not been entered on the debtor's books, nor spoken of by him in the various statements of which complaint has been made. The fact was that these securities were actually worth more than $60,286.05, and were of such a changing and shifting character that this transaction may have easily been overlooked. At any rate, the business of the bankrupt was so

large that the transaction would not have attracted any special attention, and could not in any way have defeated the bankrupt in obtaining loans if it had been known. The note, of course, did not appear among the bills payable, but this falls into the observation already made about "investment securities."

The next element detailed by the opposing creditors was the overvaluation made of the bankrupt's tannery plant. It was a very large plant, turning out daily many thousands of kid skins, imported from all parts of the world, being probably the largest in New England. The referee, who acted in this case as special master, reported to the District Court that the valuation of this plant regarding it as a going concern was not excessive. The District Court agreed with him, and there was no satisfactory evidence that the valuation under those circumstances was excessive.

These are the only items in the statements made by the bankrupt said to fail to harmonize with the provisions of the statute we have cited, which are distinctly specified in the reasons of appeal from the District Court. The errors assigned on this appeal were 25 in all, of which a large portion related to the two transactions of which we have spoken, namely, the matter of the "investment securities" and the matter of the valuation of the plant. There were a few alleged errors assigned which were of such a general character as to be clearly ineffectual. There was one alleged error assigned as follows:

"Fourteenth. The court erred in not finding squarely that Kelley on June 30, 1912, did not have on hand stock and merchandise to the value given as of that date."

This was, under the circumstances, of a somewhat general and doubtful character. Something was said about it at the trial before us. The counsel for the bankrupt made some explanation, and the counsel for the opposing creditors failed to call our attention to any evidence sufficient to sustain it, if they relied upon it

[2] Upon the whole, the special master and the District Court sustained the bankrupt on all the points involved; and the opposing creditors have furnished no evidence sufficient to contravene the result reached, as they were bound to do.

The decree of the District Court is affirmed, and the defendants in error recover their costs of appeal.

YEE ET (EP) v. UNITED STATES, and Fifteen Other Cases.

(Circuit Court of Appeals, Fifth Circuit. April 23, 1915.)

Nos. 2554, 2601, 2602–2605, 2607, 2609, 2611, 2612, 2614, 2615, 2618, 2619, 2621, 2622, 2623, 2641.

1. ALIENS ⟸32—DEPORTATION—REVIEW OF PROCEEDINGS BY COURTS—QUESTIONS OF FACT.

In a proceeding to deport a Chinese laborer, where the commissioner sees and hears the witnesses, a judgment of the District Court affirming the commissioner's order will not be disturbed on the facts, except in a perfectly clear case.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⟸32.

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

2. ALIENS ⟸32—DEPORTATION—WEIGHT AND SUFFICIENCY.

Where the testimony in behalf of Chinese persons sought to be deported as laborers unlawfully in the country was taken under commission by interrogatories, in the absence of any representative of the government, and the identification of the accused persons was by photograph, though the witnesses were personally in the same city as the accused persons and the commissioner before whom the complaint was pending, and could have testified in open court, their evidence was not above suspicion, and was entitled to little, if any, weight.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⟸32.]

Appeals from the District Court of the United States for the El Paso Division of the Western District of Texas; Thomas S. Maxey, Judge.

Sixteen proceedings on appeal from orders for the deportation of Yee Et (Ep), Wong Kee, Yee Leong, Yee Et, Ju Ling, Yee Git, Yee Yuk Jew, Wong Tong, Lew Wun, Fung Get (alias Fung Gat), Mar Hop, Mar Foon, Louie Fun Jew (alias Louie Fong Jew), Chin Ork (alias Chin Ock), Yee Dune, and Low One. From judgments affirming the orders of deportation, each of the aliens appeal. Affirmed.

Volney M. Brown and U. S. Goen, both of El Paso, Tex., for appellants Yee Et (Ep), Wong Kee, and Ju Ling.

Peyton F. Edwards and U. S. Goen, both of El Paso, Tex., for appellant Yee Git.

Volney M. Brown, of El Paso, Tex., for appellants Low One, Yee Et, and Yee Dune.

U. S. Goen, of El Paso, Tex., for other appellants.

Robert T. Neill, Sp. Asst. Atty. Gen., of El Paso, Tex., and R. E. Crawford, Asst. U. S. Atty., of Houston, Tex., for the United States.

Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

FOSTER, District Judge. In these 16 cases the appellants were arrested in El Paso on complaint before a United States commission-

er, charging them with being Chinese laborers and unlawfully in the United States in violation of the Chinese Exclusion Laws. The commissioner ordered them deported to China, and, on appeal, his orders were affirmed by the District Court. No reversible errors of law are presented, and substantially only questions of fact are presented by the records.

[1] The rule may be considered settled that in matters of this kind, where the commissioner sees and hears the witnesses, the accused is not entitled to repeated appeals on the facts, and a judgment of the District Court affirming the commissioner will not be disturbed, except in a perfectly clear case or for error of law. Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121; Yee King et al. v. United States, 179 Fed. 369, 102 C. C. A. 646; Eng Choy v. United States, 175 Fed. 566, 99 C. C. A. 188; Moy Guey Lum v. United States, 211 Fed. 91, 127 C. C. A. 515; Chew Hing v. United States, 133 Fed. 227, 66 C. C. A. 281.

[2] In most of these cases the testimony was taken under commission by interrogatories, no representative of the government was present, and the identification of the accused was by photograph. Manifestly, evidence of this character is unsatisfactory, and where the witnesses are present in the same city as the accused and the commissioner before whom the complaint is pending, and could have testified in open court, such evidence is not above suspicion, and is entitled to very little, if any, weight.

As the evidence in every case, even where the witnesses were at a distance, might have been taken on fair notice to the district attorney and by oral examination, we see no reason why the instant cases should be excepted from the rule denying a second appeal on the facts; but, as this court has not heretofore announced its adherence to the said rule, we have examined the record in each case before us.

As we find no errors in the judgments of the District Court, they will be affirmed.

McCLELLAND v. ROSE et al.†

ROSE et al. v. McCLELLAND.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1915.)

Nos. 2652, 2688.

APPEAL AND ERROR ⊂=1096—LAW OF THE CASE—SUBSEQUENT APPEALS.

The losing parties to an adjudication on appeal were not entitled on a subsequent appeal to have reopened the controversy finally settled on the first appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1177, 4353–4357; Dec. Dig. ⊂=1096.]

Appeals from the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Action by Peter McClelland, Jr., against John K. Rose and others. From the decree, both plaintiff and defendants appeal. Modified and affirmed.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied May 28, 1915.

Francis Marion Etheridge, Joseph Manson McCormick, and Henri Louis Bromberg, all of Dallas, Tex., for plaintiff.

Richard Irby Munroe, James Richard Downs, and James Richard Webb, all of Waco, Tex., for defendants.

Before PARDEE and WALKER, Circuit Judges, and SHEPPARD, District Judge.

PER CURIAM. The relief granted by the decree which is presented for review was, in view of the situation disclosed by the evidence, appropriate in giving effect to the terms of the will of Peter McClelland, Sr., as that instrument was construed by this court on the former appeal. McClelland v. Rose, 208 Fed. 503, 125 C. C. A. 505. The losing parties to that adjudication are not entitled on this second appeal to have reopened the controversy which was thereby finally settled. Bell v. Arledge, 219 Fed. 675, —— C. C. A. ——. The present appeal presents for review no ruling which would warrant a reversal of the decree at their instance.

The assignments of error made on the appeal of Peter McClelland, Jr., now the sole beneficiary of the trust created by the will of Peter McClelland, Sr., impute to the decree appealed from a meaning which, in our opinion, its terms do not express. We find nothing in that decree which has the effect of a denial of the right of the present trustee to exercise, under the direction of the court, the power conferred on the original trustees by the provision in the codicil to the effect that if, in their judgment, Peter McClelland, Jr., is provident and careful, they may make such advances out of the estate as they may think right and proper over and above the provisions made for him in the will and the codicil thereto. Another provision of the codicil makes it manifest that it was contemplated by the testator that one who in the manner prescribed by him might be substituted as trustee in case of the death, resignation, failure to act, or disability of both of the trustees named by the testator was expected "to carry out the provisions of said will and trusts therein provided for."

With reference to this matter the meaning of the decree appealed from may be made clear by a modification of it, and it will be here modified by adding thereto the following provision:

"It is further ordered, adjudged, and decreed that if the trustee shall hereafter, under the direction and control of this court or any other court seized of jurisdiction, find that the plaintiff is provident and careful within the terms and meaning of paragraph 2 of the codicil of August 17, 1886, and thus entitled to advances of and from the trust estate, such trustee may, under the direction and control of the court, make such advances."

As thus modified, the decree is affirmed. The costs will be taxed against the defendants in the court below.

WATERS-PIERCE OIL CO. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1915. On Rehearing, March 15, 1915.)

No. 2649.

On Rehearing.

CARRIERS ⊂=32—RATES—REBATES—STATUTORY PROVISIONS.

Where a special tariff promulgated by a railroad company, making a rate to a point on the line of the S. Co., though filed with the Interstate Commerce Commission, was not a joint tariff fixing a joint rate, a joint rate subsequently made by the two roads and duly filed with the Interstate Commerce Commission superseded the rate previously promulgated, the rule that a rate once lawfully published continues to be the lawful rate until it has been lawfully canceled, and that a subsequent tariff naming other rates, without canceling the previous rates, cannot carry the new rates into lawful effect, having no application; and the use and acceptance of the old rate by shippers after the filing of the new rate, and after the passage of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (Comp. St. 1913, §§ 8597–8599), was unlawful, a rebate being thereby given.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83–85; Dec. Dig. ⊂=32.]

In Error to the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

The Waters-Pierce Oil Company was convicted of an offense and it brings error. Affirmed.

J. D. Wilkinson, of Shreveport, La., and J. D. Johnson, of St. Louis, Mo., for plaintiff in error.

George Whitfield Jack, U. S. Atty., of Shreveport, La.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. We find no reversible error assigned or patent of record in this case. The judgment of the District Court is affirmed.

On Rehearing.

PER CURIAM. The special tariff promulgated by the Iron Mountain Railroad Company, effective December 5, 1894, making a rate from St. Louis, Mo., to Alexandria, La., of 15 cents per 100 pounds on petroleum and its products, applicable only to shipments destined to points in Louisiana on the Southern Pacific Railroad Company's lines, although filed with the Interstate Commerce Commission, was not a joint tariff fixing a joint rate; and therefore when, with the concurrence of the Southern Pacific Railroad Company, a joint rate for petroleum was made from St. Louis, Mo., to points in Louisiana upon the Southern Pacific Company's lines, effective December 22, 1896, and duly filed with the Interstate Commerce Commission, the 15-cent rate aforesaid was practically superseded and became inoperative, except, perhaps, as an arrangement to permit preferences under the joint rate in force; and while the use and acceptance of it thereafter

by shippers may not have been criminal until the passage of the Elkins Act of 1903, clearly thereafter the use of the said 15-cent rate, operating a rebate under the only joint tariff in force, became an unlawful device or arrangement.

All of the acts charged in the 14 counts of the indictment in this case occurred after the passage of the Elkins Act and while the joint rate was the only lawful through rate, and therefore the authorities cited, showing rulings of the Interstate Commerce Commission to the effect that a rate once lawfully published continues to be the lawful rate until it has been lawfully canceled, and that a subsequent tariff naming other rates, without canceling the previous rates, cannot carry the rate into lawful effect, do not apply.

For these reasons, and as no one of the judges who concurred in the decision of this case desires a rehearing, the petition therefor is denied.

RUTHVEN v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 9, 1915.)

No. 2545.

POST OFFICE ⊂⊃48—OFFENSES—SCHEME TO DEFRAUD—INDICTMENT.

An indictment for the violation of Cr. Code (Act March 4, 1909, c. 321, § 215, 35 Stat. 1092 [Comp. St. 1913, § 10388]), making punishable one who, having devised a scheme to defraud, shall, for the purposes of executing such scheme, place a letter in any post office to be delivered by the post office establishment, need not allege that the scheme was to be effected by the use of the United States mails.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⊂⊃48.

Nonmailable matter, see notes to Timmons v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Alfred L. Ruthven was convicted of using the mails in furtherance of a scheme to defraud, and he brings error. Affirmed.

Armand Romain, of New Orleans, La., for plaintiff in error.

Walter Guion, U. S. Atty., and Joseph W. Montgomery, Asst. U. S. Atty., both of New Orleans, La., for the United States.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The plaintiff in error was indicted, convicted, and sentenced for violation of section 215 of the Criminal Code. The record shows no bill of exceptions, and the only error assigned is that the trial court erred in overruling a general demurrer to the sufficiency of the indictment, and the contention here is that the indictment was insufficient, because the scheme therein set forth does not on its face sufficiently show a scheme to defraud within the law, and because it

fails to aver that the scheme and artifice of the plaintiff in error charged was to be effected by the use of the United States mails.

The indictment sufficiently charges a scheme or artifice to defraud. It was not necessary to charge that it was to be effected through and by the use of the United States mails, and this precise question has been lately before the Supreme Court, and there decided adversely to the contention of plaintiff in error. United States v. Young, 232 U. S. 155–161, 34 Sup. Ct. 303, 58 L. Ed. 548. On the authority of that case, the judgment of the District Court is affirmed.

Considering letters on file, addressed to the court, urging a speedy disposition of the case, mandate may issue at once.

LOEB & SCHOENFELD CO. v. ATLAS EMBROIDERY WORKS et al. (two cases).

(District Court, E. D. New York. March 6, 1915.)

Nos. 16, 17.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—EMBROIDERING MACHINES.

The Groebli patents, Nos. 593,206, 609,429, 593,208, 607,848, 618,458, and 637,458, all relating to embroidering machines operated by jacquard mechanism, and parts thereof, *held* valid, as limited by the prior art, but not infringed.

In Equity. Suits by the Loeb & Schoenfeld Company against the Atlas Embroidery Works, the Nassau Novelty Manufacturing Company and Ignatz Schuster. Decree for injunction in first case, and for defendants in second case.

James R. Sheffield, Ramsay Hoguet, and James J. Cosgrove, all of New York City, for plaintiff.

Max D. Ordmann, of New York City (William Houston Kenyon, of New York City, of counsel), for defendants.

CHATFIELD, District Judge. These actions involve charges of infringement of six patents taken out by one J. A. Groebli, and regularly assigned to the plaintiff, for improvements in or to the complicated mechanism called an "embroidering machine."

The defendant the Atlas Embroidery Works is charged with having imported into the United States, and caused to be installed and used in the factory of the defendant the Nassau Novelty Manufacturing Company, certain embroidering machines which had been made in Germany by the Vogtlandische Machinen Fabrik Aktien-Gesellschaft, and which are claimed to infringe the Groebli patents. The defendant the Nassau Company is charged with infringement through the installation of these looms and their operation in the factory of the Nassau Company in Brooklyn; while Ignatz Schuster, the president of the Nassau Company, is charged individually with personal responsibility for these several alleged acts of infringement.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The defendants deny infringement, allege invalidity and unpatentability, and each defendant (except the Nassau Company) alleges that its or his part of the acts complained of is not such as to be sufficient upon which to base a decree, even if the plaintiff's patents be held valid and infringement by the machines be shown.

It appears from the record that during the 17 years between 1894 and 1911, the inventor, J. A. Groebli, whose father had built and perfected many devices in the embroidery art (and who had himself pursued the same line of research and application), controlled, through letters patent No. 528,632, of November 6, 1894, in the United States, substantially exclusive rights for operating embroidering machines with a practical and satisfactory jacquard, attached to the same style of machines as had been previously and were still operated with a pantograph, both in this country and in Europe. The patent for this jacquard device was also taken out in various European countries, and rights thereunder licensed in Europe. Embroidering machines were manufactured by concerns in Europe, such as Saurer in Arbonne, Switzerland, Rieter in Switzerland, Dietrich at Plauen, and Robert Zahn, who was then building machines for a company known as the Stickerei-Feldmuhl, which operated an embroidery factory at Rorschach.

Mr. Robert Zahn, in the year 1897, was working in Zurich, Switzerland, with Mr. Groebli, who went over to explain his jacquard attachment and demonstrate it with a Saurer machine, and also with a Dietrich machine, in the factory at Plauen, which has since grown into the Vogtlandische concern, the actual builder of the machines which are alleged to infringe as the basis of the present action.

Loeb and Schoenfeld, the individuals who own the Loeb & Schoenfeld Company, plaintiff in these actions, have business associations or interests with the Stickerei-Feldmuhl embroidery factory, and it appears from the testimony that in Europe the manufacture of machines by the different parties, including the Vogtlandische company, is covered by an agreement which, however, does not affect the control by the plaintiff of any rights in the United States to the Groebli patents which have been conveyed to it by assignment. In fact, the record shows that certain Vogtlandische machines have been imported from Europe by the plaintiff, for use in connection with its own machines constructed according to the Groebli patents.

But the testimony shows further that the Vogtlandische company apparently do not sell machinery involving the claims of the plaintiff under the Groebli patents for importation into the United States, and do not themselves import, unless by agreement with the plaintiff.

The Groebli jacquard patent, No. 528,632, of November 6, 1894, expired in 1911. A concern in Brooklyn, called the Atlas Embroidery Works, occupied a rented plant on Van Brunt street, and manufactured various kinds of embroidery with Vogtlandische pantograph machines. Ignatz Schuster, the individual defendant in this action, had been president of the Atlas Company, and during the years 1910 and 1911 sought to buy from the Vogtlandische company embroidering machines with Zahn jacquards or automats. The change in the tar-

iff of the United States, and the anticipated expiration of the Groebli jacquard patent, were motives in Schuster's mind, and he wished to have the Atlas Company undertake the operation of the jacquard machines. He did not succeed in the purchase of the Zahn automat, but testified that he was laughed at, and then threatened, upon trying to purchase them for importation to the United States.

The embroidering machines which he did purchase with pantograph attachments, were not needed by the Atlas Company, and later Schuster, in connection with his uncle, in Dresden, Germany, planned a new concern, to be called the Nassau Company, to undertake business both in the United States and in Germany. Through his uncle, Schuster purchased from an individual named Amalie Riessner, widow of Frederich Riessner, eight Zahn automats and three Vogtlandische machines of the newest type, which were sent to the United States in their original cases, and arrived here in the month of December, 1911. No evidence is given as to the way in which the widow Riessner purchased these machines from the Vogtlandische company, but it is evident that she was used by Schuster and his uncle to secure the Zahn automats which he had been unable to purchase for exportation to the United States.

In the meantime, Schuster's proposition to use the jacquards had aroused opposition in the Atlas Embroidery Works, and Schuster had resigned as president, but retained his stock and general connection therewith. A new company, called the Nassau Novelty Manufacturing Company, had been incorporated, with $300 capital stock, by three associates of Mr. Schuster. This capital stock was immediately increased to $5,000, and was issued to Schuster in return for machinery which he purchased from the Atlas Embroidery Works. Later the capital stock was further increased to $25,000, and this again taken by Schuster in return for the machines imported from Europe or purchased by him from the Atlas Company. The Nassau Company proceeded to occupy a portion of the Van Brunt street plant of the Atlas Company, and has since maintained a separate factory and office, but with the same entrance as that used by the Atlas Company. It has manufactured lace or embroidery by removing after completion the fabric on which the design is worked, and has disposed of its product either to or through the Atlas Company.

The president of the Atlas Company, one Spiro, has assisted Mr. Schuster in the operations of the Nassau Company, and Carl Schuster, a cousin, has been foreman and manager of the Nassau factory. The eight automats and five embroidering machines imported from Europe, with the five machines purchased from the Atlas Company, were installed in the Nassau portion of the plant during the year 1912. One of the machines was completed and tested in February or March, and all were in place prior to the time of trial.

The Atlas Company and its present officers have apparently endeavored to leave with the Nassau Company and Ignatz Schuster all responsibility for the use of the embroidering machines with the Zahn automat (or jacquard), but nevertheless helped Schuster at all steps in establishing the Nassau plant, and in enabling it to continue its busi-

ness and dispose of its product. While the Atlas Company has operated nothing but pantograph machines in its own factory, and while the Nassau Company has been used by Schuster for all actual transactions relating to the jacquard, nevertheless it would seem that the Atlas Company, through its officers, has had a part in the establishment and maintenance of the Nassau factory, and therefore brought itself within the scope of injunction, if the importation and use of the embroidering machines with the jacquard are found to be an infringement of the Groebli patents.

Ignatz Schuster is plainly responsible as an individual for the entire operations which are complained of in this action, and is therefore properly joined as a defendant herein. In case of decree, the actual responsibility of the Atlas Company for any part of the damages proved, would be a matter to be disposed of on accounting or by the final decree, and would depend upon the actual showing of responsibility made by the Nassau Company and Schuster. The action, therefore, should not be dismissed as to any of the parties upon the question of responsibility, but we must proceed to consideration of the patents and the charges of infringement as against all the defendants.

*These are two suits involving the validity and infringement of six patents issued to J. A. Groebli for embroidering machines and parts thereof which are operated by jacquard mechanism, as distinguished from the pantograph or manually controlled machines of the prior art. The patents in suit are No. 593,206, claims 1, 2, and 5, issued November 9, 1897, on application filed November 10, 1896; No. 609,429, claims 1, 2, and 3, issued August 23, 1898, on application filed December 31, 1897; No. 593,208, claims 1, 3, 4, 5, 9, 10, 13, 14, 15, 25, 27, and 28, issued November 9, 1897, on application filed March 19, 1897; No. 607,848, claims 1–6, 8, and 9, issued July 26, 1898, on application filed January 15, 1898; No. 618,458, claims 1 and 3; and No. 637,458, claims 1, 5, 6, and 7. These patents cover a series of mechanisms of complicated character, and, while none of them are basic, each shows invention, and is valid, as limited by the prior art and by each other. While the machine of defendants as built infringes patent No. 609,429 for a festoon hook, such device has been removed and has not been used by defendant, and none of the other patents as limited are shown to have been infringed.

Injunction granted against infringement of No. 609,429, without damages, and bill dismissed as to all other patents.

*** The paragraph following the asterisk has been inserted, instead of the long discussion of the devices, claims, and prior art patents from the opinion as filed in the court.—T. I. C.**

PENNSYLVANIA R. CO. v. PEDRICK et al.

(District Court, N. D. New York. April 5, 1915.)

1. CORPORATIONS ⟸351—LIABILITY OF OFFICERS—ACTIONS—NATURE AND FORM OF REMEDY.

Under Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 66, providing that no corporation, which shall have refused to pay any of its notes or other obligations when due, nor any of its officers or directors, shall transfer any of its property to any of its officers or directors for the payment of any debt; that no conveyance or transfer of property of such corporation, nor any payment, etc., when the corporation is insolvent, or its insolvency is imminent, with the intent of giving a preference to any particular creditor, shall be valid; that every person receiving by means of any such prohibited act any property of the corporation shall be bound to account therefor to its creditors, stockholders, or other trustees; and that every director or officer who shall violate or be concerned in violating any provision of that section shall be personally liable to the creditors of the corporation to the full extent of the loss they may respectively sustain by such violation—where the directors and officers of a corporation transferred property to certain of the officers in payment of debts due them, and to other creditors holding notes upon which the officers were indorsers, though the corporation's trustee in bankruptcy might have sued in equity for an accounting and restitution, this was not the only remedy, and a creditor who has suffered or sustained damage from the wrongful transfer could sue the officers and directors participating therein at law for damages.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1492, 1493; Dec. Dig. ⟸351.]

2. CORPORATIONS ⟸342—LIABILITY OF OFFICERS—TRANSFERS OF PROPERTY.

Under Stock Corporation Law N. Y. § 66, officers of an insolvent corporation, who aided and abetted a wrongful transfer of the corporation's property in payment of debts due other officers and directors, and notes on which they were liable as indorsers, were liable equally with those who received a part or the whole of the property as a preferential payment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1486–1488; Dec. Dig. ⟸342.]

3. CORPORATIONS ⟸341—LIABILITY OF OFFICERS—ACTIONS—NATURE AND FORM OF REMEDY.

That in an action by a creditor of a corporation against its officers and directors for the damages sustained by the creditor from a wrongful transfer of the corporation's property in payment of debts due the officers and directors, and debts for the payment of which they were liable, it would be necessary to prove the amount of assets the corporation had and the amount so misused or misapplied, was not a valid objection to the maintenance of the action by a single creditor, on the theory that it involved an accounting, requiring the action to be brought in equity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1479–1484; Dec. Dig. ⟸341.]

At Law. Action by the Pennsylvania Railroad Company against Charles H. Pedrick, Jr., and others. On application by G. V. Schenck, as trustee in bankruptcy of the Security Steel & Iron Company, for a rule or order staying the further prosecution of the action by plaintiff, and for instructions as to his duty in the premises. Application denied, and trustee instructed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Hun & Parker, of Albany, N. Y., for plaintiff.
Randall J. Le Boeuf, of Albany, N. Y., for trustee.

RAY, District Judge. Whether this motion should be granted, and whether or not Schenck, as trustee in bankruptcy of the Security Steel & Iron Company, should be a party to this action, depends on the nature and scope of the complaint, and perhaps on the true construction of section 90 of the General Corporation Law of the state of New York, and section 66 of the Stock Corporation Law of said state. These sections read as follows:

"Sec. 90. Action against Officers of Corporation for Misconduct.—An action may be maintained against one or more trustees, directors, managers, or other officers of a corporation, to procure a judgment for the following purposes, or so much thereof as the case requires:

"1. Compelling the defendants to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge.

"2. Compelling them to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or by other violation of their duties.

"3. Suspending a defendant from exercising his office, where it appears that he has abused his trust.

"4. Removing a defendant from his office, upon proof or conviction of misconduct, and directing a new election, to be held by the body or board duly authorized to hold the same, in order to supply the vacancy created by the removal; or, where there is no such body or board, or where all the members thereof are removed, directing the removal to be reported to the governor, who may, with the advice and consent of the senate, fill the vacancies.

"5. Setting aside an alienation of property, made by one or more trustees, directors, managers or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation.

"6. Restraining and preventing such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made.

"7. The court must, upon the application of either party, make an order directing the trial by a jury of the issue of neglect or failure of defendants to perform their duties; and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of the code of civil procedure.

"As to any litigation pending prior to September one, nineteen hundred and seven, the provisions of this section as they existed prior to that date shall apply."

"Sec. 66. Prohibited Transfers to Officers or Stockholders.—No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the banking, insurance or railroad law shall make any assignment in contemplation of

insolvency. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void. No conveyance, assignment or transfer of any property of a corporation formed under or subject to the banking law, exceeding in value one thousand dollars, shall be made by such corporation, or by any officer or director thereof, unless authorized by previous resolution of its board of directors, except promissory notes or other evidences of debt issued or received by the officers of the corporation in the transaction of its ordinary business, and except payments in specie or other current money or in bank bills made by such officers. No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice. Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation."

In condensed form, the allegations of the complaint are:

(1) The plaintiff is a corporation of the state of Pennsylvania, and the Security Steel & Iron Company is a New York corporation (now in bankruptcy). From January 13, 1914, to August 12, 1914, each and every of the defendants were directors in said last named corporation. Defendant Charles H. Pedrick, Jr., was president thereof, defendant Burns was its vice president, defendant Cornelius F. Burns was its treasurer, and defendant Cunningham was its secretary.

(2) Between September 23, 1913, and November 26, 1913, the plaintiff corporation sold and delivered to said now bankrupt corporation certain cast iron pipe, for which it agreed to pay plaintiff $18,615.78. Payment was demanded and refused after such sum became due, and thereupon in an action in the Supreme Court of the state of New York, on the 11th day of June, 1914, the plaintiff here recovered judgment against said now bankrupt company on such indebtedness for the sum of $19,503.82. A transcript was filed in Albany county, N. Y., and execution issued and returned wholly unsatisfied. No part of such judgment has been paid.

(3) Prior to April 23, 1914, and continuously thereafter, said now bankrupt corporation was either insolvent or its insolvency was imminent, and this fact was known to each and every of the defendants.

(4) The complaint here sets out certain facts showing such insolvency, the existence of certain notes of said now bankrupt corporation, some held by certain of the defendants, and others by other parties, and also the fact that certain of such notes, in large amounts, were indorsed by certain of the defendants here.

(5) Subdivision 9 of the complaint reads as follows:

"(9) That at some time prior to said April 23, 1914, the defendants, knowing that said Security Steel & Iron Company was insolvent or that its insolvency was imminent, and with the intent of rendering valueless any judgment that the plaintiff herein might obtain in said action against said Security Steel & Iron Company, for eighteen thousand six hundred fifteen dollars and seventy-eight cents ($18,615.78) begun as aforesaid on April 2, 1914, and with the further intent of giving a preference to certain of the creditors of said Security Steel & Iron Company, to wit, to said defendants, Cornelius F. Burns,

James H. Burns, Charles H. Pedrick, Jr., and Richard D. Cunningham, said Security Trust Company, said Manufacturers' National Bank, said Adirondack Trust Company, said Warrensburgh National Bank, said Joseph J. Murphy, said Edgar T. Brackett, and said John F. Cahill, and certain other creditors of said Security Steel & Iron Company, for the most part resident in or near said city of Troy, over all the other creditors of said Security Steel & Iron Company, including the plaintiff herein, and with the further intent of paying the debts of said Security Steel & Iron Company to said defendants Cornelius F. Burns, Charles H. Pedrick, Jr., and Richard D. Cunningham, and of releasing them and the other indorsers on said notes from liability thereon, did conspire and confederate to cause, and did cause, said Security Steel & Iron Company to transfer and divert all of its real property to one John A. Manning, of said city of Troy, and to transfer and divert substantially all of its unincumbered personal property to the defendant James H. Burns, to said John A. Manning, to R. D. Cunningham Company, a New York corporation having its principal business office upon the property of said Security Steel & Iron Company in said village of Green Island, and to the Union National Bank of said city of Troy, by a series of divers instruments, transfers, conveyances, and incumbrances, and did conspire and confederate to cause, and did cause, said Security Steel & Iron Company, to utilize the moneys received from the said transfers and diversions of said real and personal property in making preferential payments to the aforementioned creditors of said Security Steel & Iron Company. That each of the defendants herein was concerned, as hereinafter specifically set forth, as a director or officer of said Security Steel & Iron Company, in the acts and things herein set forth, and that each of said defendants violated thereby the provisions of section 66 of the Stock Corporation Law of the state of New York, being section 66 of chapter 61 of the General Laws of the state of New York enacted in 1909."

(6) The complaint then alleges the adoption by said now bankrupt corporation of certain resolutions to aid in the execution of such conspiracy and the perpetration of such wrongs.

(7) The complaint further alleges the dissipation and transfer of the property of said now bankrupt corporation by defendants and through their connivance to themselves and to others for the purpose of releasing themselves and such persons from liability on their indorsements of notes of the said now bankrupt corporation, and all in aid and execution of the conspiracy, and also to render the said judgment obtained by this plaintiff above-mentioned worthless and uncollectible.

(8) The bankruptcy of said corporation and its adjudication as a bankrupt in November, 1914, is also alleged.

(9) Subdivision 16 of the complaint reads as follows:

"That solely by reason of the acts and things done by the defendants herein in violation of the provisions of said section 66 of the Stock Corporation Law of the state of New York, as hereinbefore set forth, the plaintiff herein has been and still is unable to satisfy either in whole or in part by execution its aforesaid judgment against said Security Steel & Iron Company for nineteen thousand five hundred three dollars and eighty-two cents ($19,503.82), and said judgment has been rendered valueless, and that the plaintiff herein has suffered damage in the entire amount secured to be paid by its said judgment against the Security Steel & Iron Company, to wit, in the sum of nineteen thousand five hundred and three dollars and eighty-two cents ($19,503.82), with interest thereon from the 11th day of June, 1914."

(10) The complaint alleges that the acts charged and alleged were in violation of said section 66 of the Stock Corporation Law.

The complaint demands judgment as follows:

"Wherefore the plaintiff demands judgment against the defendants for said sum of nineteen thousand five hundred and three dollars and eighty-two cents ($19,503.82), together with interest from the said 11th day of June, 1914, together with the costs and disbursements of this action, and such other relief as may be just and proper in the premises."

[1] I think it plain that this is an action at law by the plaintiff to recover the damages sustained by it by reason of the said unlawful and wrongful acts of the defendants committed by them in pursuance and execution of their conspiracy and confederation. Stated in a general way, to unlawfully take the assets and property of the corporation of which such defendants were directors and officers, as stated, and convert them to their own use and to the use of certain other of the creditors of said now bankrupt corporation, who were thereby preferred, all in violation of their duty and of law, and for their own gain and emolument and that of such other favored creditors, all to the damage of the plaintiff Pennsylvania Railroad Company in the sum named. It cannot be doubted that a good cause of action is stated in favor of the plaintiff against these defendants, irrespective of any statute. It is hardly supposable that the officers and directors of a corporation (insolvent) are at liberty, without liability to the creditors of such corporation, to take its assets and convert them to their own use in payment of the debts of the corporation to themselves and a favored few of the creditors, and especially on debts of the corporation where they personally are indorsers.

However, the complaint charges that the acts alleged were in violation of the provisions of said section 66 of the Stock Corporation Law of the state of New York, and it is claimed that such section confers upon an injured creditor a right of action at law to recover the damages sustained by him by reason of such acts, and that it is not necessary to resort to an accounting in an action in equity, and that the remedy is not limited to a discovery and recovery of the assets so wrongfully used or their proceeds.

It must be that there is an implied contract on the part of the directors and officers of a corporation to, at least, use reasonable care and diligence to see to it that the assets of the corporation are not dissipated, or wasted, or misapplied, or applied to payment of their own individual claims against the corporation, when it is insolvent or its insolvency is imminent, and this fact is known to them, in preference to the satisfaction of the claims and demands of other creditors of the corporation, such officers and directors having no priority by law. If such is not the law, then officers of a corporation, including the directors, whose duty it is to use reasonable care and diligence to apply the assets of a corporation to the payment of its just debts and obligations without preference in case of actual or impending insolvency, may create liabilities of the corporation to themselves, the other creditors being ignorant of such action and, in case of actual or impending insolvency, taking advantage of their confidential and trust relations and the knowledge they alone have of actual conditions, use the entire assets of such corporation to pay themselves to the ex-

clusion and great damage of other creditors. Such a condition of the law would be intolerable, even in the absence of a statute forbidding it.

In any event, by section 66 of the Stock Corporation Law it is expressly forbidden that officers and directors of a corporation within its terms shall so act. It is also expressly provided that transfers of the property of the corporation by such officers to themselves in payment of their claims under such conditions and for such purpose shall be void, and that such officers who receive such property shall be bound to account therefor to its creditors, or stockholders, or other trustees. That this section gives a right of action in such case to the trustee in bankruptcy of such a corporation cannot reasonably be doubted. Hence it is competent for the trustee in bankruptcy of this corporation to commence and maintain an action against such wrongdoers to compel discovery and restitution, and this, of course, would involve an accounting and make an action in equity the proper and appropriate remedy.

However, in the judgment of this court, this is not the only remedy given to a creditor who has suffered or sustained damage by such forbidden, prohibited, and void or voidable acts. In its concluding paragraph the quoted section provides in express terms that:

"Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation."

This is an additional remedy, and one given by this statute directly to the injured creditor. Such injured creditor is not obligated to seek or enforce his remedy through the medium of a creditor's or stockholder's or trustee's action in equity, for an accounting, but may bring his independent suit to recover the damages which he has sustained. The Legislature had the right, which it has exercised, to give as many remedies as it saw fit, and to give a remedy by suit brought by several creditors, or all the creditors, or by stockholders or trustees, and also by a direct action brought by a creditor to recover his damages.

[2] The equitable action for an accounting would seem to be one to reach the specific property or its proceeds, while the other is a direct action to recover judgment for the damages sustained by reason of the wrongful acts of such directors or officers, and may be maintained against an officer or director of such corporation who "was concerned in violating any provision" of such section 66, whether or not he received any of the property of the corporation. Those officers who aid and abet such illegal and prohibited use of the assets of the corporation are equally liable with those who pocket a part or the whole of such assets as a preferential payment.

[3] It was suggested on the argument that the action is necessarily in equity, and that all interested and concerned must be made parties, inasmuch as the damages sustained by an individual creditor who has sustained injury cannot be ascertained without such an accounting. I do not think this is a valid objection to the bringing and maintenance of an action at law by a single creditor. The liability of the wrongdoer

or wrongdoers in an action at law for damages in such a case is not limited to the amount of assets of the corporation actually received by him or them. The right of action is against the officers individually. Of course, proof would be required of the amount of assets the corporation had, and of those so misused or misapplied.

Prior to the enactment of statutes in the various states regulating the subject, there was great conflict in the decisions as to the right of a corporation, when insolvent, to give preferences to its officers and directors, who were creditors, by transfers of its property or otherwise. In some states it seems to have become settled that preferences to officers and directors, who were also creditors of the corporation, could be lawfully made. In many others, the contrary was held. However, the great weight of authority was that this could not be done. See note to Lyons-Thomas Hardware Co. et al. v. Perry Stove Mfg. Co. (Texas Case) 22 L. R. A. 802-810, and the numerous cases there cited. See, also, Brown et al. v. Grand Rapids P. F. Co., 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817. In Koehler v. Black River Falls Iron Co., 67 U. S. (2 Black) 715, 17 L. Ed. 339, it was held that directors of a corporation, who by executing a mortgage secured to themselves advantages not common to all the stockholders, were guilty of an unauthorized act, violating their trust. In that case the invalidity of the mortgage was asserted by the corporation itself as being a fraud by the directors on the other stockholders. The Supreme Court said:

"Instead of honestly endeavoring to effect a loan of money, advantageously, for the benefit of the corporation, these directors, in violation of their duty, and in betrayal of their trust, secured their own debts, to the injury of the stockholders and creditors. Directors cannot thus deal with the important interests intrusted to their management. They hold a place of trust, and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders of the corporation."

In Sicardi v. Keystone Oil Co., 149 Pa. 148, 24 Atl. 163, it was held that the president of an insolvent corporation cannot acquire a preference over other unsecured creditors by accepting on his claim bonds secured by mortgage. In Third National Bank of Buffalo v. Elliott, 42 Hun (N. Y.) 121, it was held that trustees of an insolvent corporation cannot sell its property to themselves, or to any one of their number, nor pay off their own claims against the company in preference to those of other creditors.

It seems reasonably certain that, in enacting section 66 of the Stock Corporation Law, it was intended by the Legislature to prohibit the doing of certain things, make void certain acts and transfers of property, and permit such property to be followed and compel an accounting therefor, and also to provide a remedy by action at law by creditors injured by the commission of such illegal and prohibited acts. The statute makes definite and reasonably certain what the officers and directors of a corporation may not do, and also the remedy that may be applied by injured parties.

Entertaining these views as to the intent and meaning and purpose of the statute, it seems to me clear that the plaintiff, the Pennsylvania Railroad Company, has the right to prosecute this action in its own be-

half and interest against these defendants, and that this court cannot properly enjoin the plaintiff from prosecuting it, or compel the bringing in of other parties. I do not see that it will in any manner seriously interfere with an action in equity brought by the trustee in bankruptcy against the same defendants to compel them to account for the property and assets alleged to have been improperly and illegally received or disposed of by them. If such property is recovered or restored in an action by such trustee, who represents all the creditors, it may or may not affect the right of this plaintiff to recover its damages; but that question is not now before the court. If other actions are brought, based on the same acts, alleged to be void and illegal, it is possible that they may be properly consolidated, or all tried at the same time; but clearly this plaintiff cannot be deprived of its right to bring and prosecute its action at law, even if in the end the courts should arrive at the conclusion that it cannot be maintained at all. I think that Boyd et al. v. Schneider et al., 131 Fed. 223, 65 C. C. A. 209, and Allen v. Luke et al. (C. C.) 141 Fed. 694, while not in point exactly, are illuminative and suggestive.

The language is in substance that every director or officer of the corporation violating any of the provisions of the section, or concerned in a violation, shall be personally liable "to the creditors and stockholders of the corporation of which he shall be a director or an officer to the full extent of any loss they may *respectively* sustain by such violation." Why was the word "respectively" inserted in the clause, if each creditor injured may not maintain an action to recover the loss he has sustained? Must one sue for all who elect to come in? If so, the remedy here is to show that there are other creditors who have sustained loss, and induce them to apply to be made parties. The property dissipated and improperly paid out, or its proceeds when recovered, belongs to the trustee in bankruptcy, but not so a recovery by a creditor, who sues to recover the amount of the loss he has sustained.

It is not necessary to go over the several cases decided under this section 66, as I find no case in point and am not pointed to any. The motion to enjoin and restrain the plaintiff from further prosecuting the action is denied.

If the trustee in bankruptcy is of the opinion he has a strong case for recovery against a responsible defendant, and has funds, it is his duty to prosecute the claim in an action in equity. If not in funds, he should call a meeting of the creditors, or procure one to be called, and abide their decision and instructions, and, if so instructed, bring an action on being furnished funds, or on being properly indemnified. This trustee can exonerate himself from liability by taking this course. Of course he may bring and prosecute his action on the request of a minority of the creditors, in case they properly indemnify him.

There will be an order accordingly.

ROSENTHAL v. BRONX NAT. BANK et al.

(District Court, S. D. New York. February 26, 1915.)

1. BANKRUPTCY ⇐166—PREFERENCES—BELIEF THAT PREFERENCE WILL RESULT.

Where, before the execution of a chattel mortgage to a bank by a partnership, which was then insolvent, to secure loans previously made by the bank, the bank had refused a further loan, the firm's deposit in the bank had become depleted, the bank had dishonored checks, some of which were for sums as small as $1, and one of the partners had been frequently at the bank to do what he could to satisfy the bank's officials of the firm's solvency, so as to prevent dishonor of its checks, the inference was justified that the bank's officials had reasonable cause to believe that the mortgage would operate to create a preference in the bank's favor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⇐166.]

2. BANKRUPTCY ⇐279—PREFERENCES—RECOVERING PROPERTY.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp. St. 1913, § 9644), providing that if a bankrupt shall have made a transfer of any of his property within four months before the filing of the petition, being then insolvent, and the transfer operate as a preference, and the transferee shall have reasonable cause to believe that a preference will be effected, it shall be voidable by the trustee, and he may recover the property or its value, a trustee in bankruptcy could sue to have a chattel mortgage declared an illegal preference and to recover the value of the mortgaged property, though the mortgage had been foreclosed in the state court in a suit brought with the permission of the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419–424; Dec. Dig. ⇐279.]

Suit by Marcus Rosenthal, as trustee in bankruptcy of Benjamin, Altman and another, individually and as copartners trading as the Oriental Lace Company, against the Bronx National Bank and others. Decree for plaintiff.

Eugene L. Bondy, of New York City, for complainant.
Williams, Folsom & Strouse, of New York City, for defendants.

HUNT, Circuit Judge. Suit by the trustee in bankruptcy of Banjamin Altman and Max Sokoloff, trading as Oriental Lace Company, manufacturers of laces and embroideries, to have a chattel mortgage given by the bankrupts to the defendant Bronx National Bank on January 12, 1914, and filed January 13, 1914, declared an illegal preference under section 60b of the Bankruptcy Act, and for damages for conversion of the chattels covered by the chattel mortgage, or to pay to the trustee the value of such chattels.

The bank denies all implications relating to the preference charge, and affirmatively pleads that the matters in issue have been finally adjudicated in the state courts of New York in an action wherein the Bronx Bank was plaintiff and the bankrupts and the receiver, who had been appointed in bankruptcy, were defendants; such action having been for the foreclosure of the chattel mortgage assailed in this suit, and which action in the state court proceeded to final judgment for

foreclosure and sale, having been brought in the state court after permission of this court had been obtained.

[1] Upon trial these facts were developed: The Oriental Lace Company had had many banking relations with the Bronx National Bank between the year 1911 and 1912. There was an interruption in such dealings between the latter part of 1912 and May, 1913, when business with the bank was resumed. On May 19, 1913, the bankrupt firm made a signed statement concerning its financial condition to the Bronx National Bank; the statement being made as conditions existed February 1, 1913. It showed the firm had total assets at that time of $37,181, and total liabilities of $8,100, or a net worth of about $29,081. At that time the bank was justified in looking upon the firm as offering a satisfactory business and moral risk. About November 25, 1913, the balance in bank was $500. On November 26, 1913, the bank loaned the firm $2,000, taking two promissory notes, for $1,000 each, one payable January 26, 1914, and the other February 26, 1914. For some time prior to this date the bank had been lending money to the firm, taking as security assignments of customers' accounts; the advances of the bank being about 80 per cent. of the face amount of the accounts so assigned. Some time in December, 1913, Mr. Altman, a member of the firm, applied to Mr. Quinn, vice president and credit man of the bank (with whom the firm had theretofore dealt in its financial matters), for a loan of $5,000. The loan was refused. It was about that time the financial condition of the Oriental Lace Company became complicated. Checks given by the firm were frequently dishonored by the bank for lack of funds, and on December 19, 1913, the balance to the credit of the firm was only $19.83.

Altman, in behalf of his firm, was frequently at the bank, and did what he could to satisfy the officials thereof of a sufficient solvency to prevent dishonor of checks coming in. Quinn had been to the factory of the firm and looked things over, but did not look into the books or financial accounts. Things seemed to drift along until about the ——— day of December, when Altman was told by the cashier of the bank that there were 20 firm checks that had been presented, all of which were to be dishonored. Some of these checks had been given by the firm to creditors for merchandise, and some to employés of the Oriental Lace Company. Some were for very small sums—as low as $1. The embarrassments made the situation exigent. The two $1,000 notes heretofore referred to were unpaid, there was no money in bank, merchandise accounts were outstanding, firm checks were being dishonored, employés were owed money, and certain other money due to the bank, which had been secured by the assignment of customers' accounts, was no longer fully protected, because of the apparent inadequacy of the security. Altman asked Quinn for more money, and says that Quinn upon several occasions in December, 1913, and January, 1914, asked him for a statement of the financial condition of the firm, but that he put him off, and never did give it. The firm owed nearly $16,000 and was insolvent, as were the members. Quinn testifies that he did not ask Altman for a financial statement in January, 1914, but that prior to December 18th he did call upon the Dun & Co. Mer-

cantile Agency for a financial report of the affairs of the firm. This report, while dated December 18, 1913, gave the statements of the members of the firm as to the property which the firm owned and the liabilities existing on December 3, 1912, about a year previous, when the assets were given at $40,300 and liabilities at $11,034.57.

Altman says that in January, 1914, he tried to get $5,000 from the bank. Quinn says that Altman made the proposition that the firm would give to the bank a chattel mortgage on the machinery and by making a firm loan of $4,200 they could take up the two $1,000 notes and apply $1,500 on the past-due paper that had been assigned to the bank, and that the bank could keep the balance of the assigned paper not then overdue and could lend the firm $600 to help them out in shipping goods South. Quinn says, also, that Altman told him that he had good orders that he was going to ship to the South, and in two or three weeks would have plenty of money, or something to that effect; that payments were slow, and that that was the reason he needed more money. Finally, as a result of the talks between Altman and Quinn, the firm made a chattel mortgage upon the machinery and motors it owned to the bank, covering all unsecured indebtedness and several hundred dollars in addition. The mortgage was dated January 12, 1914, and filed January 13th. It covered four notes, of $1,050 each, aggregating $4,200. The two unsecured notes of $1,000 each, which were then not due, were returned to the bankrupts as paid. About $1,573 which had been borrowed upon the security of outstanding customers' accounts past due was also paid up, and the difference, amounting to $627, went to the bankrupts and was used by them in paying debts and covering unpaid checks.

On January 16, 1914, a petition in involuntary bankruptcy was filed, and in due course, on March 24, 1914, the firm and the individuals composing the firm were adjudged bankrupts. A receiver was appointed. He took possession of the chattels described in the mortgage and refused to surrender them to the bank. Thereupon the bank brought action against the receiver in the Supreme Court in and for the county of New York and asked for decree of foreclosure. Judgment in favor of the bank was given, and on June 19, 1914, mortgaged chattels were sold at public auction for $1,550.

The preliminary matter of insolvency can be easily disposed of, because it so clearly appears that the firm and each member thereof was insolvent when the mortgage was made that it is unnecessary to dwell on the point. The fair deduction from the evidence is that the financial condition of the firm and its members upon January 12th and 13th was no better than upon the 16th, and when adjudication in bankruptcy was made it was predicated upon the insolvency of the firm and the several copartners. In re Hecox, 164 Fed. 823, 90 C. C. A. 627.

The real question in the case comes to this: Did the bank, at the time of the making of the mortgage or the registration thereof, have reasonable cause to believe that the enforcement of the mortgage would effect a preference? An examination into a state of facts upon which to rest a judgment that a banker had or had not a reasonable cause to

believe that a security he had taken from an insolvent debtor would give him a decided advantage over other creditors ought to be made in the light of the common knowledge that a bank is engaged in the business of extending credit to borrowers, and that a banker may well be presumed to be reasonably careful, not alone in ascertaining the financial condition of those who ask for and obtain loans from his bank, but also in seeing to it that loans made are protected by some sufficient responsibility behind them. If the banker finds that the customer, already in debt to the bank, is running behind, that his transactions indicate that business is falling off, that his balances are becoming depleted, that his demands for additional loans are pressing and frequent, that his overdrafts are the subject of special attention, and if the customer's credit is so overstrained that, as a banker, he will not pay the customer's checks, even for very small sums, it is but fair to conclude that the taking of a chattel mortgage or any other lien by the bank upon all that the debtor has is inconsistent with any rational view other than that the banker had reasonable cause to believe that foreclosure of the mortgage would operate to create a preference in his favor. In re Eggert, 102 Fed. 735, 43 C. C. A. 1; Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 99; Collett v. Bronx Bank (D. C.) 29 Am. Bank. R. 454, 200 Fed. 111; Heyman v. Third National Bank (D. C.) 32 Am. Bank. R. 716, 216 Fed. 685.

If these general views are correct, application of them to the facts stated leads to the conclusion that the bank had reasonable cause to believe and is chargeable. Finding, then, that the trustee should prevail, and that a decree should go in his favor for the property or its value, the next point is: What was the reasonable value of the property when transferred? The sale under the mortgage foreclosure realized only $1,550. The evidence shows that it was worth considerably more. The trustee ought not to be bound by the sum realized at the auction sale. A witness who has had much familiarity with machinery such as was included in the mortgage put the value of the whole property at about $7,000; and evidently Mr. Quinn, acting for the bank, was of the opinion that, at the time he took the chattel mortgage, the value was over $4,200. My best judgment is that the evidence fully justifies holding that the chattels were worth $4,200, less the cost of moving them, which the evidence shows would be about $500. Against this value, fixed at $3,700, the bank should be credited with $258, which it had paid to the original vendor of the machines, leaving a balance of $3,442, for which decree may go.

[2] The defense interposed by the bank, that the trustee is bound by the foreclosure judgment obtained in the Supreme Court of the state of New York, is not well founded. The statute expressly makes a preference voidable at the instance of the trustee, and I perceive no reason for denying him the right to conduct this litigation. Belding-Hall Mfg. Co. et al. v. Mercer & Ferdon Lumber Co., 175 Fed. 335, 99 C. C. A. 123; Lovell v. Latham & Co. (D. C.) 32 Am. Bank. R. 191, 211 Fed. 374.

Decree for plaintiff.

In re PROGRESSIVE WALL PAPER CORPORATION.

(District Court, N. D. New York. April 3, 1915.)

1. BANKRUPTCY ⟸258—FORECLOSURE OF MORTGAGES—SALE FREE FROM LIENS.
While, if the bankruptcy court can see that a sale of mortgaged property free and clear of liens and incumbrances will produce money enough to pay the mortgage bondholders in full, and can do this within a reasonable time, it is its duty to have the property so sold, so as to allow it to control the sale and fund, and pay off the liens in full, and avoid costs and expenses, where this does not appear, the court should not experiment with the property, thereby imperiling the rights of the bondholders, by delaying foreclosure and sale, and allowing their claims to increase by way of accumulated interest, in view, also, of the impairment of value by way of dilapidation and exposure to fire.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 358, 359, 362; Dec. Dig. ⟸258.]

2. MORTGAGES ⟸131—PROPERTY COVERED—AFTER-ACQUIRED PROPERTY.
If the language of a mortgage on the manufacturing plant of a corporation is broad enough and explicit enough, chattels put into the plant as a part thereof and to be used in carrying on the business, may be subjected to the lien of the mortgage, though subsequently acquired; but raw materials to be purchased and manufactured, or the goods made from such after-acquired raw materials, may not be so subjected to the lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 255–257, 261, 262, 265; Dec. Dig. ⟸131.]

3. BANKRUPTCY ⟸258—SALE OF PROPERTY—MORTGAGE FORECLOSURE.
Part of the real property of a bankrupt corporation was covered by an overdue mortgage, the validity of which was not questioned, but concerning which there was a dispute as to the personal property, such as tools and fixtures, covered by it. Other real property was covered by a second mortgage, but not by the first mortgage; but it was claimed that a building thereon encroached on the property covered by the first mortgage. The second mortgage was not due, and there was a dispute as to its validity and the validity of the bonds secured thereby. No party had offered for the property covered by the first mortgage the amount of the bonds with accrued interest, and, so far as appeared, no offer of any kind had been made, though the property had been in the hands of the trustee in bankruptcy for four months, and it did not appear whether the property covered by the two mortgages would sell better together or separately. *Held*, that foreclosure of the overdue mortgage would be permitted, subject, however, to the right of the trustee in bankruptcy to offer the property for sale as a whole, including all fixtures, tools, etc., before a foreclosure sale was had; the mortgaged property to be offered for sale separately, so as to fix and determine its value, and to be sold only in case it could be sold by the trustee for sufficient to pay the bonds secured by the first mortgage, with interest and costs.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 358, 359, 362; Dec. Dig. ⟸258.]

4. BANKRUPTCY ⟸ 262—MORTGAGES—SALES FREE FROM LIENS.
While there is no express authority in the bankruptcy law for a sale of real estate free and clear of liens and incumbrances, such sales may be made, and a good title is thereby given.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363–365; Dec. Dig. ⟸262.]

In Bankruptcy. In the matter of the Progressive Wall Paper Corporation, bankrupt. On application by the Adirondack Trust Com-

pany for leave to foreclose a mortgage. Application granted conditionally.

This is an application by the Adirondack Trust Company, as trustee in a certain mortgage executed by the Progressive Pulp & Paper Company, the predecessor in name and ownership of the mortgaged property (the name of the corporation having been duly changed), for leave to commence and prosecute a foreclosure of such mortgage, which was given to secure the payment of an issue of $100,000 of the bonds of said corporation issued and now due and outstanding, and on which interest for at least a year past due and payable is unpaid. The bankrupt also on the hearing favors this course. The trustee in bankruptcy, Fred H. Justin, opposes such application on the ground, principally, that there is an equity in the property, and that it is for the best interests of the general creditors to have the mortgaged property sold by the trustee, either free and clear of such mortgage lien or subject thereto. The trustee asks an order that this course be pursued.

Luther A. Wait, of Saratoga Springs, N. Y., for petitioner.
Edgar T. Brackett, of Saratoga Springs, N. Y., for bankrupt.
Weeds, Conway & Cotter, of Plattsburg, N. Y., for trustee.

RAY, District Judge (after stating the facts as above). [1] The validity of the mortgage sought to be foreclosed by the petitioner, the Adirondack Trust Company, the trustee named therein, is not questioned. The validity of the bonds issued thereunder and held by many different parties is not disputed. No person or party has come forward with an offer for this mortgaged property, or proposing or expressing a willingness to pay more therefor than the amount of such bonds and accrued interest. In fact, so far as this court is advised, no offer has been made for the property. The property has been in the hands of the trustee for about four months at this date. The bonds, with accrued interest, are in excess of $100,000. It is, of course, the duty of this court to protect the interest of general creditors, but not at the sacrifice of the rights or interests of these bondholders, whose rights were shown to general creditors by the recorded mortgage. If the court can see that a sale free and clear of liens and incumbrances will produce money enough to pay them in full, and do this within a reasonable time, it is its duty to have the property so sold, as this will allow this court to control the sale and fund, and pay off the liens in full, and avoid costs and expenses. But, if this does not appear, I doubt the right of the court to experiment with the property, and thereby to an extent imperil the rights of mortgage bondholders by delaying foreclosure and sale to be made for their benefit and allowing their claims to increase by way of accumulating interest. Then, too, comes in impairment of value by way of dilapidation and exposure to fire.

The situation is somewhat complicated, and there is a question as to what personal property is covered by the mortgage, and also other questions. It appears from the papers before the court that the bankrupt corporation was organized as a manufacturing stock corporation, about April 15, 1904, under the general laws of the state of New York. The original plant of the company consisted of a pulp mill, a paper mill, and the machinery and appurtenances connected therewith, together with a storehouse and usual outbuildings, and the real estate consisted of about 100 acres of land, including the water power on the

Saranac river used by the corporation in its operations, and this was acquired in April, 1904. Additional real estate was acquired in 1904, 1905, and again in 1906 and 1911. In 1911 a wall paper mill was erected by the company upon a tract of some 15 acres of land acquired by the company at that time. About May 1, 1904, the company mortgaged all its then owned real estate to the petitioner, the Adirondack Trust Company, to secure bonds amounting to $100,000, and this is the mortgage hereinbefore referred to. In the petition herein the mortgaged property covered by that mortgage is described in Schedule A thereof. In February, 1906, the company made a further or supplemental mortgage to the said Trust Company to secure the same bonds issued under the first mortgage and hereinbefore referred to. This supplemental mortgage covers the real property acquired by the company after the making of the first mortgage and before the execution of the second mortgage, and is described in Schedule B of the petition.

[2] It is a question in dispute whether or not these mortgages above referred to are sufficient to subject to their operation as against the trustee lands thereafter acquired, or chattels thereafter acquired and put upon the property. If the language is broad enough and explicit enough, chattels put into a manufacturing plant as a part of the plant and to be used in carrying on the business may be subjected to the lien of such mortgage, even if subsequently acquired. Not so as to raw materials to be purchased and manufactured, or the goods made from such after-acquired raw materials. This is the general rule.

About June 7, 1906, and subsequently to the execution of the said first mortgage and the supplemental mortgage above referred to, the company acquired from one Baker about one-fourth of an acre of land, and about April 1, 1911, said company acquired from one Cunningham and others a parcel of some 15 acres of land. In 1911, on these last-mentioned parcels of land, the company erected its wall paper or printing mill, and this formed a part of the plant of the company, taken as a whole, at the time of the bankruptcy of this corporation. These last-acquired parcels of land, on which was erected the wall paper or printing mill, are not claimed to be covered by the first mortgage or the said supplemental mortgage, and are not claimed to be covered by said mortgages. It is claimed, however, that this last-mentioned building was erected in such a manner and so located that it stands for some little distance on the lands included in said first mortgage.

About November 1, 1911, the now bankrupt corporation executed another mortgage to the said Adirondack Trust Company, as trustee, which covers and includes in its description, not only the property, real and personal, covered by the said first mortgage and the supplemental mortgage, but also the two parcels of land above referred to acquired after the making of the first mortgage and the supplemental mortgage. This last mortgage purports to have been given to secure an issue of 100 bonds, of $1,000 each, payable in 20 years, with interest, and which interest is payable semiannually. It is claimed that none of the bonds purporting to be secured by this last-mentioned mortgage were ever legally issued and negotiated or sold by the bankrupt, or

used in any proper manner, except that after they were formally executed by the company they were delivered at different times and in different amounts to various creditors of the bankrupt in form as collateral security for old or pre-existing debts of the company, and that that was no new consideration, or any consideration, for the issue of the bonds or their pledge, except the antecedent indebtedness of the now bankrupt corporation and an extension of time for the payment of such antecedent indebtedness. It is claimed that each and all of the persons and corporations who received and who now hold the said bonds so issued under the last mortgage mentioned held at the time the bonds were so delivered the note of the now bankrupt for the amount of the debt due from it, and that the par value of the bonds delivered to each of said creditors was equal to the principal of the note then and now held by said creditors, respectively. Some or all of the notes have been renewed from time to time. These notes were indorsed, it is alleged, by John J. Cunningham, Grenvill M. Ingelsbe, and John H. Derby, each of whom then was, and each of whom from the organization of the company had been, a director and officer of the said corporation.

It is contended that the second mortgage is invalid, and that the bonds issued and so pledged under the last-mentioned mortgage are invalid. After the execution of the first mortgage and said supplemental mortgage, the corporation purchased at least appliances for use in the operation of the mills, and which are now on hand at the mill, and this includes blocks and designs used in printing wall paper, valued by the appraisers at some $2,750, but which in the schedules are valued at $10,000.

It is claimed by the trustee that this personal property and other personal property is not subject to the lien of the said first mortgage. Just what personal property is covered by and subject to the lien of the said first mortgage and the supplemental mortgage, which is the one sought to be foreclosed, must be determined, in case of dispute, in a litigation between the Adirondack Trust Company, as trustee named in the mortgage, and the trustee in bankruptcy, acting for the general creditors. The determination of this question can be retained by this court, by selling the whole property referred to altogether, including tools, etc., but not including, of course, manufactured goods or raw materials, free and clear of all liens and incumbrances, and allowing the lien of these mortgages to attach to the proceeds of sale, and thereupon proceeding to determine who has title to the proceeds of sale. If that course is pursued, it will be necessary to sell the real estate separately from the tools and personal property of that character. In a foreclosure action, brought to foreclose the first mortgage and the supplemental mortgage, it can be determined whether this personal property referred to as tools, etc., is or is not covered by such mortgage. If the first mortgage is foreclosed, and a sale had thereunder separately and distinct from a sale of the other premises, on which was erected the building in 1911, the sale will take with it a portion of such last-mentioned building, and this will lead to complications. It is not made to appear to the court whether the prop-

erty will sell better in two parcels or altogether as one; that is, selling the original plant and premises as one parcel, and the building constructed in 1911, with the parcels of land then acquired, as another parcel. The last-mentioned mortgage is not due, and a foreclosure thereof cannot be had, and, of course, the validity of the mortgage and bonds issued thereunder cannot now be determined in a foreclosure action.

[3, 4] This court does not feel disposed to interfere with the trustee named in the first mortgage and the supplemental mortgage in proceeding to assert its rights as such by foreclosure of those mortgages, or taking both together, calling them the first mortgage. The mortgage is valid, as are the bonds, and past due. In such a foreclosure it can be determined what of the personal property is covered thereby and what is not, and a judgment therein will settle the rights of the parties therein. I think that the more appropriate place and manner for disposing of that question. The purchaser, if the property goes to a sale, will know what he is getting. This foreclosure will be permitted, however, on the condition and with the reservation that the trustee in bankruptcy will be permitted and authorized to offer for sale and sell the entire property, including all fixtures, tools, etc., but not including stock in trade, or raw materials, or manufactured goods, free and clear of all liens and incumbrances, in case he has an offer on such sale which will enable him to pay in full the bonds secured by said first mortgage, including interest thereon, and the costs incurred in such foreclosure. To this end, in so offering such property for sale as a whole, the property covered by the first mortgage, and this includes the supplemental mortgage, must be offered for sale separately, so as to fix and determine its value as distinguished from the other property, and the sale will only take place under the trustee in case such property covered by the first mortgage sells for enough to pay the said bonds issued under such first mortgage, including interest and costs in full. This sale or offer to sell will not interfere with the foreclosure proceedings, which may proceed to judgment and sale, unless prior thereto the trustee has sold the property for a sum which will enable him, under the direction of the court, to pay in full the said bonds issued under said first mortgage, including interest and costs. Sold in this way, if a sale is accomplished, the proceeds of such sale, after paying off the bonds and interest thereon just referred to, will remain in this court subject to its order, and the validity of the last mortgage referred to and of the bonds issued can be determined, and the proceeds of sale remaining disposed of accordingly.

A sale by the trustee, or an offer to sell at public auction, can be brought about on 10 days' notice, as it has been settled by the Supreme Court of the United States that 10 days' notice of a sale of real estate by a trustee in bankruptcy is all-sufficient. There is no express authority in the bankruptcy law for a sale of real estate free and clear of liens and incumbrances; but it is now settled by a long line of authorities that such sales may be made, and that good title is given. This is all that this petitioner can ask, as an order pursuant

hereto will fully protect its rights and the rights of the bondholders under the first mortgage. If the trustee in bankruptcy succeeds on a sale by him in securing money enough to pay the bonds issued under the first mortgage, including interest and costs, those bonds will be retired and the first mortgage canceled, and the other property will have been converted into money, and the rights of the various parties thereto can be determined thereafter. Of course, such a sale by the trustee must be on notice to all concerned, and will be subject to confirmation by this court.

As the bankruptcy law requires that all creditors and interested parties have at least 10 days' notice of all proposed sales of real estate, this court is of the opinion that the trustee on notice should apply for such an order as the court has indicated would be proper in the premises.

There will be an order accordingly.

In re JAMISON BROS. & CO.

(District Court, E. D. Pennsylvania. April 1, 1915.)

No. 4060.

1. BANKRUPTCY ⊂=339—DETERMINATION OF CONTROVERSIES—FINDING OF FACTS.

Under the proviso of Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1913, § 9654), that when any bankrupt shall have any insurance policy, which has a cash surrender value, payable to himself, his estate, or his personal representatives, he may pay or secure to the trustee such surrender value, and continue to hold the policy free from the claims of creditors, and the laws of Pennsylvania, under which a policy taken out for the benefit of insured's wife, or bona fide assigned to her, becomes her property as against creditors, whether the cash surrender value of endowment policies payable to insured's wife, if living, or, if not, to insured's executors, administrators, or assigns, subject to the right of insured to change the beneficiary, or of a policy payable to insured if living at the time of payment, and otherwise to his wife or his estate, which policies had been duly surrendered after insured's adjudication in bankruptcy, belonged to the trustee in bankruptcy or the wife, depended upon the facts as to whether the husband had, in addition to giving the wife the fruits of the main contract of insurance, also given her the fruits of the ancillary contract to return a part of the premiums paid on surrender of the policy, and the facts as to whose money paid the premiums, and the referee, in determining a controversy with respect to such surrender value, should have found such facts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526; Dec. Dig. ⊂=339.]

2. BANKRUPTCY ⊂=143—PROPERTY PASSING TO TRUSTEE—INSURANCE POLICIES.

Where there has been merely a designation of a beneficiary to receive moneys payable on the death of insured, and this designation is open to recall or change by insured, to whom also belongs the right to cancel or surrender the policy, the surrender value of the policy passes to his trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. ⊂=143.]

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8. BANKRUPTCY ⊂143—PROPERTY PASSING TO TRUSTEE—INSURANCE POLICIES.

Where insured's wife, children, or a dependent relative has been made the owner of a policy, by its having been taken out for or bona fide assigned to them, within the Pennsylvania statute, under which a policy taken out for the benefit of insured's wife or bona fide assigned to her becomes her property as against creditors, the cash surrender value of the policy does not pass to insured's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. ⊂143.]

In Bankruptcy. In the matter of Jamison Bros. & Co., bankrupts. On petition by the trustee for review of an order of the referee. Order revoked, and report remitted to the referee, with directions.

John C. Gilpin and George S. Graham, both of Philadelphia, Pa., for petitioner.

Henry A. Hoefler, of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. [1] The order in this case concerns the title to certain funds in the hands of the trustee. The funds represent the surrender value of certain policies of life insurance. The moneys were claimed and awarded by the referee to Nellie S. Maguire, wife of Edward L. Maguire, one of the bankrupts. The basis of her claim is this:

The petition in bankruptcy was filed May 9, 1911. At that time the above-named bankrupt held (among others) a policy for $10,000 in the Prudential Life Insurance Company of America, and four policies, aggregating $10,000, in the Equitable Life Assurance Company of the United States. After the adjudication the policies lapsed for nonpayment of premiums, and were subsequently duly surrendered, and the net surrender values were turned over to the trustee, subject to a determination of the question to whom the moneys rightfully belonged.

The policies were each of the endowment type, and were issued to the bankrupt as the insured, and, except the Prudential policy, were made payable "to his wife, Nellie S. Maguire, if living, and, if not, then to the assured's executors, administrators, or assigns, subject to the right of the assured to change the beneficiary." The Prudential policy was payable to the assured, if living at the time of payment; otherwise, payable to the wife or to his estate, as in the other policies. The premiums had been paid and the policies continued in force to a time subsequent to the adjudication of bankruptcy.

The moneys awarded to the wife are claimed by the general creditors, and this petition to review the order made by the referee was duly filed, presenting to this court for its decision the question of title to these moneys. The referee has based his award upon the rulings in the cases of In re Booss (D. C.) 154 Fed. 494, 18 Am. Bankr. Rep. 658, In re Lyon, 32 Am. Bankr. Rep. 483, and Burlingham v. Crouse, 181 Fed. 479, 104 C. C. A. 227, 30 Am. Bankr. Rep. 6. The trustee maintains his claim of title under the ruling in the case of In re

Herr, 182 Fed. 716, 25 Am. Bankr. Rep. 142, which he further asserts to be controlling upon the referee in the present case.

Among the objects to be accomplished through bankruptcy proceedings is that of administering for the benefit of the creditors all the property and assets of the bankrupt which by legal process could otherwise have been applied to the payment of the claim of that creditor who invoked the aid of such process in the collection of the debt due him. In the broad view, a contract of insurance must be regarded as we would regard any other contract entered into by the bankrupt. Given an insurable interest, any one may insure his own life and make the insurance payable to himself, or any named beneficiary, or he may in like manner insure the life of another. Under the laws of the state of Pennsylvania, a policy taken out for the benefit of the wife of the insured, or bona fide assigned to her, becomes her property in so far as that its avails may be received and held by her immune from any successful attack by creditors of the insured. What the insurance company is to pay is determined by the contract into which it has entered, and what the wife is entitled to receive by the terms of the assignment to her. One of the conditions of the contract of insurance may be that the premiums shall be duly paid. If so, there is no obligation on the part of the company to pay if the premiums are unpaid. On the other hand, there is no obligation (unless in the contract) upon the insured or beneficiary to pay the premiums. Either the insured or the beneficiary may pay, and, if the premiums are accepted by the company, its obligation to meet the terms of the policy continues. When the day of payment arrives, the company (as has been said) makes payment to the amount and to the person named in its contract. Whether, as is the case here with the Prudential policy, the policy is made payable to the insured in one event, to the beneficiary in another event, or to the estate of the insured in still another event, or whether, as in the case of the Equitable Company, the policies are made payable to either the beneficiary or the estate of the insured, according to the event, the obligation of the company is the same.

This principle of obligation which is applied in construing what may be called the main contract of the company applies also to the collateral, contingent, substituted, or subsidiary contracts into which it has entered, such as issuing paid-up insurance, paying surrender values, and the like. It is altogether purely a matter of contract, and it is not a little difficult to understand what the suggested wishes or in this sense the custom or practices of the insurance companies have to do with it. Although policies of insurance are contracts, and, as has been said, are in the main to be regarded as are other contracts, rights which have grown up under them are nevertheless to be considered as modified or enlarged by the legislation pertaining thereto. One is the right to which reference has already been made to assign them to the wife of the insured. The right so acquired by her would seem not to be affected by the thought that the husband need not have made this gift to her unless he chose, or that in making the gift he had reserved the right to revoke, if the fact remained that he had

made it and the gift stood unrevoked. Another modification is that introduced by the proviso to section 70a of the Bankruptcy Act. Where there is a policy payable to the insured, his trustee might seek to exercise the right which the insured also possesses of continuing the payments of premiums. The act of Congress extinguishes this right of the trustee upon payment to him of the surrender value of the policy. When such payment is made, all right of the trustee and of the bankrupt estate to the contract of insurance is gone, and so far as concerns the estate it is as if no policy was in existence.

There remains to consider only the proper legal conclusion flowing from one other condition of facts, and that is, as is the case here, the lapse of a policy from nonpayment of premium. If the lapse continues for such length of time that all claims against the insurance company are lost, the end of the whole matter has been reached. If, however, the obligation of the insurance company to pay the surrender value of the policy remains, then the inquiry arises to whom is the money payable? It is clear that the answer to this question is to be found in the contract into which the company has entered, and this answer in turn determines to whom the money belongs. The touchstone to the decision of the question lies in this supposititious case. The trustee, or the wife, or both separately, might bring suit against the company. The question could then have been raised by a defense to either suit, or by admitting the obligation to pay and calling upon the claimants to interplead. The case may in principle be so determined now. It is apparent that its determination calls for the finding of facts on which the report of the referee is silent. The facts could doubtless be found from the evidence already in; but, inasmuch as the case must go back in any event to the referee to make distribution, it seems best to let it go back with these facts still open.

Without forecasting any ruling involved, this should perhaps be added for the guidance of the referee. The title of the wife to these moneys apparently springs, if from anything, from the gift of the husband. It is clear he gave her in certain contingencies the fruits of the main contract of insurance. Did he also give her the fruits of the contract to return part of the premiums paid? If he did, they are hers. If he did not, she has no title by gift. It may be, however, that a fuller development of the facts will disclose claims of title which arise out of whose money paid the premiums which the insurance company has returned. Thus seems the case to stand upon principle.

There is left for consideration only the answer to the query of whether the question of title to these moneys is still an open one. The trustee argues that it is not; that In re Herr, supra, rules against any possible claim of the wife under the facts as found by the referee. If this case so rules, we deem the ruling binding, and one which must be followed. The effect of the ruling may be discussed in connection with that of In re Dolan (D. C.) 182 Fed. 949, 25 Am. Bankr. Rep. 145, in which the governing principles are clearly laid down by Judge McPherson. He makes there the distinction which we have attempted to draw between what we have termed the main contract of insurance

and the ancillary contracts growing out of its annulment. The distinction is brought out in clearer relief as the difference between the assignment of the policy contract and the mere designation of the person who is to receive the money payable in different contingencies. It is to be noted that the referee and the court there found from the evidence in the case the facts, part of which we are unable to find from the report of the referee here, not only who was designated as beneficiary to receive the money payable on the death of the insured, but also who owned the contract of insurance.

[2, 3] We are of opinion that, whatever may be the case in other jurisdictions, the rulings by which we are bound do not leave open to discussion these propositions:

1. Where there has been merely a designation of a beneficiary to receive the moneys payable on the death of the insured, and this designation is open to recall or change by the insured, to whom also belongs the right to cancel or surrender the policy there, if the insured be bankrupt, the surrender value of the policy passes to his trustee.

2. Where, however, the wife, children, or a dependent relative of the insured has been made the owner of the policy, within the meaning of the Pennsylvania statutes, by it having been taken out for or bona fide assigned to them, then nothing passes to the trustee.

These propositions are supported by In re Booss (D. C.) 154 Fed. 494, 18 Am. Bankr. Rep. 658; In re Herr, 182 Fed. 716, 25 Am. Bankr. Rep. 142; In re Dolan (D. C.) 182 Fed. 949, 25 Am. Bankr. Rep. 145; Allen v. Trust Co., 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107, 25 Am. Bankr. Rep. 126.

As already stated, the evidence already offered doubtless affords the means of applying these principles to the present case; but as one of the exceptions to the referee's findings goes to the question of evidence, and as the whole case remains before the referee, the present order is formally revoked, and the report remitted to the referee, with directions to receive and hear any relevant evidence and testimony which any of the parties have to offer, and to find the facts. It may be that, as in the Dolan Case, the application itself will throw some light upon the fact upon which the distinction pointed out turns.

UNITED STATES ex rel. SCHLIMM v. HOWE, Com'r of Immigration.

(District Court, S. D. New York. March 29, 1915.)

ALIENS ⟸53—DEPORTATION—DETENTION—DELAY IN RETURNING TO FOREIGN COUNTRY.

In the absence of any regular passenger ocean service to German ports, the detention of an alien, liable to deportation, and held under a warrant for his removal to Germany, until an opportunity to return him to Germany presents itself, is not illegal, and he cannot be discharged on habeas corpus.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸53.]

Application for writ of habeas corpus.

Charles A. Oberwager, of New York City, for relator.

Harold A. Content, Asst. U. S. Atty., of New York City, for respondent.

LACOMBE, Circuit Judge. This is an application for habeas corpus to inquire into the legality of the detention of relator by the immigration authorities. There is no dispute as to the facts. Upon investigation duly initiated and conducted, it was determined that relator, an alien, had since his entry into this country "assisted" a prostitute, within the meaning of section 3 of Act Feb. 20, 1907, c. 1134, 34 Stat. 899, as amended by Act of March 26, 1910, c. 128, § 2, 36 Stat. 263. He is therefore liable to deportation, and is now held under a warrant for his removal to Germany, from which country he came here.

At the present time there is no regular passenger ocean service to German ports, so the authorities are unable to forward him, and are holding him until some opportunity of returning him to Germany may present itself. His continual detention is unfortunate, but certainly is not illegal. His present condition can be alleviated only by the action of the executive branch of the government. A federal court would not be justified in discharging him.

The application for habeas corpus is denied.

BURKE v. SOUTHERN PAC. R. CO. OF CALIFORNIA.

(District Court, S. D. California, S. D. April 2, 1915.)

1. PUBLIC LANDS ⇐88 — GRANTS IN AID OF RAILROADS — CONSTRUCTION — "AND."

Act March 3, 1871, c. 122, 16 Stat. 573, authorized the construction of the Texas Pacific Railroad, and in section 9 granted public lands in aid thereof, but provided that all such lands not sold or disposed of within three years after completion of the road should be subject to settlement and pre-emption at a price not exceeding $2.50 per acre. Section 23 authorized the Southern Pacific Railroad to construct a line connecting with the Texas Pacific, with the same rights, grants, and privileges, "and" subject to the same limitations, restrictions, and conditions as were granted the Southern Pacific by Act July 27, 1866, c. 278, 14 Stat. 292. The act of 1866 in section 3 granted public lands to the Atlantic & Pacific Railroad, with no provision relative to pre-emption and settlement, and in section 18 authorized the Southern Pacific to construct a line connecting therewith, and provided that it should have similar grants of land subject to the conditions and limitations therein provided. *Held*, that the lands granted to the Southern Pacific Company by the act of 1871 were not subject to pre-emption and settlement, though not sold within three years, as the rights, grants, and privileges referred to in section 23 were those of the grant of 1866, and, moreover, the provision as to pre-emption and settlement was one of the things which might aptly be described as "limitations, restrictions, and conditions," which concededly were the limitations, restrictions, and conditions of the grant of 1866, and the contention that, since the word "and" connotes something additional to that which has preceded, the rights, grants, and privileges

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

referred to must be those of a different grant than the grant to which the words "limitations, restrictions, and conditions" refer, is unsound.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 235, 266–269; Dec. Dig. ⟸88.

For other definitions, see Words and Phrases, First and Second Series, And.]

2. PUBLIC LANDS ⟸70—GRANTS IN AID OF RAILROADS—CONSTRUCTION.

That political considerations entered into the drafting and enactment of a railroad land grant, that it was "put over" by the railroad through the malign influence of its agents, and that prior to its enactment Congress and the people had determined that no more railroad land grants should be made, unless they contained a pre-emption clause, could not be considered, if true, in construing the grant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 231, 236; Dec. Dig. ⟸70.]

In Equity. Suit by Edmund Burke against the Southern Pacific Railroad Company of California. On motion to dismiss. Motion granted.

Edmund Burke, of Los Angeles, Cal., in pro. per.
Chas. R. Lewers, of San Francisco, Cal., for defendant.

BLEDSOE, District Judge. This is a suit in equity to compel the defendant to execute a conveyance of certain premises, situate in the county of Imperial, state of California, to the plaintiff. In support of his claim for such relief the plaintiff alleges that the defendant railroad company obtained the title to the land in question, a certain half section, under and pursuant to the act of Congress of March 3, 1871 (16 Stat. 573, c. 122), subject to the condition that all land so acquired by the said defendant, which was not sold or otherwise disposed of within three years subsequent to the completion of its railroad, should be open to settlement and pre-emption, and should be sold and disposed of to settlers, at a price not exceeding $2.50 per acre, to be paid to said railroad company by the purchaser of such land. The plaintiff then alleges, in apt language, the facts tending to show that he is entitled to a conveyance of the precise land in question.

In my judgment, the question at issue being merely one of law, arising upon a motion to dismiss, is of such simplicity as that, in ordinary cases, the court would content itself with the making of a formal order granting the motion. Plaintiff, who appears in propria persona, however, asserts in his brief that:

"As a matter of fact nearly 500 claims (similar to the one at bar) have been filed, and several hundred new ones are being prepared for filing, and as a matter of fact those filings have cost the claimants from $37.50 to $100 per file, plus a contingent fee to be paid by each claimant, under certain circumstances, to various persons and attorneys."

Under this state of facts, the question at issue would seem to be of considerable importance to divers individuals in rather large numbers, who apparently are divesting themselves of their good money, in the belief, seemingly engendered by the advice of plaintiff, acting as their counsel, that a valid cause of action, based upon an appropriate tender of money and demand for deed, can be stated against this defendant.

Feeling, therefore, that other parties are likely to be led into litigation which this court confidently believes will be fruitless, I am led to state the reasons for my rulings herein at some length, in order that they may be clearly understood, and their force and significance appreciated.

[1] By the act of March 3, 1871, above referred to, which purported to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its railroad, the United States government, by act of Congress, empowered the Texas Pacific Railroad Company to lay out, locate, and construct a railway and telegraph line, from the eastern line of Texas, through El Paso and Yuma, to "Ship's Channel," in the bay of San Diego, in this state. By section 9 of that act, "for the purpose of aiding in the construction of the railroad and telegraph line, herein provided for," there was thereby granted to the said Texas Pacific Railroad Company every alternate section of public land, not mineral, to the amount of 20 alternate sections per mile, on each side of said railroad line, as such line might be adopted by said company, through the territories of the United States, and 10 alternate sections in California. Said section 9 contained, however, the following important provision, essentially new to many of the railroad land grant statutes:

"And provided further, that all such lands, so granted by this section to said company, which shall not be sold, or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of $2.50 per acre for all the lands herein granted."

In subsequent sections of the act suitable provision was made for the filing of a map of the route, and designation thereby of the lands which should vest in the railroad company under the above-mentioned provision.

It is admitted by both sides herein that the motif underlying the passage of the Texas Pacific grant was a desire on the part of Congress to give an outlet from the Southern states to the Pacific coast; the other railroad grants, for which provision had been theretofore made, having benefited the Northern states rather than the Southern. One faction in Congress was extremely desirous that this outlet for the Southern states should provide for an entry of the Texas Pacific Railroad into the city of San Francisco; the other faction, apparently not desiring to provide for a "grant-aided" railroad paralleling the Southern Pacific and Atlantic & Pacific to San Francisco, contended that the road should be built only to San Diego. The bill was up for consideration and passage in the final days of the Forty-First Congress, and on the last day of the session the conference committee, which had charge of the bill at that time, reported as a compromise measure the bill as it had been substantially framed theretofore, and in addition reported a new section, being section 23, the last section of the bill, and the interpretation of which gives rise to the present controversy. By enactment of the bill as originally introduced, together with this compromise section tacked on by the conference committee, the Southern states were given a road from New Orleans to San Diego, and the

Southern Pacific Railroad was given the right to connect its main line running from San Francisco to the Colorado river (which was to connect with the Atlantic & Pacific) by a road running from Mojave to Yuma. In this wise an outlet was given to the Southern states to San Francisco, as urged by the supporters of that plan, but it was given through the medium of the Texas Pacific as far as Yuma, and from Yuma to San Francisco over the Southern Pacific. Section 23, which became the basis of the compromise between the two factions, as enacted, is as follows:

"That, for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seventh, eighteen hundred sixty-six: Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company."

The act of July 27, 1866 (14 Stat. 292, c. 278), to which the above reference is made, was an act of Congress of the United States, providing for the construction, and granting lands in aid thereof, of a railroad to be built from Springfield, Mo., to the Pacific Ocean, by the Atlantic & Pacific Railroad Company. It was provided therein that such road should proceed, as near as might be suitable, along the thirty-fifth parallel of latitude. (This parallel, it might be said, in passing, lies a few miles north of Needles and a few miles south of Mojave, in this state.) Suitable provision was made in the act for the construction of the road, and the designation of its route across the continent; and by section 3 thereof there was granted to the railroad company 20 alternate sections of land per mile on each side of the right of way through the territories and 10 alternate sections on each side of the right of way in the states through which it passed, mineral lands excepted. There was, however, no provision in the act similar to that in section 9 of the act of 1871, with reference to the settlement and pre-emption of the lands granted to the railroad company. By section 18 of this act it was provided:

"That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic & Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific Railroad herein provided for."

The contention in this case, and the only point in controversy herein, has to do with the interpretation of section 23 of the act of 1871. Plaintiff's theory, and his right to demand a deed of the defendant, is based upon the belief entertained by him that the grant of lands to the Southern Pacific under said section 23 is subject to the provision

hereinabove referred to, attached to the grant made to the Texas Pacific, that such grants not sold within three years should be open to settlement and pre-emption like other government lands. In this behalf he urges that section 23 should be construed so that the phrase "with the same rights, grants, and privileges" should refer to the Texas Pacific grant, rather than to the Southern Pacific grant of 1866. The section, it will be remembered, after authorizing the construction of the road by the Southern Pacific, affixes to that authorization these words:

"With the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to the Southern Pacific Railroad Company of California by the act of July 27, 1866."

Does the first phrase of this clause refer to the Texas Pacific grant, and the last phrase refer to the Southern Pacific grant, or do they both refer to the same grant, to wit, the one specifically mentioned, that of the Southern Pacific of 1866? To my mind there is hardly room for debate upon the proposition. It would be a strained use of language which would permit of a reference to two different grants within the limits of the phraseology just quoted. In my judgment, the natural, reasonable, and immediate inference to be drawn from a consideration of the language used is that the grant to the Southern Pacific was to be in all substantial respects similar to the grant to the same company which had been made in 1866. If it had been the intention of Congress that the "rights, grants, and privileges" given to the Southern Pacific were to be similar to those given to the Texas Pacific, but that the "limitations, restrictions, and conditions" of the same identical grant were to be subject to the provisions of an entirely different grant, authorized many years previously, it seems to me that, beyond a peradventure of a doubt, more apt language indicative of that end would have been used by Congress in that behalf.

In addition, it may be said that the qualification or condition subsequent, which the plaintiff herein is seeking to fasten by interpretation upon the grant authorized by section 23, falls within the category of things which might aptly be described and referred to as "limitations, restrictions, and conditions," rather than as "rights, grants, and privileges." So that, if Congress had intended to clog the grant to the Southern Pacific with the condition now sought to be imposed upon it by plaintiff herein, it would have made the grant subject to the "limitations, restrictions, and conditions" of the Texas Pacific grant, rather than of the older Southern Pacific grant. Adopting counsel's interpretation, however, the things which were in fact "limitations, restrictions, and conditions" were not those of the Texas Pacific, where the pre-emption clause is found, but those of the Southern Pacific, where no such clause was inserted.

Counsel's argument, which has more of length than of logic to commend it, is based upon the theory that the word "and" in said section 23, which follows the reference to "rights, grants, and privileges," and precedes the use of the words "limitations, restrictions, and conditions," connotes something *additional* to that which has preceded, and must mean, therefore, that the matter preceding the word "and" "must

be matter outside of the grant of July 27, 1866, and in that event it must refer to the act of March 3, 1871." Disregarding the obvious non sequitur productive of this conclusion, it may be said that this contention arises out of the definition of the word "and" as given in the Century Dictionary, wherein it is said that there is no exact synonym of the word in English, but that it is expressed approximately by "with, along with, together with, besides, also, moreover," all of which, without doubt, do express the idea of addition, as suggested by plaintiff. The same definition, however (Cent. Dict. sub nom. "And"), calls attention to the fact that the elements which are connected by the word "and" must be "grammatically co-ordinate." This grammatical co-ordination is easily apparent if the elements preceding and succeeding the use of the word "and" refer to the same subject-matter. They are not co-ordinate, in my judgment, if one refers to a grant contained in the same act, and another refers to a grant contained in an entirely different act.

In addition, I cannot believe that, if Congress had intended that the "rights" of one act and the "limitations" of another act were to be superimposed upon the grant to the Southern Pacific, they would have made use of the two very expressive phrases, "*same* rights, grants, and privileges," and "*same* limitations, restrictions, and conditions." In other words, if plaintiff's construction were correct, Congress would have said, possibly, "with the same rights, grants, and privileges," referring to the Texas Pacific grant, "and subject to the limitations, restrictions, and conditions as were granted to said Southern Pacific," etc. In other words, if there had been an intention to differentiate the "rights" from the "limitations," the second use of the word "same" would have been omitted. Having used it, it is almost demonstration, in my judgment, that Congress intended that the word "same" in each instance should refer to the same subject-matter, namely, the grant made to the Southern Pacific in 1866.

In this connection, plaintiff argues that the use of the word "same" in qualification of "rights, grants, and privileges" shows that Congress did not intend by that phraseology to refer to the "rights, grants, and privileges" theretofore granted to the Southern Pacific Railroad Company, because, ex vi termini, "it would be physically impossible, as different routes between different terminals were called for," and then, with a candor and ingenuousness both novel and refreshing, he alleges that the words "same rights, grants, and privileges" refer only to the "grants and conditions that passed to the Texas Pacific Railroad Company." In other words, he contends that, though it would be a physical impossibility to make the "same" grants to the Southern Pacific between Mojave and Yuma as were made to the Southern Pacific between Mojave and Needles, it would be possible to, and Congress did, make the "same" grants to the Southern Pacific between Mojave and Yuma as were made to the Texas Pacific between New Orleans and San Diego. The argument, of course, proves too much, for, if it proves an impossibility in the one instance, it also proves it in the other, and leaves the phrase hanging in the air, so to speak, with nothing to which it can be attached.

These contentions, I think, exhibit their own irrefutable unsoundness and demonstrate the utter untenability of the position assumed by plaintiff herein.

[2] That, as has been claimed by plaintiff, political considerations entered into the final drafting and enactment of this bill, that it was "put over" by the Southern Pacific through the malign influence of its agents in Washington, and that, prior to its passage, Congress and the people had determined that no more land grants in aid of railroads should be made, except they contained the pre-emption clause, are matters wholly beside the question to be determined herein. They are arguments ad hominem, pure and simple, and throw no light upon the question of law addressed to the court. My sole duty is to determine the legislative intention of Congress in enacting section 23 of the act of 1871. In arriving at such determination I can consider only the language used, giving to that language its usual signification, and am not to be swayed by arguments that are unsuited to this forum, and have no relevancy to the question of law addressed to me.

I can come to no other conclusion than that the intention of Congress was, as gathered from its apt, expressive, unequivocal, and unambiguous language, that the Southern Pacific Railroad Company should receive a grant of land along both sides of the road to be constructed from Mojave, through Los Angeles, to Yuma, of the same general nature, and subject only to the same conditions and limitations as specified in the grant to the same road for the similar purpose of constructing its line from Mojave to Needles; that there is nothing from which it could be rationally deduced or inferred that Congress intended that the grant to the Southern Pacific was to be clogged with the condition imposed upon the grant to the Texas Pacific; and that for this court so to declare would be for it to usurp the legislative functions of the government and to set at naught the plainest principles of statutory interpretation and constitutional justice.

It might be said, in closing, that the Supreme Court of the United States (Southern Pacific Railroad Co. v. United States, 189 U. S. 447, 23 Sup. Ct. 567, 47 L. Ed. 896), in considering the said section 23 (with reference to another matter, however), followed the obviously natural construction adopted hereinabove, and held that the grant to the Southern Pacific was " 'with the same rights, grants, and privileges, and subject to the same limitations,' etc., as in the act of July 27, 1866" (189 U. S. 449, 23 Sup. Ct. 568, 47 L. Ed. 896. So, also, on page 450, of 189 U. S., on page 568 of 23 Sup. Ct., 47 L. Ed. 896, the court said: "The Texas Pacific act refers to the act of July 27, 1866, for the rights conferred on the Southern Pacific." These declarations of the supreme judicial authority of the land are not controlling in this case, perhaps, but they are very persuasive of the fact, as adverted to hereinbefore by me, that plaintiff's construction of the section in question would be a most strained, unnatural, and extraordinary one.

The motion to dismiss is granted.

UNITED STATES v. AMERICAN LABORATORIES.

(District Court, E. D. Pennsylvania. April 27, 1915.)

No. 16.

1. DRUGGISTS ⟸1—STATUTES—VALIDITY.
The Sherley amendment (Act Aug. 23, 1912, c. 352, 37 Stat. 416 [Comp. St. 1913, § 8724]) to Food and Drugs Act June 30, 1906, c. 3915, § 8, 34 Stat. 771, punishing the making of false and fraudulent statements of the curative properties of medicines, is within the power of Congress to enact.

[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 1; Dec. Dig. ⟸1.]

2. DRUGGISTS ⟸12—MISBRANDING—CRIMINAL PROSECUTION—CONDITIONS PRECEDENT.
The giving of the notice provided for by Food and Drugs Act, § 4 (Comp. St. 1913, § 8720), is not a condition precedent to a criminal prosecution for misbranding of a medicine, or for making fraudulent representations as to its curative properties.

[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 11; Dec. Dig. ⟸12.]

3. CRIMINAL LAW ⟸823—INSTRUCTIONS—MISLEADING INSTRUCTIONS.
Where, before the charge was delivered, the attention of the court was called to newspaper publications and discussions of the case, and after a conference between counsel and the judge it was agreed that the judge should charge as to the presumption of innocence, and bring before the jury the duty of resting their verdict on the evidence, and to acquit unless the evidence showed guilt beyond all reasonable doubt, and the judge charged at length on the subject, and, if anything, unduly emphasized the rights of accused, accused could not complain of other features of the charge, because keeping the attention of the jury on the question of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. ⟸823.]

4. DRUGGISTS ⟸5—FOOD AND DRUGS ACT—VIOLATIONS.
One may not be convicted under the Food and Drugs Act, and the Sherley amendment thereto, merely because he advocates a theory of medicine which at the time has not received the sanction of the medical profession; but one guilty of fraud may not escape conviction merely because some one may honestly believe in the theory which he fraudulently sets forth, and the essential difference is one of fact for the jury.

[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 5; Dec. Dig. ⟸5.]

5. DRUGGISTS ⟸12—FOOD AND DRUGS ACT—VIOLATIONS.
Whether one was guilty of misbranding a medicine and of making fraudulent statements of its curative properties *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 11; Dec. Dig. ⟸12.]

6. CRIMINAL LAW ⟸823—INSTRUCTIONS—MISLEADING INSTRUCTIONS.
Where the court charged, in conformity to the arguments of counsel for accused, that accused, charged with misbranding a medicine, and with making fraudulent statements as to its curative properties, in violation of the Food and Drugs Act and amendment thereto, could not be convicted because the statements made were not believed by witnesses for the United States, and that accused could not be convicted if he en-

tertained an opinion, even if that opinion was a mistaken one, and that the fact that the claims made were within the domain of opinion entitled the accused to an acquittal, accused could not complain that illustrations in the charge were all illustrations of guilt, for the illustrations could not have prejudiced him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. ⊂⊃823.]

7. INDICTMENT AND INFORMATION ⊂⊃52—AFFIDAVIT.

The failure to attach to an information the affidavits on which it is based does not justify the setting aside of a conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 163–168; Dec. Dig. ⊂⊃52.]

The American Laboratories was convicted of violating the Food and Drugs Act and amendment thereto. On motions in arrest and for new trial. Denied.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

A. S. Weill and L. Stauffer Oliver, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The prosecution in this case began with an information filed under the Food and Drugs Act and the amendment thereto. The first three counts of the indictment are under the original act, and charge different acts of misbranding, or false and misleading statements respecting the composition of a medicine put out by the defendant under the trade-name of "Bad-Em Salz." The fourth count is under the Sherley amendment to the original act, and charges the offense of making false and fraudulent statements as to the curative properties of the salts manufactured by the defendant.

The case was fully and exhaustively tried and defended, resulting on April 7, 1915, in a verdict of guilty. The motions may be treated as one, and are planted upon four propositions:

[1] The first is an attack upon the constitutionality of the Sherley amendment. The position is taken that it is beyond the power of Congress to make a crime of the act of a defendant in proclaiming his belief in the curative properties of a medicine. The argument upon which this is based is so fully met by the opinions accompanying the ruling in U. S. v. Johnson, 221 U. S. 488, 31 Sup. Ct. 627, 55 L. Ed. 823, that we do not feel called upon to give it further discussion.

[2] The second ground of complaint is that the defendant has not received the notice required by the fourth section of the Food and Drugs Act. This complaint is disposed of by the case of United States v. Morgan et al., 222 U. S. 274, 32 Sup. Ct. 81, 56 L. Ed. 198.

The third complaint is that the indictment was found and tried, and a conviction thereunder had, without other authority for the institution of the prosecution than an information emanating from the office of the United States District Attorney, without affidavits in support of it appearing. The facts are that an information, with supporting affidavits, was filed September 3, 1914. This involved two counts. Another information was filed March 17, 1915. This was the basis of the

four counts involved in the indictment upon which the defendant was convicted. The information was based upon the affidavits previously on file. No affidavits were physically attached to the second information. The discussion of the legal consequences flowing from this is for the moment reserved.

[3-5] The fourth complaint is that the whole trend of the charge was toward conviction, in that it kept the attention of the jury faced in the direction of the guilt, and not the innocence, of defendant. It must be conceded that a reading of the charge affords some ground for this complaint. It is, however, more seeming than real. The circumstances which gave the framing to the charge brought this about. Before the charge was delivered the attention of the court was called to the fact of certain newspaper publications and discussion of the case. The best method of dealing with the situation was made the subject of a conference between counsel and the trial judge. It was not known whether any of the jury had seen the publication referred to. If they had not seen it, a direct reference to it might do more harm than good. It was thought that the condition could be best met by instructing the jury as to the presumption of innocence, and bringing before their minds the responsibility resting upon them to find the facts from the evidence in the case, and to acquit unless the proofs brought home to them a conviction of defendant's guilt beyond all reasonable doubt. The trial judge complied with the suggestion made, and charged the jury at length, and, if anything, at undue length, in emphasizing the defendant's rights of trial. This was done with such fullness at the commencement of the charge that we cannot find that the effect of it was lost upon the jury by anything subsequently said, nor that the defendant was prejudiced by the later features of the charge.

Over and beyond these specific grounds of complaint lies the broader one that there was no evidence in the case to justify the defendant's conviction of a crime. The situation in this view of it may be voiced in the phrase that the defendant, if punished, will have been punished for the crime of medical heterodoxy, and not for any offense against the law. In other words, the president of the defendant company, who is himself a physician, advanced a theory, advocated by others as well as by himself, for the treatment of cases commonly known as "gall stone cases." In opposition are eminent physicians and surgeons, and, as the argument might concede, the weight of scientific medical opinion is against him. Inasmuch, however, as the treatment is the subject of controversy, and its efficacy within the domain of opinion, the minority cannot be convicted of crime merely because they are outnumbered.

It is certainly true that a man should not be convicted of fraud merely because he advocates a theory of medicine which at the time had not received the sanction of the indorsement of the medical profession. It is equally true that a fraud or a fakir cannot escape the consequences of his fraud by the mere fact that some one may honestly believe in the theory which he fraudulently and dishonestly exploits. The broad distinction between things which are frauds and things which are not frauds is clear. It would be difficult, and indeed seems

to be impossible, to give a definition of such frauds in words. Supposititious cases illustrating the distinction could be multiplied beyond number. The essential difference is a fact, and in the administration of the criminal law is a fact to be found by a jury. As applied to the evidence in this case, the statement is easily credible that a man believes in and honestly advocates a course of taking the waters of certain springs as a specific for the prevention of gall stones, in the sense of ameliorating the conditions to which the formation of gall stones are due; it is conceivable that a man may give a like advocacy to the theory that gall stones, when once formed, may be dissolved, and there may be other persons of like opinions with himself.

The views thus expressed and the treatment advocated may be groundless in fact and unsupported by respectable professional opinion, and yet the holder of them would not be the proper subject of criminal prosecution. By the very same token, however, another man might advocate a remedy and put out a medicine to be purchased by the sufferers from ailments or diseases, real or imaginary, and the act itself be so clearly false and fraudulent that the mind would not hesitate to reach a conviction of his criminal guilt. The fact that there was a widely spread disposition among people to give credence to the statement because of a superstitious belief in its efficacy, or indeed such a reputation for the remedy itself as to make people prejudiced in its favor, would not diminish, but would increase, the guilt of him who sought to make money by false statements and fraudulent devices. It is difficult, and indeed practically impossible, to draw a line in the abstract other than a broad line between these two things. There would seem to be no other way of dealing with the subject than to submit to the common sense judgment of a jury to find whether in a given case the acts of a defendant have been honest, however mistaken, or whether they have been false and fraudulent.

The present case may well be considered a test case. There is a widespread belief, whether well or ill founded, in the curative properties of the waters of many of the springs which issue out of the earth. The predisposition to believe in their efficacy may have its foundation in the search for the fountain of youth. Certain words have become polarized with this meaning, and excite a feeling of hope or expectation in the minds of sufferers, particularly those who suffer from certain ailments. The word "Spa" and the word "Bad" are of this kind. The result of the use of such words is very much akin to the thoughts which, from the principle of the association of ideas, are called up by the use of certain widely advertised proprietary words.

In order to determine what basis of merit lies at the bottom of the fame of certain springs, the knowledge and skill of the chemist have been called into exercise, and the waters have been analyzed, and the ingredients which are believed to have contributed chiefly to their efficacy have been determined. It is a short step from this knowledge to the expedient of artificially reproducing the waters, or to the more direct method of bottling and transporting the waters themselves, or to facilitate the transportation by the process of evaporation and then reproducing a water from the residuum salts. Starting with this

widely spread belief in the efficacy of certain natural waters, and following this with the thought of reproduction, either in fact or in equivalents, the defendant put on the market the medicine which it widely sells. Indeed, the president of the company in his testimony gave this history of the evolution of the idea of putting these salts upon the market. The idea began with the recommendation of patients suffering from certain ailments to go to Carlsbad, or to Ems, or to certain other springs, and there take the waters.

The next development of the idea was that a treatment would be given which is the medicinal equivalent of what could be had at the springs themselves. The standard formula for effervescent artificial Carlsbad salts given in the National Formulary was not believed to be the best combination of salts for the purpose. To vary from this, and yet put out the substitute as artificial Carlsbad salts, was thought to be inimical to the provision of the statute. The fully developed thought was to put out another combination of salts, believed to be a reproduction, and in that sense a representation, and in another sense an equivalent, of the medicinal properties of the Carlsbad waters. The embodied thought was therefore put into this product under the name of "Bad-Em Salz." This put behind this proprietary medicine the widespread belief of people in the efficacy of these natural spring waters, and the thought that they could get the same benefit from a treatment in their own homes which they would receive directly from the Carlsbad or Bad-Ems waters. The further thought was to give the sale of these salts the additional boost of a statement of their curative or therapeutical properties. Had this been fairly done, it could not be said that there was involved in it any infraction of any criminal statute.

The charge against this defendant, however, was that the medicine was misbranded in the respect that it was put out under certain false and misleading statements, the essence of which were that the impression was conveyed to the users of the medicine that they were getting the benefit of the very salts which are contained in the natural waters of the springs which had acquired a world-wide fame, and that false and fraudulent statements were made as to the curative effects or results which would flow from the use of this medicine. Right here is the fulcrum on which the lever for the argument on behalf of the defendant is sought to be placed.

As to the misbranding features of the indictment, the defensive position is taken upon the fact that the statements put out by the defendant were neither false nor misleading, and, with respect to the curative features, that, inasmuch as the result claimed to follow from the use of the medicine was a matter of opinion, there was no basis for a finding of guilt.

The answer made to these propositions by counsel for the United States is the only answer to which they are open, and that is that the statement of fact upon which the first proposition turns is one to be determined by a jury. It is not a necessary condition of a finding of guilt that the statement of what the drug is should be a statement flatly and baldly false, but that the word "misleading," in the act, has its function, which is to bring the statement within the inhibition of the

statute if it is such as to create or lead to a false impression in the mind of the reader as to what the ingredients or the composition of the drug are. This is the charge made in the first three counts of the indictment, and this is the fact which the jury has found against the defendant.

With respect to the charge under the Sherley amendment, the answer of the United States is that a man who has in fact made false and fraudulent statements as to the curative properties of the drug which he is selling cannot, when pursued by justice, take refuge in the statement that he was expressing his opinion, or in being able to find others who honestly believed in the statements made. Here again the question of guilt or innocence turns upon the fact, and here again the fact is one which must be determined by the jury, and here again the jury has determined the fact against the defendant.

[6] The charge of the court in this feature or aspect of the case was heard by the jury, and therefore must be read in the light of the argument which had been addressed to them. The president of the company, when upon the witness stand, testified to the honesty of the statements made and to the truth of the claims made for the results of the treatment advocated. This was impressively supported by counsel for the defendant in his argument that the defendant was not to be convicted because the statements made were not believed in by the witnesses called for the United States, and that a defendant could not be convicted because he entertained an opinion, even if that opinion was a mistaken one, and that the fact that the claims made were within the domain of opinion entitled the defendant to a verdict of acquittal.

These propositions were all affirmed by the court, unless the jury had been convinced by the evidence in the case that the statements as to what the drug was were in fact false and misleading, and unless the statements of what it would do were both false in fact and were fraudulently made.

The feature of the charge complained of, that the illustrations "were all illustrations of guilt, and none of innocence," could not have prejudiced the defendant, for the reason that, following the course of the argument made by counsel for the defendant, they enforced his argument and reinforced his position by impressing upon the jury that there could be no conviction unless the defendant had been guilty of an arrant fraud, such as those embodied in the illustrations given.

[7] This brings us back to the only undiscussed complaint now made. That no one can be called upon to defend to a criminal charge which is not based upon reasonable grounds appearing from statements of fact authoritatively made and sanctioned by the oath of some one who has a knowledge of the facts, or its legal equivalent in solemnity and responsibility, is a proposition having behind it the highest sanction of the law. The forms of practice in making criminal accusations which have grown out of this are the outer protections which are thrown around every citizen, and there can be no departure from them.

We have not had the opportunity to examine the record in this case with respect to the fulfillment of these conditions preliminary to a trial.

We understand the fact to be, however, and it is stated without denial, that the action of counsel for the United States in bringing this prosecution was based upon affidavits made by those having a knowledge of the facts and upon the probable cause which was disclosed by the affidavits. These affidavits are of record. The first information brought home to the defendant charges which would have taken the form of two counts in an indictment. Counsel for the United States subsequently amplified the form of the charges by putting them into the shape of the four counts of the present indictment. The information in the present prosecution was based upon the affidavits which were of record. The complaint now made, as we further understand it, is merely to the feature that the affidavits upon which the information was based are not physically attached to the information itself. We do not think this to afford any legal reason for interfering with the verdict, although we have no wish to lessen the protection thrown around defendant. U. S. v. Gruver (D. C.) 35 Fed. 59, and U. S. v. Baumert (D. C.) 179 Fed. 735, dispose of this phase of the case.

The motive and policy of the law which lies behind legislation of this general kind is highly promotive of public good. The evils sought to be removed and prevented spring out of conditions requiring tactful, and even delicate, treatment. Such laws, if arbitrarily enforced, may easily take the form of an unwise dictatorial interference with the pursuits of others. There is a natural temptation to overdo by trenching upon the domain which properly belongs to the ethics of the medical profession. There is danger, also, that the public will come to rely upon the protection promised by such laws, and therefore relax individual watchfulness. Such laws, therefore, should be administered in such a way as that honest and well-intentioned business may not be hampered, but the detection of frauds and cheats will be made sure, and their conviction and punishment rendered certain. The temptation even to those who cannot fairly be termed unscrupulous is to yield to the suggestions of greed and come as close to the forbidden line as they safely can. The only sure course in the administration of laws of this kind is to leave the determination of guilt or innocence in a given case to the sound judgment of a jury, supervised by the wisest scrutiny which the trial judge can give to make sure that no one is convicted without guilt. As has already been stated, this case discloses acts that are not far over the line of what the defendant might lawfully have done. The jury found, however, that it has transgressed that line, and we are not able to convict the jury of having misjudged the real facts in the case.

The motion in arrest of judgment, and that for a new trial, are therefore both denied.

BAXTER v. CALHOUN et ux.

(District Court, W. D. Pennsylvania. April 21, 1915.)

No. 13.

1. FRAUDS, STATUTE OF ⊂=110—SPECIFIC PERFORMANCE ⊂=29—SALE OF LAND —DESCRIPTION—CERTAINTY.

A contract which described the land sold as a tract of land in a named borough, county, and state, which was devised to the vendor by his mother by a will recorded in a certain will book at a named page, and which tract contained 22 acres, more or less, is sufficiently definite to satisfy the statute of frauds, and to be specifically enforced, where it appeared that the testatrix devised a tract of land answering that description and containing about that acreage, after a sale of a part thereof as directed by the will, to her two sons, one of whom had died intestate and without issue, so that his brother was his only heir, and there was no other land that could in any way answer the description.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 225–236; Dec. Dig. ⊂=110; Specific Performance, Cent. Dig. §§ 69–82; Dec. Dig. ⊂=29.]

2. EVIDENCE ⊂=460—PAROL EVIDENCE—DESCRIPTION OF LAND—LOCATION.

Parol evidence is not admissible to show the subject-matter of a grant; but, when the description is sufficiently definite to enable the land to be located, such evidence is admissible to supply the particular location.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115–2128; Dec. Dig. ⊂=460.]

3. VENDOR AND PURCHASER ⊂=18—OPTION—COUNTER OFFER.

An offer, submitted through one who had a binding option for the purchase of a part or all of a tract of land, to purchase all the land at a price lower than that fixed in the option, is not a refusal to take at the option price, so as to terminate the option.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. ⊂=18.]

In Equity. Suit by E. J. Baxter against George H. Calhoun and wife. Decree entered for plaintiff.

H. H. Dinsmore and Moorhead & Smith, all of Greensburg, Pa., for plaintiff.

C. B. Hollingsworth, of Greensburg, Pa., and Watson & Freeman, of Pittsburgh, Pa., for defendants.

THOMSON, District Judge. This is a bill for specific performance of a contract for the sale of land.

Findings of Fact.

First. The plaintiff is a citizen of Pennsylvania, residing in Westmoreland county, and the defendants are citizens of Ohio, residing in the city of Cincinnati.

Second. On February 15, 1911, the defendants entered into a written agreement with the plaintiff, in the form of an option to continue in force for a period of two years from its date, wherein the former agreed to sell and convey to the latter "a certain tract of land situate in the borough of Arnold, county of Westmoreland, state of Pennsyl-

vania, devised to the said George H. Calhoun by his mother, Mrs. M. M. Calhoun, by her will recorded in Westmoreland county in Will Book No. 8, page 126, containing twenty-two acres, more or less," upon certain terms and conditions therein expressed.

Third. Under the terms of said option the plaintiff was, at his own expense, to have the said land surveyed and laid off in small tracts. If the plaintiff elected in writing to accept three or more acres of the said land, the defendants agreed to execute and deliver to him a deed or deeds of general warranty therefor. The net price to be paid for said land was $750 per acre for each acre thereof, irrespective of its location or physical condition, the defendants to be at no expense, except in the preparation of the deeds required by the plaintiff and in the satisfaction of any liens affecting the land.

Fourth. The plaintiff caused two surveys of said land to be made, the one in June or July of 1911, in which said land was laid off into a plan of lots, and another survey and subdivision of the land into lots was made about the month of July, 1912. The said tract by survey was found to contain 22.76 acres of land; the courses and distances and boundaries thereof being as follows, to wit:

"All that certain tract of land situate in the borough of Arnold, county of Westmoreland, and state of Pennsylvania, devised to the said George H. Calhoun by his mother, Mrs. M. M. Calhoun, by her will recorded in Westmoreland county in Will Book No. 8, page 126, containing twenty-two acres, more or less, and more fully described as follows: Beginning at a point at corner of lands of the Kensington Improvement Company (formerly of William Bakewell) and lands formerly of Mrs. Catherine A. Zents (purpart A in the partition of the estate of George W. Hoffman); thence by said lands formerly of Mrs. Catherine A. Zents north sixty-eight degrees forty minutes east, nine hundred seven and sixty-four hundredths feet (N. 68 deg. 40 min. E. 907.64 ft.), to River View plan of lots (formerly a part of this tract); thence along said River View plan of lots north eight degrees forty-two minutes west, nine hundred forty-five and eighteen hundredths feet (N. 8 deg. 42 min. W. 945.18 ft.), to Drey street; thence along the southerly line of Drey street, south seventy-four degrees twenty-nine minutes west, eight hundred five and fifteen hundredths feet (S. 74 deg. 29 min. W. 805.15 ft.), to a point in said line; thence along same south seventy-seven degrees fifty-one minutes west, three hundred two and eighty-nine hundredths feet (S. 77 deg. 51 min. W. 302.89 ft.), to line of said land of the Kensington Improvement Company; thence along said land south twenty degrees forty minutes east, ten hundred forty-seven and thirty-four hundredths feet (S. 20 deg. 40 min. E., 1,047.34 ft.), to the place of beginning—containing twenty-two and seventy-six hundredths (22.76) acres."

The contract price of said land at the rate of $750 per acre would amount to the sum of $17,070.

Fifth. In November of 1912 and prior thereto there were two judgments against the defendant George H. Calhoun entered of record, and liens upon said land aggregating the sum of $2,989.93.

Sixth. On November 26, 1912, the plaintiff gave written notice to the defendant George H. Calhoun, a copy of which is attached to plaintiff's bill and marked "B," that he elected to purchase the entire tract of land mentioned in said agreement, and on the same day, in the city of Cincinnati, tendered or offered to pay said Calhoun the sum of $14,080.07, being the total consideration or purchase price at the rate of $750 per acre, less the aggregate amount of the two judgments afore-

said, and at the same time demanded that a deed be made to him for said land. The defendant at that time raised no question as to the amount of the judgments, or the amount of the tender, but refused performance on his part, giving as his reason that the plaintiff had not complied with his contract.

Seventh. The land in suit became vested in the defendant George H. Calhoun in the following manner: George W. Hoffman, being the owner of a tract of land in Burrell township, Westmoreland county, containing 175 acres, more or less, an inquisition was awarded to make partition thereof. The land was subdivided into four purparts, and purpart B, containing 32 acres and 113 perches, was awarded to Minnie M. Huffman in fee.

Eighth. Minnie M. Calhoun, formerly Huffman, by her will dated May 22, 1889, and registered in Westmoreland county in Will Book 8, page 125, devised the aforesaid land to her two sons, Ethelbert and George Huffman Calhoun; the executor of said will being directed to sell so much of said property fronting on the Freeport road as would make 10 acres.

Ninth. In pursuance of the authority contained in said will, Alexander W. Logan, the executor, by deed dated December 5, 1890, conveyed to Dr. David Aller the said 10 acres of land. The remainder thereof, containing 22.76 acres, being the land in suit, vested in George H. Calhoun, in severalty upon the death of his minor brother Ethelbert, unmarried, intestate, and without issue. This land, located in the borough of Arnold, which was formerly a part of Burrell township, is the only tract of land left to the defendant by his mother's will which could answer in any way the description in the contract; the only other land which she probably possessed being a small piece, less than an acre in amount, located somewhere near Braeburn station, not in the borough of Arnold.

Tenth. There is no sufficient evidence to establish any contemporaneous oral agreement affecting the written instrument, and therefore the agreement in suit expresses the contract between the parties, which contract was not thereafter surrendered or canceled.

Eleventh. The plaintiff has complied with the contract on his part, and the defendants have failed to perform it on their part.

Conclusions of Law.

1. The contract in suit is a valid contract in writing, signed by the parties, and is not within the statute of frauds.

2. The contract should be specifically enforced and the defendants should be required to execute and deliver a deed for the land fully described in the bill upon the payment of the purchase money, to wit, $17,070, without interest until final decree, deducting therefrom and paying any liens or incumbrances, with interest and costs, against said property at that time.

Discussion.

[1, 2] The first and most important question raised by the defendants is as to the sufficiency of the description in the contract in suit, to save it from the operation of the statute of frauds, which provides

that all estates created by parol and not put in writing and signed by the parties so making or creating the same, shall have the effect of estates at will only. The general rule is that parol testimony is not permitted to show the subject-matter of the grant; but, when the description in the contract is sufficiently definite to fix its location, parol evidence is admissible to supply the particular description. This is clearly established by the authorities. A brief reference to some of the cases may be of advantage.

Soles v. Hickman, 20 Pa. 180. In this case the land was described by the lot number in a town only. It was held that the contract was not self-sustaining, because, while the lot and its location were described, the amount of the consideration was not given.

Ferguson v. Staver, 33 Pa. 411. Here there was no description whatever of the land, the contract simply saying:

"And the said Henry Kissel to execute a deed, upon the payment of the above sum."

It was said in the opinion:

"If the subject-matter, the land, be described, we admit evidence in order to apply the description to the land; but we cannot admit parol evidence, first, to describe the land sold, and then to apply the description."

Smith & Fleek's Appeal, 69 Pa. 474. The description of the land was in the following words:

"Said land is all that piece bought of Rose by Thomas Smith and Porter Fleek."

It being claimed that the description of the land was insufficient, the Supreme Court said:

"Equally unfounded is the objection that the contract is incomplete in its terms. It sets out the parties and the consideration, and sufficiently describes the subject-matter: 'Said land is all that piece bought of Rose by Thomas Smith and Porter Fleek'—certum est quod certum reddi potest. If the subject of the contract is described, parol evidence is admissible to apply the description to the land."

Ross v. Baker, 72 Pa. 186. The vendees took receipts from the vendor for the purchase money, stating the amount paid to be for the "Fleming farm on French creek." The Supreme Court held, reversing the court below, that this was a sufficient description; that it identified the property and therefore satisfied the statute of frauds. The Supreme Court said:

"This document, if receivable in evidence, would have proved the plaintiffs' case undoubtedly. I am strongly of opinion that this document was admissible as evidence of the agreement, for, on the face of it, it has every ingredient necessary to constitute a valid agreement within the statute of frauds. It contains the names of the seller and buyer, a description of the property sold, and the amount of the purchase money."

Phillips v. Swank, 120 Pa. 76, 13 Atl. 712, 6 Am. St. Rep. 691. With corrected spelling, the language of the contract was:

"That Jonathan Phillips shall have the land which he is possessed of now for the labor he done for me over age, and this shall be his receipt for all my rights and claims against the land."

This was held sufficient to allow proof to identify and describe the land. In discussing the question the Supreme Court said:

"It is quite impossible in most cases so to describe land as to avoid the necessity of parol proof for its identification; for, whether it be described by metes and bounds, by monuments erected upon the ground, or by adjoiners, its identification necessarily becomes the subject of parol proof. In this instance, the lands agreed to be conveyed were described as the land of which Jonathan was at the time in the actual occupancy and possession; this was no more open to the objection stated than if it had been described by its adjoiners, or by marks upon the ground."

Peart v. Brice, 152 Pa. 277, 25 Atl. 537. A deed conveyed a tract of land described by metes and bounds and called for other land of the grantor as an adjoiner on the east, "together with the right of mining and removing all the mineral that may be reached under said grantor's land from the land above described, and hereby conveyed." Held, that the description was sufficiently certain to indicate the mineral under the grantor's land east of the tract conveyed, and that parol evidence was admissible to locate it.

Henry v. Black, 210 Pa. 245, 59 Atl. 1070, 105 Am. Rep. 802. The agreement described the property simply as the "Hotel Duquesne," and this was held to be an adequate description. Mr. Justice Dean said:

"Was the description sufficiently certain? The hotel was a prominent one, on one of the principal streets of Pittsburg; probably three-fourths of the citizens of Pittsburg know its exact location. But that, under the authorities, is not sufficient. Is the description in the writing full enough to enable a court to make a decree of specific performance of the contract? The identity of the location is fixed by the name of the hotel. Given the hotel site, the lots on which it stands and the ground properly appurtenant to it can be ascertained by measurements to a certainty. Our records in rural counties are full of deeds which describe thousands of tracts of land conveyed only by their warranty names; no one thinks of objecting to them for insufficiency of description. * * * So here, the identity of the hotel site being fixed, the city and county records establish the boundaries and quantity. This contract then clearly identified the subject of it; that identification furnished the purchaser or a court the means of making clear the boundaries and quantity of land."

Ranney v. Byers, 219 Pa. 332, 68 Atl. 971, 123 Am. St. Rep. 660. A declaration of trust provided as follows:

"The arrangement with Mr. Byers is this: All money invested by him in the 'Byers Place' to be placed to his credit, and to bear interest from the date credit is given until paid. When the total principal and interest is paid in full, then the residue or remaining property to belong to C. W. and R. B. Ranney."

Held, that the designation of the place as the "Byers Place" identified the property.

Lemmon v. Lemmon, 47 Pa. Super. Ct. 604. In this case the reference was to "those lots." The court said:

"If the lots had been referred to in the contract as lots devised to the plaintiff by the last will of Sidney Lemmon, that would have warranted showing by parol evidence where said lots were located, but we find nothing of that kind in either the oral or written contract."

The cases in which it has been held that the description was insufficient under the statute are in entire harmony with the principles

above laid down, as in Mellon v. Davison, 123 Pa. 298, 16 Atl. 431, where the property was described as:

"A lot of ground fronting about 190 feet on the P. R. R., in the Twenty-First ward, Pittsburgh."

Barnes v. Rea, 219 Pa. 287, 68 Atl. 839. There the first party agreed to sell—

"all the nine-foot or Pittsburg vein of coal in and under that certain tract of land in Cumberland township, in Greene county, Pennsylvania, bounded by lands of * * * and containing thirty-nine (39) acres, more or less."

The court held the description insufficient, because the contract did not designate the tract by any name, or give any adjoining owner, or fix any natural boundaries, nor designate it in any manner by reference to deed, will, warrantee number or source of title.

Welsh's Estate, 45 Pa. Super. Ct. 115. The agreement was:

"John E. Williams sold to Andy Welsh house and lot on Acorn street for the sum of five hundred dollars."

The court held this description might apply to any one of the several houses owned by the defendant on Acorn street.

Troup v. Troup, 87 Pa. 149. The description was:

"A tract of three acres of land, more or less, situate in the township aforesaid."

Held, the description was insufficient, but the taking of possession and the markings on the ground identified the property.

Hammer & Dauler v. McEldowney, 46 Pa. 334. A receipt was:

"Received from Messrs. Hammer & Dauler, $20, on account of property sold to them, the houses on Smithfield street; the price to be $7,800."

The description was held insufficient.

It is clear that in none of these cases was the subject of the grant sufficiently identified, and they therefore came within the statute of frauds. Applying the principles enunciated in the cases to the contract in suit, the property is described as:

"A certain tract of land situate in the borough of Arnold, county of Westmoreland, and state of Pennsylvania, devised to the said George H. Calhoun, by his mother, Mrs. M. M. Calhoun, by her will recorded in Westmoreland county, in Will Book No. 8, page 126, containing 22 acres, more or less."

The general description as to location and acreage is made specific by reference to the will under which it was devised to the grantor. The description refers to a definite piece of property and can refer to no other. The testatrix had no other property to which the description could by any possibility apply. The property which the mother willed to her two sons became, on the death of the younger, the property of the grantor. From the tract so devised, 10 acres, under the directions of the will, were sold. This left 22 and a fraction acres, formerly in the township of Burrell, now in the borough of Arnold. Shortly before and shortly after the making of the contract, the defendant pointed out to the plaintiff upon the ground the general boundaries of the land, thus distinctly identifying it as the subject-matter of the contract. The land was surveyed by the plaintiff, laid off in lots, and blue-

prints furnished the defendant. In the defendant's testimony he identifies the land in question as the land willed to him by his mother and as the land described in the contract of sale. The description of the land in the contract was sufficiently specific to fix its location and to admit oral and record proof to supply its description and boundaries. That which was capable of being rendered certain has been rendered indubitably certain by the testimony. I am convinced, under all the authorities, that the contract is not within the statute of frauds.

[3] There was no sufficient evidence of any parol contemporaneous agreement modifying or altering the legal effect of the contract in suit. There was much correspondence passed between the parties, but on the whole it is not inconsistent with the provisions of the written agreement. The plaintiff had the right to accept 3 or more acres at a time, as lots might be sold, the defendants to make deeds and be paid at the rate of $750 per acre. As it was not certain, during the running of the option, what part, if any, of the land the plaintiff might choose to purchase, it was natural that he should manifest a desire that it be laid off in lots to the satisfaction of the defendant. There is evidence of delay in getting surveys satisfactory to both parties, and evidence that the consideration named was above that at which it appeared to be marketable; but the letters passing back and forth did not relate to the terms of the original contract nor undertake to alter those terms.

On March 19, 1912, plaintiff sent to defendant the following telegram:

"Will you take 14,500 dollars net—4,500 cash when title is ex—bal. 1000 3 yrs. 6% mortg—privilege of 1000 or more at any time—better cut loose. Wire me to-day. E. J. Baxter."

It is strongly urged by the defendants that this must be construed as a refusal on the part of the plaintiff to take the property at the option price, and that therefore the option is at an end. I do not so regard it. This telegram must be read in the light of the correspondence which preceded it, the defendant's reply thereto, the plaintiff's testimony in relation to the same, and the rights of the parties as they existed under the contract. The case is not the same as an offer by A. to sell to B. at a certain price, and a reply by B. offering a lower price. This would be construed as a rejection by B. of A.'s offer, and his subsequent acceptance would not be binding on A.

Here the plaintiff had the right to accept within the period of two years. As I construe the contract, this related either to a part or to the whole. If before plaintiff had made any election some one offered through him to take the whole tract at a lower price, surely the plaintiff's submission of that offer to the defendant, if refused, should not deprive the plaintiff of his rights under the contract.

While the case is not free from difficulty, I am of opinion that the plaintiff is entitled to have the contract specifically enforced.

Let a decree be drawn accordingly.

Ex parte PSIMOULES.

(District Court, S. D. California, S. D. March 26, 1915.)

1. ALIENS ⊂=54—DEPORTATION—SUFFICIENCY OF EVIDENCE.
In determining the sufficiency of the evidence to warrant the deportation of an alien, the evidence taken prior to, and used as the basis of the issuance of, the warrant of arrest, can be considered.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⊂=54.]

2. ALIENS ⊂=51 — DEPORTATION — ALIENS SUBJECT TO DEPORTATION — "INMATE."
A "mack," or pimp, residing continuously in a house of prostitution, is an "inmate" thereof, within Act March 26, 1910, c. 128, 36 Stat. 263, providing for the deportation of any alien who shall be found an inmate of, or connected with the management of, a house of prostitution, as an "inmate" is one who is a mate or associate in the occupancy of a place, an associated lodger, or inhabitant; and such a person is not in the same position as a jailer, who, though living in a jail, would not be an inmate thereof, especially as Act Feb. 20, 1907, c. 1134, 34 Stat. 898, which was amended by the Act of 1910, applied only to any alien woman or girl, while the words "woman or girl" are omitted from the act of 1910.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 111; Dec. Dig. ⊂=51.
For other definitions, see Words and Phrases, First and Second Series, Inmate.]

3. ALIENS ⊂=51—DEPORTATION—ALIENS SUBJECT TO DEPORTATION.
A man who assumed to dictate the terms of a sale of an interest in the business carried on in a house of prostitution, endeavored to secure a prostitute to work for him there, and had a telephone there in his name and rented by him, through which much of the business of the house was transacted, was connected with the management of the house, within Act March 26, 1910.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 111; Dec. Dig. ⊂=51.]

Application by George Psimoules for a writ of habeas corpus. Writ discharged, and petitioner remanded.

Ford & Hammon, of Los Angeles, Cal., for petitioner.
Albert Schoonover, U. S. Atty., and Harry R. Archbald, Asst. U. S. Atty., both of Los Angeles, Cal., for respondents.

BLEDSOE, District Judge. This petitioner, who is a citizen of Greece, has been ordered deported by the Department of Labor, after due hearing by the immigration officers of said department, because "he has been found an inmate of, and connected with the management of, a house of prostitution, subsequent to his entry in the United States."

[1] The claim is made that the evidence which was taken prior to, and which was used as the basis of the issuance of, the warrant of arrest cannot be considered in determining the question of the sufficiency of the evidence to warrant deportation; that, excluding that evidence, there is nothing in the record to establish any material fact necessary to support the order of deportation; and, specifically, that there is nothing to show that the petitioner, at or prior to his arrest,

was either an inmate of, or connected with the management of, a house of prostitution.

This court, in the Case of Hidekuni Iwata (No. 80, Criminal Southern Division) 219 Fed. 610, has had occasion to go into the scope and character of the proceedings which must be had to justify an order of deportation. Its conclusions were stated therein with definiteness, and need not be here repeated. It was therein decided that the first point made herein by the petitioner was not tenable.

In this case numerous witnesses were examined, and there is ample evidence to justify the finding of the Secretary of Labor. The testimony showed that for some considerable period, at least a couple of years, certain premises in Los Angeles were reputed to be a house of prostitution; the "landlady" of this house was a certain woman named Mabel Thompson; the defendant lived in this house with her, occupying the same room and bed; numerous other prostitutes also lived in and about, and plied their trade in, the premises; it was generally reputed in the vicinity that the defendant was the "mack," or pimp, of the Thompson woman; the house was rented in her name, but the telephone to the house, which was in the principal room used for "soliciting," etc., was in his name, and he paid the rental therefor; a certain woman, who wanted to buy a half interest in the place, was told to go to him, which she did; and he offered to effect a sale of a half interest in the business to her. On one occasion he asked a prostitute to come and "work" one Sunday for him at the house. When the woman Thompson bought a half interest in the place from another prostitute, who owned it in partnership with her, the petitioner furnished the money for this transaction. There was also some evidence to the effect that he had a mortgage on the furniture in the place, and for some months, at least, paid the rent to the landlord. Of course, much of this evidence is controverted by the testimony given by the petitioner; but that does not establish a want of its verity. On the contrary, the fact of his denial, for instance, that he knew that the house was a house of prostitution, or that the woman Thompson was a prostitute, doubtless in itself caused the departmental officials in the immigration service to conclude that all of his testimony was given recklessly, and that no reliance or credence should be accorded to it.

[2] The argument is advanced that the finding in the order of deportation that the petitioner was an inmate of a house of prostitution is entirely unsupported, in that the claim is made that it is impossible for a man to be an "inmate" of a house of prostitution; that the statute evidently refers to women, and that it is an obvious contradiction in terms to accuse or convict a male person of being an inmate of such a house; that the word "inmate," as used in the statute, "signifies a female who is an occupant of a house with the intention on her part to follow the occupation for which the house is maintained." In support of this contention considerable argument of a learned nature is indulged in to demonstrate the philological unsoundness of the contention that a man can be an "inmate" of such a place. In this connection it is said that obviously the "inmate" of a jail, or a

poorhouse, or a lunatic asylum, could not possibly be held to comprehend the jailer, or the superintendent, or other directive head of such institution, even though such person might be living within the place and wholly an occupant thereof. In my judgment, however, the statute itself refers equally to males as well as to females, in inhibiting against residence in a house of prostitution on the part of aliens, and I am also constrained to hold that a fair use of language would properly classify a "mack," or a pimp, residing continuously in a house of prostitution, as an inmate thereof, along with the others therein.

Act Feb. 20, 1907, c. 1134, 34 Stat. 898, contained the provision that:

"Any alien *woman or girl* who shall be found an inmate of a house of prostitution or practicing prostitution, * * * within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections 20 and 21 of this act."

After some administration of this law, its inefficacy was made apparent, and by Act March 26, 1910, 36 Stat. 263, it was amended to read as follows:

"Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, * * * shall be deemed to be unlawfully within the United States," etc. (Italics are mine.)

It is apparent from a comparison of the two statutes that Congress, ex industria, eliminated that portion of the statute which confined its operation to an alien "woman or girl" and made it apply, without limitation or qualification, to "any alien." In my judgment, the obvious intention of Congress in thus amending and strengthening the law was to make it apply to men as well as to women, and therefore to make it possible for men as well as women to be classed, if the occasion should demand it, as "inmates" of houses of prostitution. The court should not, in my opinion, be astute to construe the law so as to nullify its beneficent aims and purposes. "Inmate," as defined in the Century Dictionary, is:

"One who is a mate or associate in the occupancy of a place; an associated lodger or inhabitant."

Under this definition, it would easily be true that the jailer, living in a jail, would not be the "mate" or "associate" of other occupants of the place, and hence not an "inmate"; but, by the same token, it would require no stretch of language to say that a man situated as the petitioner was, with respect to the premises in question, was such an "associate," or "associated lodger," as that he would properly fall within the terms of the definition of the word as thus given by standard authority.

[3] So, also, there is ample evidence in the record, as indicated hereinabove, to sustain the finding that the petitioner was "connected" with the management of the house in question. The statute does not attempt to define the extent to which an alien must be "connected" with such management, in order that he may be placed under the ban

of the Immigration Law. Giving full meaning to the terms employed, it is sufficient if it be shown that such alien is "connected" in any degree or capacity with such management. In other words, if he assumes at all, knowingly, any of the responsibilities for the carrying on or conduct of the inhibited business, he may then be said to be "connected" with its management. That the petitioner, in assuming to dictate terms as to a sale of a half interest in the business, in endeavoring to secure a prostitute to "work" at her trade, in paying the rent of the house for a time, and in having the telephone in the house, through which much of its business was transacted, in his name, and rented by him, was thereby "connected with the management" of a house of prostitution, is amply demonstrated.

The writ of habeas corpus is discharged, and the petitioner is remanded for deportation.

UNITED STATES v. EIGHTEEN PACKAGES OF DENTAL INSTRUMENTS.

(District Court, E. D. Pennsylvania. March 30, 1915.)

No. 3072.

1. CUSTOMS DUTIES ⟸130—VIOLATION OF CUSTOMS LAWS—FORFEITURES.
Imported goods, intended for entry through the customs house in the regular way, may be the proper subject of forfeiture proceedings for an attempted fraud upon the revenue, though there has been no actual introduction of the goods into the commerce of this country through a formal entry.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 296–315; Dec. Dig. ⟸130.]

2. TREATIES ⟸2—PARCELS POST CONVENTIONS.
The authority for entering into parcels post conventions with other countries is to be found in the treaty-making power.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 2; Dec. Dig. ⟸2.]

3. TREATIES ⟸8—PARCELS POST CONVENTIONS.
Under article 12 of the parcels post convention with Germany (31 Stat. 1836), providing that the Postmaster General and the Secretary of State of the Imperial German Posts shall have authority to jointly make further regulations of order and detail necessary to carry out the convention, and may by agreement prescribe conditions for the admission in packages exchanged thereunder of articles thereby excluded from the mails, requirements made thereunder, if fairly within its scope and not destructive of the convention itself, are a part of the law of the land.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 8; Dec. Dig. ⟸8.]

4. CUSTOMS DUTIES ⟸130—VIOLATION OF CUSTOMS LAWS—FORFEITURES.
No forfeiture of imported goods for a violation of the customs laws can be declared, unless clearly imposed by the law.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 296–315; Dec. Dig. ⟸130.]

5. CUSTOMS DUTIES ⟸130—VIOLATION OF CUSTOMS LAWS—FORFEITURES.
Under the parcels post convention with Germany, providing that all parcels post packages are subject to all customs duties and regulations, that the sender must make a customs declaration, giving, among other

things, an accurate statement of the contents and value of the parcel, that customs duties properly chargeable shall be collected on delivery in accordance with the customs regulations, and that a descriptive list of all packages sent shall accompany the mail in which dispatched, giving, among other things, the declared contents and value; the provisions of the customs regulations limiting parcels to a value of $80, and requiring entry where the foreign market value exceeds that stated by more than 25 per cent., or where it exceeds $100; and the provision of the act of 1909 for a forfeiture of importations accompanied with an intent to deprive the United States of its lawful duties—parcels post packages were not subject to forfeiture, though the true value of some of them exceeded the value as given by more than 25 per cent., where none of the packages had a value exceeding $80, there was no valuation under oath, and no formal invoice or invoice of any kind other than a supposititious bill of purchase; there being no requirement for a formal entry, and it not sufficiently appearing that the goods were the proper subject of entry.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 296–315; Dec. Dig. ⟸130.]

6. CUSTOMS DUTIES ⟸63—ENTRY—VALUATION.

Under the provision of the customs regulations for a customs entry with respect to parcels post packages, where the foreign market value exceeds that stated by the sender by more than 25 per cent., or where the value exceeds $100, it is the value of the individual package, and not of the entire number of packages arriving by the same mail, that determines the necessity of an entry.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 169; Dec. Dig. ⟸63.]

Information for forfeiture by the United States against Eighteen Packages of Dental Instruments. On exceptions to the sufficiency of the libel. Exceptions sustained, and libel dismissed.

Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for the United States.

Walter Evans Hampton, of New York City, for claimant.

DICKINSON, District Judge. The issue raised is the demurrer issue. The exceptions go both to the substance and form of the libel. The latter, at least in part, is met by an amendment which the United States asked leave to file. This leave was granted, and the case heard, as we understand, as if the exceptions had been filed to the libel as amended. The attempt to compress into a single phrase the question involved in this contention, and at the same time give anything like an adequate presentation of the points on which the question turns, is fraught with some difficulty. In its broadest outlines it is the right of the United States to confiscate through forfeiture proceedings the property of the claimant. The ground of forfeiture is the charged offense of an attempt to deprive the United States of its just revenues.

The transaction out of which the controversy arises is the importation of 18 packages of dental instruments. From the viewpoint of this case there are two ways in which goods may be brought into the United States. One is the well-known customs house method, and the other the parcels post. It will perhaps contribute to clarity of view to consider the transaction from the customs house entry standpoint. The tariff laws of the United States, with the administrative

features incorporated in or accompanying them, and the various customs house regulations, the practice of the appraiser's office, and the rulings of the Board of General Appraisers, unavoidably result in such a complex system that no one not familiar with the workings of all this elaborate machinery can be sure of what would happen to an importation in a given case.

[1] It is clear, under the ruling in United States v. 25 Packages of Panama Hats, 231 U. S. 358, 34 Sup. Ct. 63, 58 L. Ed. 267, that goods which had arrived at a port in the United States, intended for entry through the customs house in the regular way, might be the proper subject of forfeiture proceedings for an attempted fraud upon the revenue, notwithstanding there had been no actual introduction of them into the commerce of this country through a formal entry. That was the case of an information for a forfeiture of an importation on the ground of fraudulent undervaluation, and was upheld under Act Aug. 5, 1909, c. 6, §§ 8, 9, 36 Stat. 96, 97, notwithstanding the absence of any formal entry. If goods arrive at a port of entry without the usual preliminary compliance with the requirements of the law and the regulations, provision would seem to be made for a declaration of value, an appraisement, and, if called for, reappraisement of the goods, the ascertainment of the proper duty, and the imposition of fines and penalties for attempted frauds on the revenue. It will be observed that in each of these cases the things done are accompanied with the formalities of the taking of required oaths and something in the nature of according his day in court to the owner of the importation before his property can be confiscated. The Lace House v. United States, 141 Fed. 869, 73 C. C. A. 103. Goods sent by parcels post stand on a different footing from customs house entries.

[2] Originally the law made no provision for dutiable articles to be brought into this country through the mails, admission to which was limited to what is ordinarily regarded as mail matter. As was to be expected, parcels containing dutiable goods were nevertheless sometimes thus sent. The ever-growing intercommunication between the peoples of other countries and our own people made it necessary to in some way extend the operations of the postal service, so as to include packages and parcels other than what is recognized as ordinary mail matter. As a means to this end conferences of representatives of the countries most concerned were held and conventions reached. The authority for entering into these conventions is to be found in the treaty-making power, and what they are by an examination of the statutes.

The first extension of mail privileges was in favor of merchandise samples having no commodities value. The development further on was into the "parcels post" conventions. Admission to the foreign mail service was given to all articles of merchandise which could be lawfully carried in the domestic mails. The convention with which we are concerned was reached August 26, 1899, and carried into the laws of the United States on September 2, 1899. It is that between the United States and the German empire. 31 Stat. p. 1830. By its terms it is confined to mail matter, the exchange of which is therein provided for, and the arrangements under the universal postal convention are expressly retained.

The general definition of what shall be admitted to the mails is unlimited, except by the reference to what is mailable under the provisions of the law regulating the domestic service and by the specific exceptions noted. By the fourth article packages are subject to all the customs duties and regulations in force. The fifth article provides that the sender of the package must make a customs declaration in the form prescribed, giving, among other things, "an accurate statement of the contents and value" of the parcel. By article 6:

"The customs duties properly chargeable * * * shall be collected on delivery, in accordance with the customs regulations."

One of the requirements of article 7 is that a descriptive list of all packages sent shall accompany the mail in which dispatched, giving, among other things, "the declared contents and value." By the eighth article, as soon as the mail has reached its destination the contents shall be checked. Such other requirements as may be found necessary to carry out the provision of the convention may be made by the Postmaster General on behalf of the United States, in accordance with article 12. The exceptions in article 2 referred to relate only to weight, size, etc., and packages not admissible under the provisions of article 2 may be admitted under the provisions of article 12. For the purposes of this case, the limitations which are above stated may be considered the only limitations imposed upon what shall be admitted to the parcels post.

[3] The requirements made under the authority of article 12, if fairly within its scope and not destructive of the convention itself, must be deemed to be part of the law of the land. It may be further observed that while all packages are subject to the payment of customs duties, and the traffic itself to the customs regulations on the subject, and the collection of the customs duties is enjoined, the convention is silent on the subject of the consequences of an infraction of the revenue laws, and is without any reference to the criminal code or punitive statutes, or for forfeiture of any right of property or confiscation of any packages thus forwarded through the parcels post mails. Whatever provisions of this character can be extracted from this convention must therefore first be read into it from the customs laws and regulations. These laws and regulations are very drastic and highly penal, as they of necessity must be.

Certain of the customs requirements have been from time to time extended to the parcels post. Customs officers are detailed for service at the post offices and meet the mails on arrival. By T. D. 21698, in 1899, such officers were required to correct the valuations when inadequate, or supply them when omitted. Forms for this purpose are provided. Article 775 of the Customs Regulations of 1908 required accurate statements of contents and valuations. Article 815 exempted goods from seizure for undervaluations unless the packages contained cigars or cigarettes. Subsequently formal entry was required in certain cases. In 1909 parcels were limited to a value of $80, and entry required where the foreign market value exceeded that stated by more than 25 per cent., or where the value exceeds $100. In 1911 this entry was required, whether the goods were dutiable or not. We have

not been able, however, to find any provision for valuations under oath or other formalities, except such as would follow where formal entry was required. The act of 1909 provides for the forfeiture of all importations accompanied with an attempt to deprive the United States of its lawful duties.

The libel declares these goods to have been sent by parcels post, and to have been seized because of such fraudulent attempt, and prays process of forfeiture. Samuel Rubin, as claimant of the property, excepts to the information or libel upon the averments of which the forfeiture is declared, and by way of demurrer advances the proposition that no justifying reason for the seizure is set forth. Under the acts of Congress preceding that of 1909 it was held that goods arriving by parcels post were not liable to seizure for undervaluations in the descriptive statement required by the Mexican convention. Board of General Appraisers, T. D. 26664, G. A. 6132. This was because of the absence of those formalities which accompanied regular customs house entries.

[4-6] The case of United States v. 99 Diamonds, 139 Fed. 961, is authority, if any is required, for the proposition that no forfeiture can be declared, unless clearly imposed by the law. The exceptions are broadly based upon this proposition, and that the drastic provisions of the act of 1909 do not apply to goods sent by parcels post. The argument proceeds upon the omission of these provisions from the postal conventions, the policy of liberal treatment of such importations evidenced by the regulations of the Treasury Department, and the ruling that the earlier acts do not so apply. Counsel for the United States, conceding there could be no forfeiture under the former acts, earnestly contend that the Panama Hats Case rules that there may be under the act of 1909. We are unable to follow this argument to the conclusion reached. In the Panama Hats Case the importation was unclaimed by the consignee. In consequence of this the shipment went into a general order warehouse. Here it was open to claim and entry by the consignee at any time within 12 months. In the absence of such claim and entry, the goods were subject to sale at auction. No such claim was made. A forfeiture, it is true, was upheld in the absence of any formal entry; but there was the element of a formal consular invoice in triplicate and a valuation under oath in accordance with the requirements of the customs regulations. What was ruled was that what was done in this case constituted the prohibited "attempt to introduce merchandise into the commerce of the United States," which the act of 1909 visited with forfeiture as a consequence; there being the added guilt of a fraud upon the revenues. Here there was no valuation under oath, no formal invoice, or invoice of any kind, other than a supposititious bill of purchase, no requirement of a formal entry, and no sufficient averment in the libel that the goods were the proper subject of entry. There is an averment that the 18 packages had a value above $100, but the proper unit is the individual package, and not the entire number of packages. None of these had a value exceeding $80. The true value of some of them, as set forth, exceeds the value as given by more than 25 per cent.; but this does not render all subject to entry, nor subject all to forfeiture.

The conclusion reached is that, although the packages might be held for payment of the duty and may be liable to such added duties as the customs regulations prescribe, no justification for a forfeiture appears by the libel.

The exceptions are therefore sustained, and the libel dismissed.

In re AMERICAN PRODUCT CO.

(District Court, E. D. Pennsylvania. April 12, 1915.)

No. 4970.

1. BANKRUPTCY ⟸345—CLAIMS—PRIORITIES—SURETIES.

Where a contractor incurred debts exceeding the amount of his surety bond, and the surety paid the amount of the bond for distribution among the creditors for whose protection it was given, and other assets of the contractor were being distributed in bankruptcy, the surety's claim against the contractor for the amount paid by it was not entitled to share in the distribution of the funds until the creditors for whose protection the bond was given were paid in full, though with all other creditors it had a right to share dividends.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⟸345.]

2. BANKRUPTCY ⟸353—CLAIMS—PRIORITIES—SURETIES.

In such case, a dividend percentage should be found by dividing the amount for distribution by the total indebtedness, and awards should be made to the general creditors on that basis, and the moneys not so awarded should then be distributed to those creditors within the protection of the surety bond until their claims were paid in full; any balance remaining to be awarded to the surety.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 541–544; Dec. Dig. ⟸353.]

In Bankruptcy. In the matter of the American Product Company, bankrupt. On petition for review of two orders of the referee. Orders revoked and modified respectively.

Frank Rogers Donahue, of Philadelphia, Pa., for Title Guaranty & Surety Co.

Walter L. Sheppard and Porter, Foulkrod & McCullagh, all of Philadelphia, Pa., for Thompson Lockhardt Co.

Robert W. Finletter, of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. In the course of the proceedings in this case a question arose which has been certified to this court for decision. It has been certified in the form of two pro forma orders made by the referee, to review which separate petitions have been filed. In legal effect, however, they involve but one general question, and will be so treated.

[1] The question springs out of this condition of facts: American Product Company entered into a municipal contract with the city of Philadelphia. Following the requirements of the city ordinances, which are in turn based upon the acts of assembly, which give coun-

cils power to so require, American Product Company gave bond in the sum of $34,395, with condition that it would pay all debts contracted for work and labor done and materials supplied in the fulfillment of the contract. Title Guaranty & Surety Company became the surety on this bond. The contractor entered upon the performance of its contract, and in so doing incurred debts exceeding the amount of the bond. Claim was made upon the surety, and suit was brought upon the bond in the state court, to which many creditors became parties by suggestions filed. As the aggregate of the claims exceeded the amount of the bond, the surety paid the full sum of its obligation into court in payment, and in this sense in discharge of its liability, and the sum thus paid was distributed through an auditor pro rata among the claimants. The contractor then went into bankruptcy, and assets came into the hands of its trustee for distribution. When the surety company became surety, it followed the usual course in such cases of taking what was in effect the indemnifying obligation of the contractor to it as surety, so that upon payment of the bond it became the creditor of the principal in the sum of $34,395. The total indebtedness of the contractor including this exceeds the sum for distribution. A very practical situation, therefore, presents itself. The amount of the dividend which each class of creditors will receive is affected by the scheme or basis of distribution adopted.

Among the questions which might arise out of the situation, the one which is presented by one of these petitions comes up in this way. Among those who were the beneficiary obligees of the surety bond is Thompson Lockhardt Company. The debt due it by the contractor was or is $5,744.33. Upon this, through the proceedings spoken of, they received a dividend of $1,636.66. They asked the referee to allow them a dividend on the full claim of $5,744.33. He, for the purpose of raising the question, entered a pro forma order disallowing the full claim and directing a credit of $1,636.66 to be made. The petition is to review this order.

The question raised by the other petition comes up in this form: The surety company, having made this payment of $34,395, presented its claim. The trustee asked that it be rejected. The referee by his order allowed it. There is also a petition to review this order. The review involves, however, the question of what is the proper principle in accordance with which distribution should be made. The logical value of an argument cannot always be determined by the test of the results of the application of its deductions to the facts of a particular case. This test nevertheless sometimes has a verification value, and in the case now before us is of utility, in that it presents the arguments supporting each side of the controversy in what may be called concrete form. Incorporating for this purpose, the essential features of the instant case in a supposititious one, we have this presentation. A corporation secures a municipal contract. It gives bond, with surety, in say the sum of $30,000, for the payment of all debts contracted in the fulfillment of its contract. When the time of payment arrives, the contractor owes $60,000, and has assets of its own of $30,000, to which the surety adds $30,000 in payment of his

bond, which is applied to the debts, reducing them to a balance of $30,000. The fund for distribution is then $30,000; the debts are $60,000, including the $30,000 due the surety. A decree of distribution in accordance with the argument of the petitioners would allow them payment of their claims in full. The argument of the surety would call for a dividend of $15,000 to the creditors on $30,000, the balance due them, and a like amount to the surety.

We may have the aid of further light in our search for the correct principle of distribution by varying somewhat the analogue we are pursuing. If the debt due the surety be viewed as the loan of $30,000 to the contractor, and applied by it to the payment of its debts, we would have presented the case of assets of $30,000, a debt of $30,000 due the contractors, and a like debt of $30,000 for money loaned. This situation would seem to clearly call for a pro rata distribution. If, however, we suppose a surety bond, and the surety not to have made payment, but to have postponed meeting the obligation of its bond until after the creditors had exhausted the assets of the principal, then the condition would have been this: A fund for distribution of $30,000, with $60,000 due the creditors; a dividend of 50 per cent. paid them; and a claim in their hands of $30,000 against the surety on the bond. This brings into clear light two thoughts. One is that the equities of the bond creditor are affected by the contractual obligation into which it has entered. The other is that its equities may be affected by the fact of whether it made payment of its obligation before or after the application of the assets of the principal to the discharge of the debts for which it was surety.

This brings us to the special facts of this case. The contract of the principal was that all labor and material claims for work done and materials supplied to the work would be paid in full. The surety agreed to be responsible for this undertaking. The only limitation imposed by the surety was that in no event should its money liability exceed $34,395. Within that limitation, therefore, its liability for the payment of this class of debts became absolute. As between it and the creditors, for whose claims up to this amount it was responsible, it is within the equitable principle that, where two parties are claimants upon a common fund, one of whom is liable for the debt of the other, he cannot, as against that part of the debt of the other for which he is responsible, share in the fund. The surety here paid the amount of its bond to these creditors. In consequence, it cannot be called upon by them to pay more. Such payment, however, does not give it the right to receive back as against them any part of what it has so paid.

We have treated the case as if there were no other claimants upon the fund other than the creditors to whom the surety was under bond. With all other creditors the surety has the right to share dividends. With those to whom it is liable it has no right to share up to the limit of its liability. As presented by the one petition, these creditors are content to share in the fund on the basis of the amount of their original claims. In so doing they are within their rights. As presented by the other petition, the creditors invoke the principle that as

against them the surety company, which is surety to them, cannot lay claim to the assets of the principal until those for whose claims the surety company is surety have been paid in full.

[2] So seems the case to stand on general principles. It only remains to inquire whether the Bankruptcy Law in any way modifies these rights. It is sufficient to observe that we do not find that it does, except under conditions which do not exist here, and no such claim is made by counsel. It follows that the pro forma orders made by the referee should each be revoked, and this is accordingly done. If the record is in shape for final disposition of all matters pending before the referee, a decree for this purpose may be submitted by counsel. If no such decree is asked for within five days, the report is referred back to the referee, the cause to be proceeded with in accordance with this opinion. In such event, the principles of distribution which are to be followed are, for the convenience of the referee, recapitulated as follows:

1. The debts of the bankrupt are to be ascertained and classified. One class is to be made up of such debts as are within the protection of the surety bond; the other, of all other debts, or such divisions thereof, necessity for the separate statement of which may arise.

2. The surety company is entitled to share with all creditors of the bankrupt, but not to the prejudice of the beneficiary obligees of the bond on which it was surety.

3. The labor and material supply creditors, to the amount of their claims within the protection of the surety bond, are entitled to payment in full of the respective sums due them before the surety company is entitled to receive any share in the assets of the bankrupt.

4. As a practical method of working out these equities, a dividend percentage may be found by dividing the total indebtedness of the principal into the amount for distribution, and awards made to general creditors on this basis. The moneys not so awarded are to be distributed to those creditors who are within the protection of the surety bond for the part of the debts due them which is so protected, until they shall have received payment of such part of their claims in full. The balance for distribution, if any, is to be awarded to the surety company. This may necessitate the formal proof of the surety's claim, and the order with respect to this is modified to this extent.

GEDDES et al. v. ANACONDA COPPER MINING CO. et al.

(District Court, D. Montana. May 1, 1915.)

No. 1086.

1. CORPORATIONS ⟸519—PROPERTY—SALES—ADEQUACY OF PRICE—EVIDENCE.
In a suit by minority stockholders of a mining corporation to set aside a sale of the company's property to another corporation in exchange for stock of the other corporation, some of the directors being common to both corporations, evidence *held* not to show that an adequate price was obtained for the property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2085, 2088–2089, 2091, 2093; Dec. Dig. ⟸519.]

2. MINES AND MINERALS ⊂=105—MINING CORPORATIONS—POWERS—SALE OF PROPERTY.

Where a mining corporation was dormant or had been unprofitable for a long period, and its property could be worked only after a great expense, the directors cannot be compelled to borrow the money to resume operations and to explore further for ore, but the corporation has a common-law power to sell its property without unanimous consent of its stockholders.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. ⊂=105.]

3. CORPORATIONS ⊂=318—ACTS OF DIRECTORS—GOOD FAITH—BURDEN OF PROOF.

The rule that, where there is a conflict of interest in the discharge of a fiduciary duty, the transaction, if not void, may be impeached by the beneficiary, and will be closely scrutinized by the courts, and set aside if the trustee does not establish its fairness, applies to a sale of its property by one corporation to another, where some of the directors are common to both corporations, though the common directors do not constitute a majority of either number.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1363, 1364; Dec. Dig. ⊂=318.]

4. CORPORATIONS ⊂=377—PROPERTY—CONVEYANCES—EXCHANGE FOR CORPORATE STOCK.

A corporation cannot, without unanimous consent of its stockholders, exchange its property for stock in another corporation, unless a disposition thereof was immediately necessary, and a cash purchaser could not be obtained, or a substantially larger sum could be realized from the exchange than from a sale.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1531–1534; Dec. Dig. ⊂=377.]

5. CORPORATIONS ⊂=318—SALE OF STOCK—SUIT TO SET ASIDE—RELIEF AWARDED.

Where the evidence does not show that a sale of property of a corporation, which could sell its property without unanimous consent of its stockholders, but which was made to another corporation who had common directors, was for a greater price than could have been obtained in open sale, the sale will not be unconditionally set aside; but a public resale will be ordered, the property to be struck off to the highest bidder, if thereby a greater amount is realized—otherwise, the former sale to remain undisturbed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1363, 1364; Dec. Dig. ⊂=318.]

In Equity. Suit by Peter Geddes and others against the Anaconda Copper Mining Company and others to set aside a sale of property of a corporation. Decree rendered, directing a public sale of the property on condition that a greater price be received than was received at the former sale.

Walsh, Nolan & Scallon, of Helena, Mont., for plaintiffs.

C. F. Kelley and L. O. Evans, both of Butte, Mont., W. B. Rodgers, of Anaconda, Mont., and D'Gay Stivers, of Butte, Mont., for defendants.

BOURQUIN, District Judge. This is a suit by minority stockholders of the Alice Company to avoid an executed sale of all Alice property to the Anaconda Company (both defendant corporations) for stock

of the latter. It will suffice to say the grounds alleged are that the Anaconda is of a copper combine in unreasonable restraint of interstate trade, and that to serve its purposes therein it secured control of Alice, and against plaintiffs' dissent accomplished said sale for an improper and inadequate consideration. The answer is of denials and justification, sufficiently hereinafter appearing. Disposition of said stock was enjoined pending suit. 197 Fed. 860.

The court refrains from determining the issue involving the Sherman Anti-Trust Act, because unnecessary, in that all the relief warranted is otherwise awarded. Furthermore, in Wilder v. Refining Co., 236 U. S. 165, 35 Sup. Ct. 398, 59 L. Ed. ——, decided by the Supreme Court February 23, 1915, it is emphasized that for familiar reasons the act is not available, in attack at least, save as in it provided, viz., at the suit of the government to dissolve and enjoin and punish conduct by it made unlawful, and at the suit of private parties injured by its violation to recover the treble damages it awards. This general language is beyond the necessities of the decision and will not conclude the court in a case like this at bar. Shawnee Compress Co. v. Anderson, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865, indicates that in a proper case minority stockholders may enjoin and undo corporate acts ultra vires, because of violation of the Sherman Act. Act July 2, 1890, c. 647, 26 Stat. 209. For though said case involved a contract not fully executed and though the basis of the decision is somewhat vague, it must rest upon the Sherman Act to whatever extent interstate commerce was involved, in that in respect thereto the said act monopolizes the field. And see Boyd v. Railway Co. (D. C.) 220 Fed. 180.

[1] Coming direct to the issues upon which this decision is based, the court finds that the price paid for the Alice property was substantially inadequate, and because thereof, of the methods of sale, of the nature of the consideration and its intended disposition, and of the dissent of Alice minority stockholders (plaintiffs), the court concludes that plaintiffs are entitled to relief.

[2] At the time of sale Alice was dormant. Its long-time specific operations for silver had finally failed, and it was in debt, its plant destroyed, its mines closed and flooded, an expense, and unprofitable for some 17 years next prior to the sale. Alice was ripe for dissolution and distribution of its assets to stockholders. Although it had large bodies of unworkable zinc-silver ores, and much virgin ground, under such circumstances no rule of law obligates a corporation to borrow, if possible, necessarily large sums of money to pay debts and expenses, or to enable it to rehabilitate its mines and experiment and explore, however desirous minority stockholders might be to assume the risk; for that is matter of judgment, in which the majority control. By reason of the circumstances there was common-law power, coextensive with any possibly given by statutes or articles, without unanimous consent to sell all Alice property. This property consisted of about 140 acres of fairly compact mining ground, embracing three-quarters of a mile of the Rainbow, the great lode that first made Butte famous for silver. Its many claims contained other lodes and unexplored ter-

ritory. Its known silver ores were exhausted, but it has large bodies of zinc-silver ores, the discovery of a process to reduce which was not hopeless at the time of sale, nor now. Though the Rainbow lode is without the copper section of the Butte district, and is not known to contain copper ores of value, from a trace to above 1 per cent of copper had been found in some indefinite places and extent in Alice.

Defendants' experts testify that in Alice copper is a remote possibility; plaintiffs', that it is a geological probability. The former are of opinion the price paid for Alice—30,000 shares of Anaconda, of a market value of $1,500,000, and assumption and payment of all Alice obligations and debts, indefinite in amount—was fair and liberal to Alice; the latter, that Alice was worth at least $3,000,000, and one of them, Walter Harvey Weed, declares he would have advised against sale because of "unearned increment" from development and discoveries tending in Alice's direction, and that at $5,000,000 to bring to the producing stage Alice "is a very good gamble." John D. Ryan testifies the price for Alice was arbitrarily fixed—"it had to be; it could not be otherwise"—and Weed inclines to the view that mining values are arbitrary. Ryan further testifies that "on a gamble" in 1906, having purchased control of Alice at the rate of $600,000 for the whole, from the standpoint of Alice he believes the sale to Anaconda for $1,500,000 was a "very good trade and a very good profit," and that since Anaconda's resources and not too distant workings would enable it to more cheaply explore Alice at depth in the "speculative hope" of finding something, from the standpoint of Anaconda it was a justifiable purchase, and Anaconda "could well afford to take the gamble involved." (Of course, when Ryan bought control of Alice, its quotations immediately rose. One of plaintiffs contributed 11,000 shares of Alice to the Ryan purchase and immediately purchased more at a much higher price.)

It would serve little to detail the facts, circumstances, and reasoning by which the parties arrive at their widely different conclusions, for the fact remains that upon the gamble, inspired by possibilities or probabilities, hopes or expectations, Anaconda paid for Alice an arbitrary price of $1,500,000 plus. If there is any reason to believe this was the limit, that an open field would not have produced a purchaser more optimistic and less conservative than Anaconda, and who would have paid more, it is not apparent.

It is clear there is no market value for such properties. Their price is arbitrary. It is not alone the value in sight, but also all that hopes of valuable discoveries or ability to resell to the speculative public will inspire some one to pay; and this often involves more in the nature of the personal equation than accurate knowledge or scientific attainment. Anaconda paid a large price, but in view of the extent and history of Alice and of the district—the latter's tendency to confound experts by unexpected discoveries supporting the prospector's dictum, that "ore is where you find it"—the price was not so large that it can be said it is clear there was no reasonable prospect of a larger price. Anaconda could *afford* to pay more than any other, but the question is: ***Did*** it pay more than any other *would* have paid? And in view of the

common directors of vendor and vendee the minority stockholders were entitled to have this question answered by the acid test of a public sale in open market, whereat Anaconda might have purchased if the highest bidder. An arbitrary price is prima facie unreasonable, and when assailed as unfair under circumstances like those involved, who defends it as reasonable must prove it.

[3] Because of common directors the learned judge who granted the injunction held the burden was on defendants to clearly demonstrate the sale was fair, and the case was tried on that theory. This burden has not been sustained. It is not clear the price paid was substantially adequate, and so the court finds it was not.

It is impossible to reconcile the cases upon the law of common directors. See Cook, Corporations, § 658 et seq.; Thompson, Corporations, §§ 1242, 1243; Thomas v. Railway Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018; Leavenworth v. Railway Co., 134 U. S. 689, 10 Sup. Ct. 708, 33 L. Ed. 1064. The rule is a good one, and general, that wherever fiduciary relations exist and in discharge of duty there is conflict of interest, if the transaction is not void, as it often is, it is open to impeachment by the beneficiary, will be closely scrutinized by the court, and if the trustee does not make manifest its fairness it may be set aside or other relief granted. Corporate transactions like this at bar ought to be subject to this rule. That the common directors were not a majority of either board is a difference in degree, but not in principle. They may have dominated the board. In both cases is divided duty, conflicting interest, possible impaired judgment of unknown effect, difficulty of proof, and danger to stockholders. In either case inadequacy of price is unfairness, and condemns without further inquiry in an attempt to determine whether due to corruption or honest, but mistaken, judgment unconsciously swayed by adverse interest. There is no safety otherwise.

The sale was incident to a consolidation of Butte copper properties, and to all intents and purposes was by Butte-Coalition to Amalgamated, by reason of interlock and control in the relations of eight or nine corporations involved. Ryan was vice president and director of Butte-Coalition, and president and director of Amalgamated, and he was president and director of Alice, and director of Anaconda. B. B. Thayer was director of Butte-Coalition, and he was president and director of Anaconda. Not a majority of any board, the power and influence of Ryan and Thayer are obvious. It is fair to say, however, that though their private interest was not inquired into, and though their future lay with the quick, and not with the dead, of these corporations, there is nothing to inspire belief that they aimed at aught but fair bargaining, or that they designed injury to Alice and consciously abused their trust. Prejudice to Alice would be betrayal of Butte-Coalition, organized by Ryan, and of his associates and friends. Ryan knew less of Alice than was known to its stockholders from inspection and reports. He had not seen its flooded depths, but to one of plaintiffs they were familiar.

Some 2,000 feet from any Alice territory, and in part within veins that may penetrate it, there was Anaconda incipient development of ore

chutes and production of copper, locally encouraging and known to Ryan, but of little consequence in relation to Alice value and sale. Alice was idle when Ryan purchased control and at cost transferred it to Butte-Coalition, and it so continued, but from no purpose but reluctance to then take the hazard of its financing and operation. It was more or less continuously worked in a small way by lessees, and was open to examination and experiment upon its zinc-silver ores by any one. Therein was earlier failure of costly efforts, and during Butte-Coalition's control of Alice there were two extensive investigations by large zinc operators, both of whom reported adversely thereon. The magnitude of the price paid for Alice does not warrant suspicion; otherwise, the larger the price the greater the suspicion, neither logic nor law. However, common directors and inadequacy of price invoke the rule aforesaid.

[4] Additional ground for relief is that the transaction was not a sale, but a swap. One year thereafter proceedings were instituted to dissolve and distribute the stock to Alice stockholders. Now, Alice had not capacity to acquire corporate stock, save under exceptional circumstances—that disposition of its property was of urgent and immediate necessity, and that no cash purchaser was available, or that by trade a substantially larger sum could be realized, or the like—absent here. It is of the contract between corporations and their stockholders that any sale of all corporate property to distribute proceeds to stockholders shall be for money, the ultimate measure of value. A stockholder is not bound to accept anything but money for his equitable share of corporate property, nor bound to permit a sale to be made for other chattels or goods to be distributed. Although Alice directors personally contemplated sometime dissolution of Alice and distribution of the Anaconda stock, not finding expression in contemporaneous board action, it did not deprive the taking of the stock of the quality of a permanent investment.

In respect to this latter ground for relief the cases are likewise in conflict, perhaps more in relation to the nature of than to the right to relief. See Cook, Corporations, § 671. The instant case in principle resembles Mason v. Pewabic Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524. The difference between them is also of degree only. For a proposed sale of all property of a corporation in process of dissolution by the majority to a new corporation by them organized, and for its stock to be distributed to the former's stockholders, is substantially like an executed like sale for like consideration and purposes by a majority of a corporation contemplating dissolution to another corporation in which they are interested, so far as the rights of minority stockholders are concerned. The rule of the Pewabic Case is that any stockholder can insist that any sale of all corporate property upon dissolution shall be to the highest bidder for cash, and not to a corporation in which the majority are interested and for its stock at prices fixed by them. It will be remembered that Butte-Coalition controlled Alice and was heavily interested in Anaconda by reason of a trade of its own mining property—that is, the Red Metal property—to Anaconda for 500,000 shares of Anaconda stock.

[5] In the matter of relief to be granted, it appears plaintiffs own 12,560 shares of Alice, of 400,000 shares outstanding. At the time of sale Butte-Coalition owned about 234,000 said shares. The sale was ratified by 289,590 shares, and opposed by 5,500. The answer alleges that since this suit commenced Alice stockholders anxious to receive their proceeds of the sale were accommodated by Amalgamated exchanging Anaconda stock for Alice stock upon the basis of the sale, to the extent of 353,446 Alice shares, and which includes that of Butte-Coalition, but no proof was made thereof. In any event, at least 34,000 shares of Alice are owned by others than the parties hereto and Amalgamated. A court of equity will model relief so that all parties in interest, whether before the court or not, will be protected.

As before stated, the majority could lawfully sell Alice. The minority's right was a fair sale for money, to the end that each thereof received in money the value of his equity in Alice property. Their present right is to sufficient relief to still accomplish that end. The sale is not to be unconditionally set aside, however; for, unless the property can be sold for more, the interests of all the parties hereto, and of those stockholders who neither appeared nor complained, require it shall not be disturbed. The method of the Pewabic Case will be followed as near as may be. The value of the Anaconda stock paid for Alice was $1,500,000. Some $300,000 dividends thereon have since been paid. What was the amount of debts and obligations of Alice assumed by Anaconda does not appear. The decree will provide that a resale will be made, and provided, when made, if no bid greater than the total proceeds to Alice as above be made, and provided thereupon defendants pay to plaintiffs and all those entitled thereto the money value of their equity in the proceeds of the sale heretofore made—that is, their proportionate share of the market value of the Anaconda stock at the time of the sale and of the dividends thereon—no resale will be made, and the sale involved will be undisturbed. Thereby defendants will gain no advantage, plaintiffs will suffer no loss, and all Alice stockholders will receive their just dues.

Further proof will be received, and orders made to enable the decree to be executed.

In re FOX.

(District Court, E. D. New York. April 10, 1915.)

BANKRUPTCY ⊂=380—OFFER OF COMPOSITION—PROCEEDINGS.

The purpose of Bankr. Act, July 1, 1898, c. 541, §§ 12, 58, 30 Stat. 549, 561, as amended by Act June 25, 1910, c. 412, §§ 5, 9½, 36 Stat. 839, 841 (Comp. St. 1913, §§ 9596, 9642), providing that a bankrupt may offer, either before or after adjudication, terms of composition, after, but not before, he has been examined, and that in compositions before adjudication the bankrupt shall file the required schedules, and the court shall call a meeting of creditors for the allowance of claims and examination of the bankrupt, and declaring that creditors shall have at least 10 days' notice of hearings on applications for confirmation of compositions, meetings of creditors, etc., is to shorten the time necessary in cases of honest composition, and do away with the necessity of waiting for adjudication,

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

first meeting, and subsequent notice of the meeting to prove claims, and of offer of composition, and an offer may be presented at the first meeting of creditors and the examination of the bankrupt, provided that notice that the offer will be made and considered is given to the creditors who may wish to prove their claims or participate in the election of a trustee, and their rights are not affected, unless they wish to oppose the composition and make sure that their claims are presented and allowed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 577; Dec. Dig. ⚖380.]

In Bankruptcy. In the matter of William Fox, bankrupt. Proceedings for approval of composition. Offer of composition rejected.

Harold Remington, of New York City, for objecting creditors.

Virgil Guernsey, of Jamaica, N. Y., and Lesser Bros., of New York City, for other creditors.

Blau, Zalkin & Cohen, of New York City (Maurice P. Davidson, of New York City, of counsel), for bankrupt.

CHATFIELD, District Judge. The alleged bankrupt conducted a shoe store and made an assignment for the benefit of creditors, which was followed in a very short time by an involuntary petition in bankruptcy. The assignee has remained in possession of the bankrupt's property, and, apparently without specific authority of this court, has allowed the bankrupt to proceed with the conduct of his business, upon the assumption that a composition was to be offered and that the creditors, generally, were in favor thereof.

The record shows that the bankrupt's property at all times was sufficient to pay 30 or 35 per cent. of his debts, if not more than that amount, and even after the lapse of time which has been consumed by these proceedings, there would seem to be sufficient stock to produce an amount equal to that which the creditors would receive under the composition, if the composition were paid in full.

The offer of composition was 10 per cent. cash and 15 per cent. in notes, these notes to be indorsed by a member of the bankrupt's family, who seems to have no great amount of property which would furnish security to the creditors, although he seems to be abundantly able to assist the bankrupt in carrying out the composition, if he and the bankrupt continue in their desire to do so.

It appears that about the time the petition was filed a meeting of creditors, some of whom had been in consultation prior thereto, discussed the offer of the bankrupt to pay 25 cents on the dollar and agreed thereto. As it subsequently turned out, the creditors making this agreement comprised a majority both in number and amount, even though some of the claims might be attacked or their amount reduced.

The creditors who did approve of the composition signed a written acceptance of the proposed offer. Subsequently adjudication was had, and the bankrupt filed his schedules and arranged for a first meeting of creditors. In connection with this first meeting, the referee in bankruptcy sent out a notice to the effect that a meeting would be held on

the 15th of December, 1914, to consider an offer of composition made by the said bankrupt of 25 per cent., for the examination of the bankrupt, filing of claims, etc.

At this meeting of creditors opportunity for the election of trustee and examination of the bankrupt was given, and thereafter the formal offer of composition was presented to the creditors, on behalf of the bankrupt, and their opinion thereof noted by the referee, who reported to the court that a majority in number and amount favored the composition, and also reported the claims proven.

The bankrupt thereafter deposited the 10 per cent. in cash and the incomplete notes (the date being left to be filled in when determined), and after proper advertising and notice to all creditors a hearing for confirmation was had. At this hearing objections were made and specifications filed by certain creditors, who comprised a considerable proportion both in numbers and amount of the merchandise creditors of the estate, and who are entitled to careful consideration of their objections, because of the nature of the difference of opinion which has arisen. The specifications of objection, 14 in number, were referred for hearing, and the special commissioner has reported that 4 of them should be sustained as sufficient to overthrow the composition offer.

We can disregard the specifications of objection not sustained by the commissioner, which include failure to keep books, concealment of property, and the giving of false testimony in certain particulars.

The last 2 of the 4, which he sustains, charge that the offer of composition was not properly made under the bankruptcy statute, and could not be considered for the reason that the bankrupt did not wait until the first meeting of creditors, and after examination in open court had been completed, to present his offer of composition and to send out a 10 days' notice of a meeting to consider that offer.

Argument upon this point has been made at considerable length, but a consideration of the statute simplifies the matter. The law as originally passed provided, in section 12:

(a) "A bankrupt may offer * * * terms of composition to his creditors after, but not before, he has been examined in open court, or at a meeting of his creditors, and has filed" schedules, etc. "(b) An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration," etc., deposited. "(c) A date and place," etc., "for the hearing upon each application to confirm shall be fixed. (d) The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors," etc.

The law provided that claims could be proven within one year, and by section 58 creditors were to have 10 days' notice (1) of all examinations; (2) of all hearings upon applications for the confirmation of compositions; (3) of all meetings of creditors, it being evident that the year within which claims could be proven could not be shortened for the "purpose of considering a composition," without giving notice to those creditors who might wish to file their claims and vote upon the question of composition.

The Supreme Court provided by form 60 for a notice to be given by the bankrupt, reciting the fact that a composition had been offered,

and praying for a meeting of creditors to act upon the proposition for a composition.

It is evident that the real purpose of this meeting of creditors was to give opportunity for the creditors to put themselves in a position to be recorded for or against the composition, and to prove their claims, in case question was raised as to those claims as scheduled. The ordinary procedure would be the presentation of the offer of composition at the regular first meeting of creditors, and then the sending out of a further notice for a meeting to take up the offer of composition. After the report thereon, with the allowance of claims, form 61 would be used by the bankrupt, to show that he had complied with the statute, and to ask the court to proceed under the provisions of section 12 (c) above stated.

It soon became evident, in administering the Bankruptcy Law, that the delay required for the return of the subpœna and the entry of an order of adjudication, the filing of schedules, and the calling of a first meeting, when followed by 10 days' notice of hearing to consider the offer of composition, and then with 10 days' further notice of the confirmation, created unnecessary delay and expense, in cases where no prolonged investigation or litigation was necessary.

Relief was had in two ways: (1) By the amendment of the act, which will be stated subsequently; and (2) by giving notice to the creditors in advance that the bankrupt would present an offer of composition as soon as he was entitled to under the law, thus notifying them that, if they wished to have the standing of creditors whose claims had been proven before the offer of composition was considered, they should present their claims or see that their claims were admitted by the bankrupt at the proper amount before the offer of composition was considered.

There is nothing in the statute requiring notice of the offer of composition as such, nor is there anything which would prevent any creditor from approving or consenting to an offer of composition at any time, whether before or after it has been presented to the court. There is nothing in the law which would require any meeting of creditors to consider the composition offer, until it comes up for confirmation, except that, as has been said, the creditors are entitled to an opportunity (after 10 days' notice of the proposed compromise) to present their claims, and inasmuch as the certificate of the referee (that the bankrupt has not been guilty of any acts or failure to perform duties such that he would not be entitled to a discharge) is necessary, it would appear that at least 10 days' notice of the time when the referee proposed to make this certificate, in which to fix the status of the claims that might be voted upon the composition, should be had.

The other change came by Act June 25, 1910, which provides that section 12, subd. (a), of the Bankruptcy Law should be amended to read as follows:

The "bankrupt may offer either before or after adjudication terms of composition to his creditors, after, but not before, he has been examined," etc. "In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates," etc.

It will be seen that the amendment to the first part of the statute was accomplished by the forcible interjection of the words "either before or after adjudication," without reference to their effect upon the balance of the sentence. Whatever effect was accomplished must therefore have been intended. The idea of Congress in providing that a bankrupt can offer a composition before adjudication, but after he has been examined in open court, and that upon filing schedules and suggesting a composition the court shall call a meeting for such examination, shows rather clearly that the words "after but not before he has been examined in open court" (while not repealed) were made to mean that the bankrupt might advance the time of examination and thereafter might present at once the offer of composition. Thus the purpose of Congress was plainly to shorten the time necessary in cases of honest composition, and to do away with the necessity of waiting for adjudication, first meeting, and subsequent notice of the meeting to prove claims and of the offer of composition. Such being the purpose of the amendment, it would be unwise for the court to so interpret the law that a composition offer *after* adjudication must suffer an unnecessary burden. The argument of the objecting creditors, that all safeguards suggested by the statute, and all possibility of investigation and examination, should be extended rather than cut down, does not persuade the court that unnecessary delay should be caused. On the other hand, all saving of time is desirable, unless objection is made by some one, or unless suspicion is aroused by the circumstances of the cases, and then all necessary time for investigation should be granted, in the cases where investigation is needed, rather than in those where it is not.

For these reasons, it cannot be held that the first specifications upon which the commissioner has based his recommendation that the composition be disapproved are well founded. The offer of the bankrupt and the approval of certain creditors were matters which, unless the approval was withdrawn, could be presented as soon as the first meeting and the examination of the bankrupt had been completed. Notice that the offer would be made and considered, and that those who might wish to prove their claims and be sure of their position, or participate in the election of a trustee, could attend, was sufficient to protect them in their rights, and, as a matter of fact, their rights would not be affected unless they wished to oppose the composition and to make sure that their claims were presented and allowed.

It is not necessary to go into the merits of the other grounds stated by the commissioner. They are findings of fact, and there is testimony tending to support the findings, and they will be confirmed. He has found that false testimony was given, and that the offer is not to the advantage of the creditors. The offer apparently contemplates payment of 10 per cent. in cash within 30 days after the confirmation of composition. If this could have been carried out, and if the business has been kept open in the meantime, the evidence showing that the property on hand would more than equal the amount to be paid creditors under the composition, makes it plain that the composition is not to the best interests of the creditors unless the payment offered be made substantially in cash.

The commissioner has reported that, if a cash offer of 25 per cent. be made, he would consider the amount sufficient to justify a finding that the composition was for the best interests of the creditors. The bankrupt should make a new offer of composition, and remove the objections raised by the special commissioner after a deposit of the total amount in cash, if he is so advised.

The recommendation will be confirmed, and the present offer of composition rejected.

AMERICAN SURETY CO. OF NEW YORK v. CONWAY et al.

(District Court, D. New Jersey. April 24, 1915.)

1. FRAUDULENT CONVEYANCES ⟸265—REMEDIES OF CREDITORS—PLEADING—ISSUES.

A prayer in a creditors' bill to set aside a conveyance by the debtor as fraudulent, which asks that defendants, or some of them, shall pay the amount due on the judgment, is serviceable only when predicated on proper allegation that the defendants sought to be reached have obtained some pecuniary benefit from the land fraudulently conveyed, and is not applicable to defendants expressly omitted from the parts of the bill charging the receipt of pecuniary benefit, especially where the bill further shows that such defendants had no other connection with the alleged fraud than that of serving as conduits through which the legal title to the land passed to the present holders.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 760, 761; Dec. Dig. ⟸265.]

2. FRAUDULENT CONVEYANCES ⟸235—ACCOUNTING—PARTIES.

In a creditors' bill to set aside a conveyance by the debtor to a defendant, who conveyed to codefendants, who reconveyed to defendant, and for an accounting for rents and profits, an accounting cannot be had against codefendants, unless the conveyance by the debtor to defendant is set aside as fraudulent, and defendant and codefendants are necessary parties.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. ⟸235.]

3. FRAUDULENT CONVEYANCES ⟸256—REMEDIES OF CREDITORS—NECESSARY PARTIES.

In a creditors' suit to set aside a conveyance by the debtor, since deceased, the administrator of the deceased debtor, and the present holder of the legal title are necessary parties.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 751, 752; Dec. Dig. ⟸256.]

4. REMOVAL OF CAUSES ⟸48—SEPARABLE CONTROVERSY.

A judgment creditor's suit to set aside a conveyance by the debtor, since deceased, as fraudulent, brought in a state court against the administrator of the debtor, the present holder of the legal title (both of whom are residents in the district where suit is brought), and third persons obtaining a conveyance from the debtor's grantee and reconveying to the grantee, and for an accounting of rents and profits, does not present a separable controversy between the third persons, residing in another state, and the plaintiff, and the nonresidents are not entitled to have the cause removed to a federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 93, 94; Dec. Dig. ⟸48.]

In Equity. Suit by the American Surety Company of New York against William F. Conway and others. On motion to remand to state court. Granted.

Pitney, Hardin & Skinner, of Newark, N. J., for complainant.
McCarter & English, of Newark, N. J., for removing defendants.

RELLSTAB, District Judge. The complainant, a resident of the state of New York, claiming to be a judgment creditor of the estate of James Conway, deceased, on behalf of itself and other creditors of said James Conway similarly situated, filed its bill in the New Jersey Court of Chancery for the purpose of having certain conveyances of land by the said James Conway declared to be in fraud of such creditors. The defendants who removed the cause into this court, viz., Edward B. Reiley and Bessie A. Reiley (his wife), and John F. McGrath and Frances A. McGrath (his wife), reside in the state of Connecticut. The remaining defendants reside in the state of New Jersey.

The bill charges, in substance, and so far as pertinent to the questions presented on this motion, that the said James Conway conveyed six of the twelve therein described tracts of land to his son, William F. Conway; that said William F. Conway conveyed three of such tracts to Edward B. Reiley and the remaining three to John F. McGrath, who respectively, each joined by his wife, reconveyed the same to him; that such six tracts with others (also alleged to be affected by such fraud), were afterwards conveyed by said William F. Conway to Isabelle E. McGrath, who thereafter became the wife of the said William F. Conway; and that all said conveyances were in fraud of complainant's rights as a creditor, and to place such lands beyond the reach of the ordinary process of law. The bill also alleges that said James Conway died possessed of "no real estate the legal title to which stood in" his name; that letters of administration upon his estate were issued to his daugher, Mary L. Conway Mason; that the said James Conway, during his life, and his heirs since his death, have possessed and received the rents, issues, and profits of said lands "as fully to all intents and purposes as if said pretended conveyances had never been made"; and that complainant had applied to the relatives (by blood and marriage) of said James Conway to pay it his said indebtedness, but that they had refused to do so. The bill prays, in addition to the usual prayers for process, answer, discovery, a sale of the lands for the benefit of complainant, and general relief, that it may be decreed that the said Isabelle E. McGrath Conway hold such tracts of land—

"in trust for the heirs of the said James Conway, subject to the lien of the indebtedness of the said James Conway to your orator, and that the heirs of the said James Conway (William F. Conway, Mary L. Conway Mason, and Helen D. Conway Kelly, son and daughters) are the beneficial owners of said real estate, and that your orator's said lien by reason of the indebtedness of the said James Conway, now deceased, to your orator, may be established as against said lands and premises, and that the said defendants, or some one of them, may be decreed to pay to your orator the full amount due and owing to it on the said judgment, with interest and costs thereon."

The ground of removal is that there exists—

"in the cause a separable controversy between the complainant and the four defendants residents of Connecticut, to which said controversy the remaining defendants were not necessary parties, and which can be wholly determined without their presence."

[1, 2] The bill does not allege that the defendants who removed the cause were asked to pay the complainant's judgment, nor that they at any time possessed any of said lands, nor that they received any of the profits derived therefrom. With regard to such possession and profits, the allegations of the bill are, as noted, that others than they had such possession and enjoyed such profits, and it is the defendants other than those residing in Connecticut who it is specifically prayed shall render an accounting and pay over such rents and profits. Except for that part of the prayer, viz., "that the said defendants, or some one of them, may be decreed to pay to your orator the full amount due and owing to it on the said judgment," there would not be the slightest basis for the claim that as between such defendants and the complainant there is a separable controversy, etc. Such a prayer, while often used in creditors' bills, is serviceable only when predicated upon the proper allegation that the defendants sought to be reached thereby have obtained some pecuniary benefit from the lands fraudulently conveyed. So construed, it is not applicable to the Connecticut defendants, because, as already stated, they are expressly omitted from the parts of the bill which charge the receipt of pecuniary benefit by reason of such fraudulent conveyances, and from the specific prayer founded on such allegation. Furthermore, there are no allegations in the bill from which it might be gathered that such defendants had any other connection with the alleged fraud than having served as conduits, through which the legal title to such lands found its way mediately to the present holder thereof.

[3, 4] Assuming that, under the prayer for other and further equitable relief, an accounting may be had against such defendants for rents and profits obtained during the period they held the legal title, with or without any amendment of the bill of complaint, no such accounting can be decreed unless the challenged conveyances preceding theirs to the said William F. Conway are decreed to be in fraud of creditors. To the issues thus raised Mary L. Conway Mason, administratrix of the estate of the said James Conway, deceased, at least, is a necessary party, inasmuch as it is the alleged fraudulent conduct of said deceased that is the primary question that must be investigated. Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 610, 13 Sup. Ct. 691, 37 L. Ed. 577; Fuller v. Montague, 59 Fed. 212, 214, 8 C. C. A. 100, and cases cited. See, also, Walker v. Powers, 104 U. S. 245, 251, 26 L. Ed. 729; and Beswick v. Dorris (C. C.) 174 Fed. 502, 508. As the present holder of the legal title to the lands in question is a necessary party in the main suit (Wilder v. Virginia, T. & C. Steel & Iron Co. [C. C.] 46 Fed. 676; Terhune v. Sibbald, 55 N. J. Eq. 236, 37 Atl. 454), so is William F. Conway a necessary party to the alleged controversy between the complainant and the Connecticut defendants, if the same ends with their conveyances to him, for he is not only the immediate

grantor to such defendants, but their immediate grantee, and in the latter connection he bears the same relation to such controversy as does the present holder of the legal title of the lands in question to the main suit. If, however, such controversy, viz., an accounting from the Connecticut defendants, is but incidental to—an outgrowth of—the main case or principal dispute, it is indivisible therefrom. Corbin v. Van Brunt, 105 U. S. 576, 26 L. Ed. 1176; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528. Such controversy, therefore, however regarded, whether as a branch of the main case, or as one to which some of the defendants, residents of this state, are necessary parties, is not one wholly between such Connecticut defendants and the complainant, capable of being fully determined between them, and is therefore not removable into this court. Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514; Merchants' Cotton Press, etc., Co. v. Insurance Co., 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; Hanrick v. Hanrick, 153 U. S. 192, 196, 14 Sup. Ct. 835, 38 L. Ed. 685; Fishblatt v. Atlantic City (C. C.) 174 Fed. 196; Regis v. United Drug Co. (C. C.) 180 Fed. 201, and cases cited.

Barney v. Latham, though the main reliance of the defendants in their contention that this is a separable and removable controversy, is really a controlling authority for the contrary view. In that case the removable controversy was one to which there were no necessary parties other than the plaintiffs and the defendants who sought to remove the cause, all of which defendants were citizens of a state different from that wherein the suit was brought and different from the state of which the plaintiffs were citizens. In the present suit, as noted, all the necessary defendants to the alleged separable controversy are not so situated.

As, in my judgment, the controversy which thus emerges from the bill of complaint, and which may be said to be separable from the main suit, is one that cannot be removed into this court, because the presence of defendants resident in New Jersey is necessary to its determination, it is unnecessary to decide the other question raised, namely, whether, even if the controversy were as contended by the removing defendants, it could be removed into this court, because the plaintiff as well as such removing defendants are not residents of this district.

For different interpretations of the phrase "proper district," as applied to the removal of causes from state to United States courts, see St. John v. Taintor (D. C.) 220 Fed. 457, and cases cited.

The motion to remand is granted.

GOODMAN MFG. CO. v. PITTSBURG-BUFFALO CO.

(District Court, W. D. Pennsylvania. April 3, 1915.)

No. 10.

RECEIVERS ⊂=107—APPOINTMENT—POWERS.

Where a United States District Court, appointing three persons as receivers of a corporation, permitted a mortgagee of the corporation to bring suits to protect its rights, and the mortgagee brought suit in a state court, and two of the receivers filed an answer, admitting the more material averments of the bill, while the third receiver alleged that the mortgage was ultra vires and invalid as against creditors, the court would not restrain the third receiver from prosecuting in good faith an appeal from a decree of the state court adjudging the mortgage a valid lien, for one receiver need not yield his judgment to, or be governed in his actions by, coreceivers.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 157; Dec. Dig. ⊂=107.]

In Equity. Suit by the Goodman Manufacturing Company against the Pittsburg-Buffalo Company, in which receivers of defendant were appointed. On petition of the Union Trust Company of Pittsburgh for an order restraining a receiver from taking an appeal from a decree in equity of the court of common pleas of Allegheny county. Denied.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., for petitioner.

McIlvain & Murphy and S. S. Robertson, all of Pittsburgh, Pa., for receiver.

THOMSON, District Judge. This is a petition of the Union Trust Company of Pittsburgh for an order restraining a receiver appointed by this court from taking an appeal from a decree in equity entered in the court of common pleas of Allegheny county, Pa. The facts necessary for the determination of the question involved are as follows:

The Pittsburg-Buffalo Company executed to the Union Trust Company of Pittsburgh, the petitioner, two mortgages—a first mortgage to the trust company as trustee, dated August 25, 1909, to secure an issue of the first mortgage bonds, aggregating in principal amount $2,500,000, and a second mortgage, dated April 29, 1910, to the said trust company, mortgagee, to secure a like indebtedness of $2,500,000. The said Pittsburg-Buffalo Company having become financially embarrassed, F. R. Babcock, John W. Ailes, and John H. Jones were, at the above number and term, appointed by this court receivers of the property and assets of said company. The mortgagor having made default in the aforesaid mortgages, afterwards, on August 1, 1914, the Union Trust Company, on petition, was granted leave by this court to commence and prosecute such suit or suits as it might be advised to be necessary for the purpose of protecting and enforcing its rights under the said second mortgage, dated April 29, 1910, and was authorized, if it deemed the same necessary for the protection of its right, to make the Pittsburg-Buffalo Company and the said receivers parties defendant. Under the authority so granted and for the purposes aforesaid, the said Union Trust Company, mortgagee, filed a bill in equity in

the court of common pleas of Allegheny county, Pa., against the said Pittsburg-Buffalo Company, the aforesaid receivers of said company, the United States Sewer Pipe Company and the Pittsburgh Title & Trust Company, Trustee. To this bill an answer was filed by F. R. Babcock and John W. Ailes, two of the receivers, and a separate answer was filed by John H. Jones, the other receiver. The answer of Messrs. Babcock and Ailes admitted the more material averments of the bill, averring certain matters for further answer not important to specify here. The answer of the said John H. Jones, receiver, alleged, among other things, that the said mortgage in suit, dated April 29, 1910, was an ultra vires contract and invalid as against the creditors of the Pittsburg-Buffalo Company for certain reasons therein set forth. The cause went to trial on the issues raised; the court finding the said mortgage valid and a lien upon the properties covered thereby, and further finding that the principal debt of $1,750,000, secured by the mortgage, was owing, due, and payable. To the court's findings of fact and conclusions of law the said John H. Jones, as receiver, filed exceptions, all of which, save one, were, after hearing, dismissed by the court. None of the other parties defendant excepting to the action of the court, a final decree in harmony with the court's findings was entered on March 23, 1915.

The petitioner, having set forth in detail the foregoing facts, the issue raised by the bill and answers, and the court's findings of fact and conclusions of law, bases its prayer for a restraining order on the following averments: That substantially the only matter at issue in the foreclosure proceedings was as to whether the said second mortgage was an ultra vires contract; that the determination of this matter depended upon facts averred by petitioner in its bill of complaint, admitted by two of the receivers, not denied by the Pittsburg-Buffalo Company, and admitted by the said John H. Jones in his testimony, and with respect to which the court has made clear and convincing findings, to which the said Jones has filed exceptions so improper in form that they could not be the basis for valid specifications of error to the Supreme Court of Pennsylvania; that these exceptions have been dismissed by the court; that an appeal to the Supreme Court upon the errors assigned, if error could be properly assigned upon the exceptions taken, would virtually be matters of fact found by the court upon ample evidence and admitted by all parties, except the said John H. Jones; that the appeal which the said John H. Jones threatens to take from the said decree will not be taken in good faith and in the discharge of his duties as an officer of this court, but, as petitioner believes and charges, will be taken for the purpose of delay and of harassing petitioner in the collection of a debt which has been adjudicated to be due and payable in foreclosure proceedings authorized to be instituted by this court; that the questions involved therein are altogether frivolous and without merit, and will subserve the personal interests and purposes of the said John H. Jones, and would be contrary to the interest of the trust held by the court and in the administration of which the said Jones is an agent and officer of this court. The prayer of the petitioner is that this court make an order enjoin-

ing the said Jones, as receiver of the Pittsburg-Buffalo Company, from taking an appeal to the Supreme Court of Pennsylvania, from the decree of the court of common pleas entered as aforesaid, or from otherwise delaying or interfering with the sale of the properties of the said Pittsburg-Buffalo Company in accordance with the said decree.

The answer to said petition alleges that petitioner had submitted his cause to the courts of Pennsylvania for determination, with such right to appeal as is allowed by the laws of that state, and that no prayer was made to this court, nor any order made by it, that it should be restricted to an adjudication in the lower courts; nor was the right reserved to this court to review the adjudication of the court of common pleas. Respondent further averred that the said court of common pleas erred in its findings of fact and conclusions of law, and that because of such errors the decree was erroneous, and that respondent was advised by counsel learned in the law and verily believes that, upon consideration of the said decree by the Supreme Court of Pennsylvania, the decree will be reversed, and a decree entered dismissing the bill of complaint. He denies that any material delay will be caused by such appeal, and avers his willingness to co-operate with petitioner in having the cause advanced in the Supreme Court and heard at Philadelphia. He further avers that under his appointment by this court he is clothed with authority to administer the affairs of the estate intrusted to his care and to defend the rights of those in whose place he stands; that he is required as such officer to act according to his best judgment and good conscience, and is not permitted to surrender the rights of those for whom he acts because others may differ with him in opinion. The respondent asks that, in order that this important matter may receive full consideration by this court, he may be permitted to perfect his appeal to the Supreme Court of Pennsylvania, so as to operate as a supersedeas, as petitioner would have as ample remedy by injunction to restrain proceedings on the appeal as on the present application, while respondent would be remediless, unless he should incur the risk of a contempt of this court, and his cestuis que trustent would suffer irreparable injury, if an appeal should not be taken to the Supreme Court of Pennsylvania.

A question of procedure, and the power and duty of the court in the premises, is thus raised on petition and answer, which is important and fundamental. It is, of course, true that a receiver is an officer of the court. He derives his existence from an order which the court may vacate, or he may be held to his trust and compelled to exercise it properly. But his individuality is not lost, his conscience fettered, nor his judgment surrendered, when he accepts a receivership. On the other hand, he is presumably chosen because the court believes he will execute the trust reposed in him with wisdom, diligence, and fidelity; nor does it follow that he should necessarily yield his judgment to, or be governed in his actions by, his coreceivers, who may constitute a majority. The majority is not always right, and in the end he must answer for himself on all questions of fidelity in the execution of the trust. There appears to be nothing in the case which would justify the court in concluding that the receiver in question is acting in bad faith.

What, then, is the power and duty of the court under the facts as presented? The petitioner chose its own forum, and thus submitted its cause to the court of common pleas for final adjudication under the laws of the state. If Mr. Jones, one of the receivers, who was made a party defendant, believed that there was a valid legal defense to the action, it was not only his right, but his duty, to interpose it. The proceedings being adversary, he did not need the consent of the court for this purpose. The right to make defense inhered in his office. If this be true, at what point did his powers and duties in that regard cease? If he had a right to defend and urge upon the court the justice of his defense, he has also the right to call in question the judgment of the court, if he believes it to be wrong; in other words, the right to except and appeal. On what principle can the plaintiff claim a right superior to other litigants and insist that in this case the judgment of the lower court should be final, and that, because the one who interposes what the plaintiff regards as an adequate defense happens to be an officer of this court, we should pass upon the case and prevent further defense? I think such an exercise of power by this court, if such power exists at all, would be extremely arbitrary and seriously interfere with the orderly administration of the law.

In Felton v. Ackerman, 61 Fed. 225, 9 C. C. A. 457, the right of a receiver to appeal from the judgment of the court appointing was recognized. Judge Taft in discussing this right, said:

"While it is true that the receiver is an arm of the court in the administration of the property, yet where persons intervene to obtain relief against him, because they cannot obtain full relief in any other forum, the issue raised by his answer to the petition makes the proceeding an adversary one, in which the receiver represents the interests of the owners of the property of which he is temporarily in charge. If, as such representative, he feels aggrieved by an order of the court made in an adversary proceeding of this character, it is difficult to see why he should not be permitted to have the order of the court reviewed by the appellate tribunal to which any other litigant may resort. Certainly, the owners of the property, if aggrieved by the order against the receiver, might appeal, and there would seem to be no justice in preventing the temporary custodian of their property from doing so. * * * But where the appeal is in the interest of the property, and therefore is in the interest of all who shall thereafter be shown to have any right to the property, it is quite convenient and proper that the receiver should be allowed to conduct the appellate proceeding. * * * He is the receiver of the federal court; and, while it is true that this is an adversary proceeding, as already stated, he does not lose his character as an officer of the court, with all the consequences as to directness of remedy against him which this relation makes necessary. Section 2 of the act of August 13, 1888, defining the jurisdiction of the Circuit Courts of the United States, provides that whenever, in any cause pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner, that the owner or possessor thereof would be bound to do, if in possession thereof."

If a receiver may question by an appeal the legality of a judgment rendered by the court which appointed him, and to which alone he is legally answerable, how much more certainly would he have the right to appeal from the judgment of a court to which he is in no way answerable? As a general proposition, the courts have no power to grant

injunctions to stay proceedings in a state court. Section 720 of the Revised Statutes of the United States provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

See Haines v. Carpenter, 91 U. S. 254, 23 L. Ed. 345.

In Wilson v. Lambert, 168 U. S. 611, 18 Sup. Ct. 217, 42 L. Ed. 599, the court said:

"There can be no reason or propriety in appealing to a court of equity to restrain proceedings that are being conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding. To allow litigations to be thus diverted tends to the multiplication of litigation, and the production of unnecessary delay and expense—to say nothing of the unnecessary vexation to parties."

As we would not undertake to enjoin the action of the common pleas court, we ought not to enjoin the parties before that court, and thus seek to do by indirection what we could not do directly. It was said in Riggs v. Johnson County, 6 Wall. 166, 18 L. Ed. 768:

"It is a doctrine of law, too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. * * * The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

The plaintiff having chosen its forum in which to prosecute its action, that court having full and complete jurisdiction of the case, and defense having been made therein, presumably in good faith, I can see no reason why this court should interfere with the orderly course of procedure in that tribunal. Without passing on the justice of the plaintiff's case, it is sufficient to say that, if the defense interposed is without merit, in due course the plaintiff will obtain a final decree in its favor. The prayer of the petition must therefore be denied.

SMOLIK v. PHILADELPHIA & READING COAL & IRON CO.

TOBIAS v. SAME.

(District Court, S. D. New York. April 21, 1915.)

CORPORATIONS ⟸665—FOREIGN CORPORATIONS—ACTIONS—SERVICE OF PROCESS.

General Corporation Law N. Y. (Consol. Laws, c. 23) § 16, provides that, before granting a certificate to do business in the state to a foreign corporation, the secretary of state shall require every such corporation to file a statement designating a person upon whom process against the corpora-

tion may be served. Code Civ. Proc. N. Y. § 432, provides that personal service of the summons upon a foreign corporation must be made by delivering a copy thereof within the state to a person designated as provided in section 16 of the General Corporation Law. Section 1780, Code Civ. Proc., provides that an action against a foreign corporation may be maintained by a resident of the state for any cause of action. *Held* that jurisdiction was acquired by a New York state court or a federal court sitting in New York by personal service of the summons within the state upon the person designated, though the cause of action sued on did not arise out of the business done by the corporation in New York.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2571, 2573, 2595–2600; Dec. Dig. ⊜665.]

At Law. Two actions, by Anthony Smolik, and by Stanley Tobias, an infant, by Wladyslaw Tiburski, his guardian ad litem, against the Philadelphia & Reading Coal & Iron Company. On motion in each action to set aside the service of process. Motions denied.

In each of these cases the defendant moves to set aside the service of process upon an agent designated by it to accept service, as provided in section 16 of the General Corporation Law of the state of New York, and in section 432 of the New York Code of Civil Procedure. In one case the action was brought in the state court, and the defendant, appearing specially for the purpose of setting aside the service, removed it to this court. The other was originally brought in this court, and the motion is made upon a special appearance only for this purpose. The ground of each motion is that the defendant is a Pennsylvania mining corporation, doing business, but having no part of its mines, in this state, and that the action arises from personal injuries suffered by the plaintiff in Pennsylvania while an employé of the defendant in its mines there situated.

Section 16 of the General Corporation Law of New York requires every corporation doing business in that state to take out a license, without which it cannot sue or defend in any action of contract, and is subject to other penalties. One condition of procuring such a license is the appointment of an agent within the state upon whom all process may be served. Such an agent the defendant did appoint, and service was made upon him as stated at the outset.

Pierre M. Brown, of New York City, for the motions.
Roderic Wellman, of New York City, for Tobias.
Martin T. Manton, of New York City, for Smolik.

LEARNED HAND, District Judge (after stating the facts as above). In Simon v. Southern Railway, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. ——, the Supreme Court decided that a court of Louisiana had not acquired jurisdiction under the following facts: The defendant was a railroad company organized in another state, having none of its railroad in Louisiana, but doing some business there. The statutes of Louisiana directed all foreign corporations doing business in the state to appoint an agent on whom process should be served, and provided that, if the corporation failed to make an appointment, service might be made upon the secretary of state. The defendant not having appointed any such agent, Simon served his process on the assistant secretary of state in an action arising upon the tort of the defendant committed within the state of Alabama. The ground of the decision was that the implied consent of the corporation arising from its doing

business within Louisiana must be limited to actions arising out of the business done within the state. The same rule was laid down in Old Wayne Life Association v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345; the action there being in Pennsylvania upon a life insurance contract executed in Indiana by an Indiana corporation.

In Simon v. Southern Railway, supra, the court especially reserved from the decision a case, such as those at bar, where a foreign corporation has complied with the state statute and appointed an agent upon whom process may be served. Such a case at first blush presents an apparent contradiction. Since 1839 (Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274) it has been the doctrine of the Supreme Court that a foreign corporation was a fictitious entity, which had no existence outside of the territory of the sovereign which created it. All its acts elsewhere must be viewed as those of an absent principal, acting through an authorized agent. It resulted that personal jurisdiction could arise only when some agent had been appointed who was expressly authorized to appear or to accept service for the absent principal. St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222. Otherwise, the foreign state must proceed in rem against the property of the corporation, or in personam against agents within its borders. In 1855 (Lafayette Insurance Co. v. French, 18 How. 404, 15 L. Ed. 451), the court modified the extreme application of this doctrine by holding that, when a corporation did business within a foreign state which required as a prerequisite the appointment of an agent, consent to such an appointment must be assumed from the doing of the business, and that jurisdiction in personam would be acquired, just as if there had been in fact an appointment. St. Clair v. Cox, supra.

The defendant here argues that the terms of such an implied consent cannot be supposed to be other than those which the state statute attempts to exact, and that if the implied consent is to be limited, as has now been indubitably done, the express consent must be limited in exactly the same way. Were this not true, the defendant urges, an outlaw who refused to obey the laws of the state would be in better position than a corporation which chooses to conform. The theory of implied consent dialectically requires the same limitations to be imposed upon express consents, at least in the absence of some explicit language to the contrary in the state statute.

The plaintiffs, on the other hand, urge that the express consent of a foreign corporation to the service of process upon its agent (section 16, General Corporation Law; section 432, Code of Civil Procedure) must be interpreted in the light of the statutes of the state, giving jurisdiction to its own courts, and that in the cases at bar residents of New York may, under the New York Code, section 1780, sue foreign corporations upon any cause of action whatever. While, of course, the jurisdiction of this court over the subject-matter of suits depends altogether upon federal statutes, the question now is of personal jurisdiction, and that depends upon the interpretation of the consent actually given, an interpretation determined altogether by the intent of the state statutes. That intent being determined, there is no constitutional objection to a state's exacting a consent from foreign corporations to any

jurisdiction which it may please, as a condition of doing business. Intent and power uniting in the sections in question, how is it possible to confine the provision to actions arising from business done within the state?

These two arguments, treated as mere bits of dialectic, lead to opposite results, each by unquestionable deduction, so far as I can see. One must be vicious, and the vice arises I think from confounding a legal fiction with a statement of fact. When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.

The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it has been limited in Simon v. Southern Railway, supra, and Old Wayne Insurance Co. v. McDonough, supra. The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and, where that meaning calls for wide application, such must be given. There is no reason that I can see for imposing any limitation upon the effect of section 1780 of the New York Code, and as a result I find that the consents covered such actions as these. This does not, of course, touch the question of the jurisdiction of this court over the subject-matter in either case.

Motions denied.

Ex parte ISOJOKI.

(District Court, N. D. California, First Division. April 6, 1915.)

No. 15786.

1. ALIENS ⇐46—EXCLUSION—OFFENSES AGAINST IMMIGRATION LAWS—"MISDEMEANOR INVOLVING MORAL TURPITUDE."

A woman having sexual intercourse with a man in her native foreign country and with another man on a vessel en route to another foreign country, and living with a man as his wife in a state while both were unmarried, is not guilty of a "misdemeanor involving moral turpitude," within Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (Comp. St. 1913, § 4244), excluding aliens who admit having committed a "misdemeanor involving moral turpitude," in the absence of evidence of any law violated by her in the foreign country, or of evidence bringing the vessel within the admiralty and maritime jurisdiction, essential to give jurisdiction over the offense denounced by Cr. Code (Act 1909, March 4, c. 321) § 318, 35 Stat. 1149 (Comp. St. 1913, § 10491), punishing any unmarried man or woman committing fornication, if the provision may be

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

transferred to the admiralty and maritime jurisdiction, and where, under the laws of the state where the cohabitation was maintained, she was not guilty of adultery.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. ⟸46.]

2. HABEAS CORPUS ⟸23—IMMIGRATION—FINDINGS OF IMMIGRATION AUTHORITIES—JUDICIAL REVIEW.

A finding that an alien in custody of immigration authorities for deportation is likely to become a public charge, rendered by the executive officers after a hearing provided for by the statute, will not be disturbed on habeas corpus, and the court can only determine whether the alien was afforded a proper hearing.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. ⟸23.]

Application of R. Frank for a writ of habeas corpus for and on behalf of Tina Isojoki, also known as Tina Ihrmark, for the discharge of the latter, in custody of officers for deportation. Demurrer to petition sustained.

E. Lyders and Catlin, Catlin & Friedman, all of San Francisco, Cal., for petitioner.

John W. Preston and Walter E. Hettman, both of San Francisco, Cal., for respondent.

DOOLING, District Judge. Petitioner, a Swedish woman, 25 years of age and unmarried, having been denied the right to enter this country upon returning thereto from a vaudeville venture in Australia, and being held in custody for deportation by the immigration authorities, has applied to this court to be discharged upon habeas corpus.

The exclusion of petitioner is based upon two grounds: (1) That she has admitted the commission of a misdemeanor involving moral turpitude; and (2) that she is a person likely to become a public charge.

[1] The matter was heard upon demurrer to the petition, from which and the accompanying record it appears: That petitioner came to this country from Sweden in February, 1910, and remained here until October, 1913. That during this period she worked for a year and a half as a domestic servant, and then took up the teaching of swimming and giving exhibitions as a professional swimmer, in which occupations she was engaged until her departure for Australia in 1913. During a portion of this period she lived with one Carl Ihrmark as his wife, both she and Ihrmark being unmarried. She also admits having had sexual intercourse with one Carl Eklund in Sweden, and with one Arthur Troutt on the Ventura en route to Australia. These are "the misdemeanors involving moral turpitude" upon which petitioner was denied the right to land.

In passing upon this phase of the case it may be well to note at the outset that as to these lapses from virtue, not amounting to prostitution, the petitioner stands exactly in the same position before the court as would a man who was similarly charged. If an unmarried man, guilty of like offenses against the moral law, could not be excluded because of such offenses, then this woman cannot be excluded because

of them. If an unmarried man could not be held under the circumstances to have committed a "misdemeanor involving moral turpitude," then neither can this woman be held to have committed such misdemeanor. For the law makes no distinction here between the man and the woman, but applies to both equally, though such sexual lapses are ordinarily condoned on the part of the former and condemned on the part of the latter. Petitioner then may not be excluded on this ground, unless her paramour, if an alien, could be excluded under the same circumstances.

Section 2 of the Immigration Act provides, in so far as its provisions are applicable here:

"That the following classes of aliens shall be excluded from admission into the United States: * * * Persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude * * * prostitutes, or women or girls, coming into the United States for the purpose of prostitution or for any other immoral purpose."

It is not claimed or found that petitioner is a prostitute, or that she is coming into the United States for the purpose of prostitution, or any other immoral purpose; but she is excluded because in the judgment of the immigration officers her lapses from virtue constituted a "misdemeanor involving moral turpitude." What law of Sweden she violated by having intercourse with Eklund is not pointed out, and if the Swedish law is the same as ours, and in the absence of proof to the contrary this must be presumed, she was guilty of no crime or misdemeanor, whether involving moral turpitude or otherwise.

Counsel for the government cites section 269a of the Penal Code of California as covering her relations with Ihrmark in this state. This section is as follows:

"Every person who lives in a state of cohabitation and adultery is guilty of a misdemeanor. * * *"

But this section cannot possibly be violated by two unmarried persons, because one of its elements is adultery, and adultery is the sexual intercourse of two persons, either of whom is married to a third. So far as the relations of petitioner with Eklund in Sweden and Ihrmark in California are concerned, they did not constitute a "crime or misdemeanor" within the meaning of the Immigration Act. As to the single act of sexual intercourse with Troutt on the Ventura en route to Australia, counsel cites section 318 of the Criminal Code, which declares:

"If any unmarried man or woman commits fornication, each shall be punished," as therein provided.

But that section is found in a chapter headed "Certain Offenses in the Territories," and cannot be transferred by the court to the chapter defining the offenses within the admiralty and maritime jurisdiction of the United States. Nor, indeed, does it anywhere appear that the steamship Ventura is a vessel belonging in whole or in part to the United States or a citizen thereof, or to a corporation created by or under the laws of the United States or of a state, territory, or District thereof, which fact would be essential to give jurisdiction over the of-

fense denounced by section 318, if by any chance it could be transferred to the admiralty and maritime jurisdiction.

I am therefore of the opinion that that portion of the excluding decision which declares that petitioner has admitted the commission of a misdemeanor involving moral turpitude finds no support in the record, and, if this were the only ground of exclusion, the demurrer would be overruled.

[2] But it is also found that petitioner is a person likely to become a public charge. While this finding might not be one that the court would make if the question were still an open one, the rule in such cases is stated by the Circuit Court of Appeals of this circuit in the following terms:

"In the present case the executive officers found that the aliens were persons likely to become a public charge. This is a ground of exclusion provided for by law. In reaching this conclusion the officers gave the aliens the hearing provided for by the statute. This is as far as the court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusion reached by the officers. As said by the Supreme Court in [Chin Yow v. United States] 208 U. S. 8 [28 Sup. Ct. 201, 52 L. Ed. 369]: 'Unless and until it is proved to the satisfaction of the judge that a hearing, properly so called, was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong.'" White v. Gregory, 213 Fed. 768, 130 C. C. A. 282.

The hearing as to the latter ground of exclusion was not unfair, and for this reason it is ordered that the demurrer to the petition be sustained.

UNITED STATES v. YEE FING.

(District Court, D. Montana. April 3, 1915.)

No. 2554.

1. CONSTITUTIONAL LAW ⊂=266 — POISONS ⊂=2 — PRESUMPTIONS — STATUTORY PROVISIONS—DUE PROCESS OF LAW.

Act Feb. 9, 1909, c. 100, 35 Stat. 614 (Comp. St. 1913, §§ 8800, 8801), prohibiting the importation of opium after April 1, 1909, except that opium for medicinal purposes, and other than smoking opium can be imported under regulations, and providing that on a trial for unlawful importation of, or knowingly receiving, such opium, the possession thereof shall be deemed sufficient evidence to authorize a conviction, unless the defendant shall explain such possession to the satisfaction of the jury, and Act Jan. 17, 1914, c. 9, 38 Stat. 276, providing that all smoking opium found within the United States shall be presumed to have been imported after April 1, 1909, and that the burden of proof shall be on the claimant or the accused to rebut such presumption, are not invalid, as they merely provide for presumptions or prima facie proof sufficient to sustain a verdict for guilty, but which the jury need not accept as sufficient to satisfy them of accused's guilt beyond a reasonable doubt, and such presumptions do not deny due process of law, provided there is a rational connection between the facts proved and the facts therefrom inferred, and provided the party affected is free to oppose them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 756; Dec. Dig. ⊂=266; Poisons, Cent. Dig. § 1; Dec. Dig. ⊂=2.]

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2. CRIMINAL LAW ⊂=304—EVIDENCE—JUDICIAL NOTICE.
The court takes judicial notice that opium is not commercially a domestic product.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700–717, 2951½; Dec. Dig. ⊂=304.]

Yee Fing was convicted of an offense, and he moves for a new trial. Motion denied.

B. K. Wheeler, U. S. Atty., of Butte, Mont., and H. G. Murphy, Asst. U. S. Atty., of Helena, Mont.

John W. Stanton, of Great Falls, Mont., for defendant.

BOURQUIN, District Judge. This is a motion for a new trial. Defendant was charged with unlawful importation of smoking opium and with having knowingly received the same. The prosecution introduced evidence that November 21, 1914, in Anaconda, defendant, an aged Chinese garden and laundry laborer of many years' local residence, was taken with 2¾ pounds of smoking opium in his possession. Defendant testified that, about that time at night in an alley near Chinatown in Butte, upon an unknown white man's solicitation he purchased the opium, paying therefor $100. Thereupon, upon the prosecution's unopposed motion, the first charge was dismissed and upon the second charge was a verdict of guilty.

[1] Defendant's contention is that the evidence apart from statutory presumptions is insufficient to sustain the verdict, and that said presumptions should be rejected as unconstitutional in that their application deprives defendant of liberty and property without due process of law.

The statute of February 9, 1909, prohibits importation of opium after April 1, 1909, save that opium for medicinal purposes and other than smoking opium can be imported under regulations. Unlawful importation and knowingly receiving such opium are offenses and incur forfeiture and punishment, and upon trial therefor possession of such opium "shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." 35 Stat. 614. The statute of January 17, 1914, provides that on and after July 1, 1913, all smoking opium "found within the United States shall be presumed to have been imported after the first day of April, 1909, and the burden of proof shall be on the claimant or the accused to rebut such presumption." 38 Stat. 276.

These statutes provide for presumptions or prima facie proof of the offense, which, while sufficient to sustain a verdict of guilty, may or may not be sufficient to satisfy the jury of the guilt of the accused beyond a reasonable doubt. They are but what are commonly styled rules of evidence and not substantive law creating offenses, and do not deprive the jury of its function of weighing evidence and determining facts. Though the accused presents no evidence, the circumstances inevitably appearing in the prosecution's evidence may often be such that the jury will and should refuse to draw the inferences

these statutes authorize, but do not and probably could not command, in that it is not satisfied they should be drawn—not convinced that the accused is guilty beyond a reasonable doubt. Like presumptions are familiar to common and statutory law in England and this country, in the former prior to emigration of our ancestry and now. So too, to civil law. They dictate the burden of evidence as public policy may require. Conforming to ancient procedure, when not prohibited by Constitutions legislative bodies have power to create them, and in their application is "due process of law," provided there is rational connection between the facts proved and the facts therefrom inferred, that the inferences are not so unreasonable as to be mere arbitrary mandates, and that the party affected is free to oppose them. See Luria v. U. S., 231 U. S. 25, 34 Sup. Ct. 10, 58 L. Ed. 101, and cases cited. For other cases, see State v. Potello, 40 Utah, 56, 119 Pac. 1027.

The presumptions here involved, though beyond any in revenue laws or elsewhere brought to the attention of the court, appear to come within the limits of legislative power. Doubtless they go far to prevent possession, use, and intrastate traffic in opium, which are subject only to state police power; but this is only incidental to regulation of foreign commerce over which Congress has exclusive authority.

[2] The court takes judicial notice that opium is not commercially a domestic product. Perverted to evil uses, it is in general an outlaw. Its presence in this country, apart from statutes, is practically a conclusive presumption of importation. Presence and possession in the accused invoke the statutory presumption that he imported it or received it after importation. And since its importation is unlawful these six years, in view of its nature the statutory presumption that it was imported within said period and to the knowledge of any receiving it is not unreasonable to the extent hereinbefore indicated. This is not presumption upon presumption, for the inferences are created by legislative power and are not inferences of fact from inferred fact by the jury's unaided reason.

It is true, as urged, that the opium may have been imported before made unlawful, or it may have been grown in this country, or it may have been imported under regulations and here converted into smoking opium, or accused may have received it not knowing it was of unlawful importation, in either of which events no offense would have been committed. That is, possession and the statutory presumptions are not absolute proof of the facts constituting guilt. But absolute proof is never required, these suppositions are remote probabilities or negative, and in view thereof and of the nature of the thing the burden to make them or any of them so far appear that upon the whole case the jury entertains a reasonable doubt of accused's guilt as charged, under settled law in familiar and like cases may be by statute imposed upon accused. He who with safety would receive opium must have in mind these statutory presumptions of which he is charged with knowledge, and must so far ascertain its history and arm himself with evidence that he can sustain this burden. In this case, when defendant made the purchase he knew the opium was imported since April 1, 1909, and so, unlawfully, as that was the statutory presumption of

which he was charged with knowledge and which he was bound to assume until he was otherwise advised.

It is not as urged by way of analogy a case of an article of only beneficial use and produced at home as well as from abroad, wherein like presumptions might be held unreasonable and their application not "due process of law." It is a case of an article under the ban of the law save in exceptional instances.

The motion is denied.

Ex parte GREAVES (two cases).

(District Court, N. D. California, First Division. April 14, 1915.)

Nos. 15762 and 15763.

1. HABEAS CORPUS ⊂=92—DEPORTATION OF ALIENS—REVIEW OF PROCEEDINGS.
In a proceeding to deport an alien, the credibility of the witnesses is solely a question for the immigration authorities, as other questions of fact, and the only question for the court on habeas corpus is whether the immigration officers have exceeded their authority.
[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96; Dec. Dig. ⊂=92.]

2. ALIENS ⊂=53—DEPORTATION—GROUNDS.
Aliens, permitted to enter the United States without inspection because of their misstatements to the immigration authorities as to their citizenship, are subject to deportation, whether such misstatements are fraudulently or mistakenly made.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⊂=53.]

3. HABEAS CORPUS ⊂=23 — DEPORTATION OF ALIENS — REVIEW OF PROCEEDINGS.
The propriety of the policy of deporting aliens who have long resided in the United States, because they obtain entry into the country upon their return after an absence abroad by misrepresenting that they are citizens, is a matter into which the court may not inquire on habeas corpus, as the court cannot interfere with the executive department of the government with respect to questions of policy.
[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. ⊂=23.]

4. ALIENS ⊂=46—DEPORTATION—REVIEW OF PROCEEDINGS ON HABEAS CORPUS.
Aliens unlawfully entering the United States without inspection by misrepresenting that they were citizens, and therefore subject to deportation, could not complain on habeas corpus that the immigration officers were led to a rigid enforcement of the law against them because of acts subsequent to their admission not rendering them subject to deportation.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. ⊂=46.]

Applications for writs of habeas corpus by Rebecca Greaves and by Phyllis Seymour Greaves. On demurrer to the petition in each proceeding. Demurrers sustained.

Denson & Denson and Catlin & Catlin, all of San Francisco, Cal., for petitioners.

John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. Two separate petitions for writs of habeas corpus having been presented to the court, the government demurs to each of them. As they present the same questions, they will be considered together.

The petitioners, Rebecca I. Greaves and Phyllis S. Greaves, are mother and daughter. The mother is now over 50 years of age and the daughter in the early 20's. The former was born in England, the latter in Canada, and neither is a citizen of the United States. In April, 1913, they arrived at New York in the Mauretania from Liverpool, and were landed without inspection, because of the statement made by the mother that she was a citizen of the United States. This statement was based upon the fact that her deceased husband had declared his intention to become a citizen, although never having completed his naturalization. Whether this statement was made for the purpose of deceiving the immigration officers, or because Mrs. Greaves was honestly mistaken in the belief that she was a citizen, is a question much discussed, but absolutely immaterial. There is testimony in the record that she told Richardson, one of the witnesses, "that when she came to this country on different occasions she always stated she was a citizen of the United States for the sake of convenience, not to be bothered much by the immigration authorities, and that the trick always worked."

[1] The arguments addressed to the court as to the credibility of Richardson are misdirected, as that question is one solely for the immigration department, as is also every question of fact passed upon by them. The law is quite plain and very well settled. The question to be determined here is not, What would the court do if the matter were presented to it in the first instance? The sole question is, Have the immigration officers exceeded their authority?

[2, 3] Under the Immigration Law (Act Feb. 20, 1907, c. 1134, 34 Stat. 898) all aliens arriving in this country are to undergo investigation as to their right to land. From such investigation citizens of this country are free. If an alien lands without such investigation, because of misleading statements as to his citizenship, he is subject to deportation. Nothing in the law is better settled than this. Indeed, any other construction would, as stated by the court in Williams v. U. S., 186 Fed. 479, 108 C. C. A. 457, "render the Immigration Act abortive."

As to the policy of deporting the petitioners here, in view of their long previous residence in this country, this is a matter into which the court is not at liberty to inquire. It might seem to the court that the rational thing to do would be to investigate now their right to land as aliens, and to permit them to remain, if such right were established. But the court has no power to direct the method by which the executive officers shall administer the law. The enforcement of the immigration laws is committed to the Department of Labor, and the deportation of petitioners, because, being aliens, they entered the country without the preinvestigation which the law requires, is well within the power of the Department. The court is no more authorized to interfere with the executive department, or to question its policy, when

acting within the authority conferred upon it, than such department is authorized to interfere with the court. The power of the court is limited to the inquiry, "Is the action of the executive within the law?" If it is, the remedy for any supposed hardship resulting therefrom is by application to the executive to be relieved from such hardship, and not by appeal to the court to prevent the enforcement of the law.

In the present case much is said concerning the unfairness of the hearings. But this complaint goes only to collateral matters, as the real fact which is the basis of the order of deportation is not in dispute. This basic fact is the entrance into this country of the aliens without the inspection which the law requires. This was brought about by their claim to be citizens, and, whether this claim was fraudulently or mistakenly made, the result was the same. It secured their admission without examination, and rendered their entry unlawful.

There is much in the record showing the relations existing between petitioners and one B. N. Northrup, a married man upon the complaint of whose wife these proceedings were inaugurated. There is nothing in these relations which would render petitioners subject to deportation, if their entry into the country had been lawful. It may be, however, that these relations have led the immigration officers to a rigid enforcement of the law against petitioners; but, if so, they are not in a position to complain. In this regard I do not wish to be understood as imputing to the petitioners, or either of them, any conduct which they themselves do not admit. This subject is touched upon only because counsel seem to think that the court should inquire closely into the motives which actuated the immigration officers in the investigations which led up to the order of deportation. If the court did so inquire, the order would not be disturbed.

It is also urged that subsequent to their entry their right to remain was once before inquired into. This is true, but the inquiry led to nothing, as the inspector reported that petitioners were citizens, and hence not subject to deportation. The warrant of deportation is sufficiently definite, and under it petitioners will be sent back to England, whence they last came. If the daughter would prefer to be sent to Canada, her birthplace, an application to that end should be made to the Department of Labor.

The order of deportation appearing from the record to have been made after a full hearing, and being within the authority of the Department of Labor upon the facts and the law, it is ordered that the demurrers be sustained.

In re HARRELL.

(District Court, E. D. North Carolina. April 5, 1915.)

1. BANKRUPTCY ⟸399—EXEMPTIONS—OBJECTIONS—PREMATURE OBJECTIONS.
Under Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (Comp. St. 1913, § 9590), providing that such act shall not affect the allowance to bankrupts of exemptions prescribed by the state laws; section 47 (11) [section 9631], requiring the trustee to set apart the bankrupt's exemptions and report the items and value thereof to the court as soon as practicable after his appointment; General Order 17 (89 Fed. viii, 32 C. C. A. xix), requiring the trustee, within 20 days after notice of appointment, to report the articles set off to the bankrupt, with the estimated value of each article, and providing that any creditor may take exceptions to the determination of the trustee; and General Order 5 (89 Fed. v, 32 C. C. A. viii), and Schedule B (5) [89 Fed. xxv, 32 C. C. A. xlix], requiring the bankrupt, in his schedules, to state out of what property he claims his exemptions and wishes them allotted, whether a bankrupt had forfeited his right to exemptions by withholding property from his schedules, or by conveying property with intent to defraud his creditors, could not be raised by an objection during the examination of the bankrupt, as the duties imposed upon the trustee may not be neglected or postponed until an issue of fraud, regarding the disposition of the property, is tried.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⟸399.]

2. BANKRUPTCY ⟸399—EXEMPTIONS—FORFEITURE.
A bankrupt does not forfeit his right to claim his exemptions, secured to him by the state law, by conveying property in fraud of his creditors, or failing to schedule portions of his property, especially as in North Carolina it is the settled law that a fraudulent disposition of property by a debtor does not work a forfeiture of his exemptions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⟸399.]

3. BANKRUPTCY ⟸32—OMISSIONS FROM SCHEDULES—CORRECTION.
If a bankrupt fails to schedule property which should be surrendered to his trustee, and this fact is shown upon his examination, he may be permitted to correct his schedules.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 31–33; Dec. Dig. ⟸32.]

In Bankruptcy. In the matter of J. F. Harrell, bankrupt. On petition for a review of a ruling of the referee. Ruling affirmed.

Winston & Mathews, of Windsor, N. C., for creditor.
Smith & Banks, of Gatesville, N. C., for bankrupt.

CONNOR, District Judge. From the certificate of the referee it appears that, upon the examination of the bankrupt, George W. Liverman, a creditor, alleging that the bankrupt had withheld property from his schedule, and had conveyed property with intent to defraud his creditors, "protested against the allotment by the trustee of the homestead and personal property exemption to the bankrupt." The referee, being of the opinion that upon the evidence before him no fraud had been shown, and further that as matter of law the bankrupt could not be deprived of his exemptions, overruled the "protest" and denied the motion, whereupon the creditor filed his petition for review.

[1] The procedure adopted by the creditor is rather novel. No

question was at the time, or could have been, before the referee regarding the right of the bankrupt to have his homestead and personal property exemption allotted. Section 6 of the Bankrupt Act, which contains the only reference to the exemption of property to bankrupts, provides that:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws, in force at the time of filing the petition in the state wherein they have had their domicile for the six months or the greater portion thereof, immediately preceding the filing of the petition."

It is manifest, therefore, that for the purpose of ascertaining the amount, character of property, etc., which a bankrupt is entitled to have set apart to him as his homestead and personal property exemption, recourse must be had to the Constitution and statutes of the state of his domicile. By the provisions of article 10, §§ 1, 2, of the Constitution of North Carolina, every resident of the state is entitled to have personal property of the value of $500, to be selected by him, and real estate of the value of $1,000 allotted to him, and exempt from execution or other legal process resorted to for the collection of debts against him.

The question arises how, in proceedings in bankruptcy, are the exemptions to be allotted? The answer is found in section 47 (11) of the act. Among the duties imposed upon the trustee, he is required to "set apart the bankrupt's exemptions and report the items and value thereof to the court as soon as practicable after his appointment." By General Order 17 (89 Fed. viii, 32 C. C. A. xix) his duty in respect to the allotment of the exemptions is made more specific. He is required to make report to the court, within 20 days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee, within 20 days after filing the report, etc. The bankrupt is required, in his schedule, to state out of what property he claims his exemptions and wishes them allotted. General Order 5 (89 Fed. v, 32 C. C. A. viii); Schedule B (5) [89 Fed. xxv, 32 C. C. A. xlix]. These duties imposed upon the trustee may not be neglected, or their discharge postponed, until an issue of fraud in regard to the disposition of property is tried The rights of creditors in regard to exempt property may be raised by exception to the report of the trustee. It is uniformly held that the title to the exempt property does not vest in the trustee; the allotment does not confer title, but simply designates and sets it apart from his other property which passes to the trustee.

[2] The brief of counsel indicates that he is of the opinion that the bankrupt forfeits his rights to claim the exemptions secured to him by the state law, by doing some act prohibited, or omitting to discharge some duty enjoined, by the Bankrupt Act, as, in this instance, conveying property in fraud of his creditors, or failing to schedule portions of his property. I find nothing in the act to sustain this view. In Re Tollett, 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222, Lurton, Circuit Judge, says:

"How a homestead may be acquired or lost must depend upon the law of the state under which the right of homestead arises. That law, as construed and applied by the highest court of Tennessee [the domicile of the bankrupt], constitutes a rule of property binding upon the federal courts in respect to homestead rights claimed in that state."

That a fraudulent disposition of property by the debtor does not work a forfeiture of the exemptions secured to him by the Constitution of North Carolina is settled by a number of decisions of the Supreme Court. Crummen v. Bennet, 68 N. C. 494, and other cases. In the statutes of several states it is provided that the right to exemptions is forfeited by the making of fraudulent conveyances. See cases cited, Collier, Bankruptcy, 197.

[3] It is therefore clear that, viewed from any aspect, the referee ruled correctly upon the question sought to be raised by the protest. If the bankrupt has failed to schedule property, which should be surrendered to his trustee, and this fact is shown upon his examination, he may, if so advised, be permitted to correct his schedule. If he has conveyed in fraud of his creditors, of course, he cannot have it allotted to him as exempt.

The trustee may bring his action to set aside such conveyance and recover the property. The question of his right to claim it as exempt cannot arise—certainly not until the conveyance is set aside. I am not able to see how, according to any orderly procedure, questions of this character can be raised and tried in the manner adopted in this case.

The ruling of the referee is affirmed.

CHANNELL CHEMICAL CO. v. E. W. HAYDEN CO. et al.

(District Court, N. D. Ohio, W. D. January 15, 1915.)

No. 108.

TRADE-MARKS AND TRADE-NAMES ⊂=85—SUIT FOR INFRINGEMENT—DEFENSES —MISREPRESENTATIONS OF COMPLAINANT.

Complainant makes and sells a mop and a furniture polish for use together on floors, etc., and in connection with both articles it uses the registered trade-mark "O-Cedar," either alone or in combination with other words. In its advertisements of the polish it repeatedly represents that it is a purely vegetable product, containing no grease nor mineral oil, and that it constitutes a varnish food or restorer. In fact, it is composed of 85 per cent. of mineral oils, and the evidence showed that it is of no special value as a varnish restorer. *Held*, that complainant had no standing in equity to maintain a suit for the protection of its trade-mark in respect to either product.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. ⊂=85.]

In Equity. Suit by the Channell Chemical Company against the E. W. Hayden Company, and Edwin W. Hayden, Orlie P. Wilkinson, and Herbert J. Chittenden, as officers and directors of said corporation. On final hearing. Decree for defendants.

Chas. T. Lawton, of Toledo, Ohio, and Chas. W. Hills, of Chicago, Ill., for complainant.

Owen, Owen & Crampton, of Toledo, Ohio, for defendant.

KILLITS, District Judge. The complainant is the owner of trade-marks registered Nos. 87,163 and 99,142, on applications simultaneously made, to use as a trade-mark the formula "O-Cedar," as applied to floor mops and furniture polish, respectively. It is alleged that complainant's mops and polish have been largely advertised and sold throughout the United States, invariably marked with the trade-marks "O-Cedar," and that complainant's products have become widely, generally, and popularly known to the public and to the trade as "O-Cedar Polish," "Cedar Polish," "O-Cedar Polish Mops," "Cedar Mops," "Cedar Polish Mops," "Round Cedar Mops," "Round Cedar Polish Mops," and under many other compound words, of which the word "Cedar," or "O-Cedar," form a component part, and that the mops are marketed in a metallic can or container of distinctive color and size, with characteristic and descriptive matter thereon, including the trade-mark. It is alleged that the defendants are imitating the registered trade-marks, applying the same to inferior and spurious products closely resembling the respective products of complainant, designating their products under the mark and name of "Oil of Cedar Polish," and "Oil of Cedar Mops," and "Cedar Polish Mops," respectively, and are therefore engaged in unfair competition with the business and trade of the complainant. The usual injunction and accounting is asked for.

The testimony makes it unmistakable that the complainant transacts its business, through advertising and otherwise, with a view of inducing the public to use its mops in connection with its polish, and vice versa. It is very questionable whether the court should decide that the use of the term "Oil of Cedar," in compounds relating to mops and furniture polish, by the defendants, is in any way an unlawful imitation of complainant's trade-mark, because complainant obtained the registration of that formula only through a positive disclaimer that it was at all descriptive, but upon the insistence that it was purely arbitrary, and the only substantial ground upon which the complainant appealed very strongly to the court for relief on the facts of this case was in the fact that defendants' mop containers were in approximately the same color as that employed by the containers of the complainant, which resemblance defendants very promptly agreed to destroy by the adoption of some other tint.

But there is in this case an insuperable objection to giving the complainant any relief whatever. In Worden v. California Fig Syrup Company, 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282, the court decides that:

"When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark or in his advertisements and business, be himself guilty of any false or misleading representation, and if he makes any material false statement in connection with the property which he seeks to protect, he loses his right to claim the assistance of a court of equity."

In this case it is indisputable that the complainant has been guilty of false and misleading advertising of its product. We quote from one advertisement:

"O-Cedar Polish, a wonderful varnish food. * * * It contains no grease, mineral by-product, or benzine. Every ingredient of O-Cedar polish is a pure vegetable substance. * * * O-Cedar Polish is well and favorably known, and is widely advertised in connection with the O-Cedar Mop."

From another:

"O-Cedar Polish is more than furniture polish. It cleans as it polishes, and acts as a varnish renewer and rejuvenator."

From another:

"O-Cedar Polish is a vegetable compound and mixes freely with water."

From another:

"O-Cedar Polish. This 'varnish food' is a rejuvenator and restorer, * * * is a pure vegetable compound, and mixes freely with water."

On some of the complainant's bottle cartons introduced in evidence was the statement that:

"O-Cedar polish penetrates through the varnish pores, instead of clogging them, as mineral products do."

The specific testimony before the court as to the ingredients of complainant's compound shows that 85 per cent. thereof is hydro-carbon oil, otherwise a light mineral oil; the rest of the percentage being divided between methyl salicylate and oil of cedar. No testimony is offered on behalf of the complainant to meet this. The unsworn statement in open court of complainant's expert chemist, who was a witness for another purpose, was that the complainant's O-Cedar Polish contained more than 50 per cent. mineral oil; but the exact proportions were not admitted in testimony, upon the excuse offered by complainant's counsel that to disclose its formula would be to expose a trade secret. Expert testimony also advised the court that there can be no element of food value to varnish in this compound, and that its efficiency as a varnish restorer is negligible.

In the presentation of the case it seemed to be acknowledged by complainant's counsel, that, so far as the trade-mark respecting the polish was concerned, this evidence was fatal to complainant's claim for relief; but the claim is made that still the complainant should be protected respecting its mop trade-mark. We have alluded to the fact that complainant advertises its products for joint and mutually dependent use. On this showing of deceptive advertising, we do not feel inclined to permit the complainant to have the advantage of an injunction out of this court to protect its mop trade-mark, and thus indirectly protect it in its polish trade-mark for a product to be used jointly with its mop. Besides, if it insists that the formula "O-Cedar," as applied to the mop, has become identified in the public mind with a cedar product, that identification is in connection only with the use of O-Cedar Polish; otherwise, the formula as applied to the mop is deceptively descriptive, for the mop itself is not made of cedar.

There is some evidence in this case which leads the court to suspect that the complainant itself has imitated articles of this character as put out by the defendant—at least, that it copied the special wording of defendants' descriptive advertising. This evidence is, at least, just as plain against the complainant as the evidence that defendants imitated the color of complainant's containers; for it is a question which manufacturer used the golden yellow color first. Defendants, however, voluntarily agreed to abandon this color for their containers as soon as the cans now on hand are exhausted.

This situation leaves the case without any equity in favor of the complainant, and the bill is dismissed, at its costs.

UNITED STATES v. SMITH.

(District Court, E. D. Pennsylvania. February 26, 1915.)

No. 14.

POST OFFICE ⊂⊃48—FRAUDULENT USE OF MAILS—INDICTMENT—VARIANCE.

On the trial of a person for using the mails in aid of a scheme to defraud by representing himself to be a physician and specialist in certain diseases, inviting the submission of statements of symptoms and, irrespective of what the symptoms indicated, inducing the belief in the patients that they were the victims of serious ailments and in dire need of medical attention, evidence showing that accused's acts constituted a scheme to defraud, and that fraudulent use was made of his professional character and experience, supported a conviction, though the indictment characterized as false and fraudulent each element in the scheme, whereas in fact the evidence did not justify a finding that accused's representation that he was a physician and specialist was false.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⊂⊃48.]

W. O. Smith was convicted of using the mails to defraud, and he moves for a new trial and in arrest of judgment. Motion discharged.

Francis Fisher Kane, U. S. Atty., and John H. Hall, Asst. U. S. Atty., both of Philadelphia, Pa., for the United States.

A. B. Geary, of Chester, Pa., for defendant.

DICKINSON, District Judge. The first reason assigned in arrest of judgment is that the proofs adduced at the trial fell short of the averments of the indictment. The facts in the case, from the viewpoint presented on this motion, are that the defendant was a practicing physician and a specialist in certain forms of nervous diseases, which he was because of this able to successfully treat. The indictment charged the scheme or artifice to defraud consisted, among other things, in the defendant falsely representing himself to be a physician and a specialist as above stated. No proof of the falsity of these representations was offered at the trial, and the representations were shown by the evidence offered on behalf of the defendant to have been true. The position is now taken by the defendant that the falseness of these representations was an essential part of the scheme or arti-

fice to defraud with which the defendant was charged in the indictment, and, the United States having failed in its proof of these averments, the verdict is left without support.

The charge as presented in the indictment was a scheme or artifice to defraud within the meaning and the language of the acts of Congress upon the subject. The scheme or artifice laid at the door of the defendant by the indictment consisted in representing to intended dupes of the defendant that he was a physician professionally equipped and specially trained in the diagnosis and treatment of certain diseases and ailments. This, of course, was for the purpose of inspiring them with confidence in him and trust in his judgment of their condition. The scheme further contemplated that the persons thus approached should be invited to submit statements of symptoms to the defendant, and that, irrespective of what the symptoms indicated, whether health or disease, the defendant would dupe the patients into the belief that they were the victims of serious ailments and in dire need of medical attention, when in point of fact they were in normal health, and thus fraudulently induce them to part with their money for the defendant's benefit.

The gravamen of the offense, so far as the United States is concerned, was, of course, the use of the mails in the promotion of the fraud. The indictment, it is true, characterizes as false and fraudulent each element in this scheme. It is likewise true that the evidence would not have justified a finding that every representation made by the defendant was false, in the sense of being an untrue statement in fact. In particular, the evidence would not have warranted a finding that the defendant was not a physician, nor that he had not made a specialty of the treatment of certain ailments. There was evidence, however, to support the finding that the acts of the defendant constituted a scheme to defraud, and that fraudulent use was made of the professional character and experience of the defendant.

Counsel for the United States were following good principles of pleading in characterizing each element in the fraudulent scheme as false in fact, as well as fraudulent in use. By this the burden is not assumed of proving every averment of falsity, as well as the averment of fraud. The case is within the principle, the soundness of which is not controverted by counsel for the defendant, that the consonance of probata and allegata does not require that every averment in the indictment should be proved in order to warrant a conviction. It is enough if so much of the charge be proved as constitutes an offense against the law, and the offense for the commission of which the defendant stands indicted.

The second reason is based upon the assertion of the insufficiency of the evidence to support a conviction. This really also includes the third. If the case involved, as counsel for the defendant assumes, nothing more than a difference of diagnosis, or of opinion as to the proper diagnosis, the position would be well taken that a mere difference of opinion offered no evidence in itself of any insincerity in any one of the opinions. The case presented against this defendant, however, was more than a difference of opinion. He was a physician. When the defense, as well as the case for the United States, was

under the consideration of the jury, there was evidence of competency and experience as a medical practitioner. Moreover, whether there was knowledge or ignorance on the part of the defendant, the real question is the same.

The evidence for the United States was full, and indeed unanswerable, that the symptoms which the defendant represented to his prospective patients as alarming evidence of disease were in fact no symptoms of disease at all, but of normal health. In point of fact, the symptoms set forth were the recognized symptoms of perfect health. This afforded the basis for the judgment of the jury as to whether or not, under all the evidence, the diagnosis made by the defendant was a fraudulent one. A finding of guilt is consistent with the view that, without knowledge of whether the symptoms were those of health or disease, the defendant, with the intent of fraudulent deception, meant to frighten the supposed patient into parting with his money. The finding is likewise consistent with the view that the defendant, being a physician, with a like purpose pretended the symptoms to be those of disease, when he knew them to be indicative of health.

The case was fairly presented on behalf of the United States, and the defense was adequately and ably presented to the jury. There is no complaint made of the mode or manner of its submission.

The motion for a new trial is therefore discharged, and the United States has leave to move for sentence.

In re THOMPSON.

(District Court, D. New Jersey. April 7, 1915.)

BANKRUPTCY ⊂⊃336—CLAIMS—FILING—AMENDMENT.

Under Bankruptcy Act July 1, 1898, c. 541, § 57a, 30 Stat. 560 (Comp. St. 1913, § 9641), providing that proof of claims shall consist of a statement under oath signed by the creditor setting forth the claim, the consideration therefor, and whether any, and, if so, what, securities are held therefor, and what payments have been made thereon, and that the sum claimed is justly owing, and section 57n, providing that claims shall not be proved subsequent to one year after the adjudication, where, in response to an inquiry from a receiver in bankruptcy prior to the adjudication, a creditor wrote the receiver, stating the amounts of the notes held by it on which the bankrupt was liable, and the collateral security held therefor, but there was no intention thereby to file a claim, and there was no direction that the letter should be filed as a claim, and it was not so filed, the letter was not such proof of the claim as could be amended, more than one year after the adjudication, by the filing of a proper claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 523, 524; Dec. Dig. ⊂⊃336.]

In Bankruptcy. In the matter of William J. Thompson, bankrupt. On review of the referee's order directing the filing of the claim of the First National Bank of Woodbury. Reversed.

See, also, 205 Fed. 556.

Bleakly & Stockwell, of Camden, N. J., for trustee.
A. H. Swackhamer, of Woodbury, N. J., for creditor.

RELLSTAB, District Judge. The referee's order under review permits the First National Bank of Woodbury to (in the language of the order) "amend its proof of claim to conform to the formal requirements of the Bankruptcy Act and general orders." Sections 57a and 57n of the Bankruptcy Act provide:

57a: "Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

57n: "Claim shall not be proved against a bankrupt estate subsequent to one year after the adjudication. * * *"

No proof of claim meeting such requirements was filed by the bank within one year after the adjudication. Before adjudication, and while the estate was in the custody of a receiver, the following correspondence took place between the attorneys of the receiver and such bank:

"April 27, 1911.

"First National Bank, Woodbury, N. J.—Gentlemen: In re William J. Thompson, bankrupt. On behalf of Henry J. West, receiver in bankruptcy, we would request that you advise us at once as to the amount of the indebtedness of Mr. Thompson to your bank, and also the amount and character of the collateral which you hold as security with each note held by you. Kindly also state when each note falls due. It is necessary for us to make a report at once to the court as to the condition of his assets. Kindly also advise us as to the amount of his cash balance, if any, in your bank to the credit of his account.

"Very truly yours, Bleakly & Stockwell."

"Woodbury, N. J., May 2, 1911.

"Bleakly & Stockwell, Attorneys for Henry J. West, Receiver in Bankruptcy for William J. Thompson—Dear Sirs: Your favor of April 27th has been received and contents carefully noted. We beg to report the indebtedness of William J. Thompson, of Gloucester City, N. J., to this bank, as follows:

"$3,500 note of Harry M. Harley, indorsed by William J. Thompson, due and protested on April 27, 1911. Also holding note of H. M. Harley, deceased, for $4,500, that fell due on October 27, 1910, with this.

"Note of William J. Thompson for $10,000, due June 27, 1911, with 200 shares of the capital stock of the Gloucester Ferry Co. and $2,000 of bonds of Fries-Harley Co.

"Yours very truly, J. F. Graham, Cashier."

The referee agreed with the contention of the bank that its letter was a sufficient filing of a claim to permit of an amendment to make it conform to the quoted requirements of the Bankruptcy Act. There is nothing in the bank's letter from which it can be inferred that it intended thereby to file a claim against the estate. Neither of the bank's officials who testified in this matter stated that such was the intention. There was no direction that such letter should be filed as a claim, and it was not so filed. To my mind, the rule declared in Re McCallum & McCallum (D. C. E. Dist. Pa.) 127 Fed. 768, is controlling. In that case Judge McPherson, at page 769, said:

"With every disposition to be liberal in the allowance of amendments, there is nevertheless a limit to the power of the court in this regard. If the year within which claims may be proved is still unexpired, amendments are largely a matter of course; but after the expiration of the year a different situation is presented. The rights of creditors are then fixed by the act itself, and no new right can be introduced. If the proof of a right that had already been asserted in substance should thereafter be found to lack form or precision, ordinarily, I suppose, such defect might still be remedied; but, as Judge Archbald said in a similar case (his opinion was afterward adopted by the Circuit Court of Appeals): 'The general right to amend, regardless of the time which has elapsed, is abundantly sustained by the authorities. * * * But to do so, it is plain, there must be in the record, as it stands, the substance of that which is asked for. The right to amend can go no further than to bring forward and make effective that which in some shape is already there.' In re Mercur (D. C.) 116 Fed. 655; Id., on appeal, 122 Fed. 384, 58 C. C. A. 472."

In re Fairlamb (D. C. E. Dist. Pa.) 199 Fed. 278, and In re McCarthy Portable Elevator Co. (D. C. Dist. N. J.), 205 Fed. 986, are reported instances in this circuit of the liberality in allowing amendments to matters of record relating to creditors' claims; but in these cases, as well as in all others brought to the attention of the court, wherein such amendments were allowed, there was either something in the nature of a claim filed or entered of record within the prescribed year, or the creditor had endeavored to file his claim within such period with the proper officer.

The bank not having filed or attempted to file the claim in question within such year, there is nothing of record to support the order under review. Therefore it must be reversed.

THE AZTEC.

(District Court, E. D. Pennsylvania. April 19, 1915.)

No. 9.

ADMIRALTY ⇐57—SUIT FOR BREACH OF CHARTER—SECURITY FOR RELEASE OF VESSEL.

In a suit by the charterer for breach of the charter party, by the refusal of performance by the owners, the amount of the security to which libelant is entitled cannot be affected by a subsequent offer of the owners to furnish the use of the vessel, which offer libelant was not bound to accept.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 452–478; Dec. Dig. ⇐57.]

In Admiralty. Suit by the Interocean Transport Company against the steamer Aztec. On motions for order to fix amount of security and to dismiss libel. Motion to dismiss denied, and amount of security fixed.

Convers & Kirlin, of New York City, Edward F. Pugh, of Philadelphia, Pa. (J. Parker Kirlin and John M. Woolsey, both of New York City, of counsel), for libelant.

H. Alan Dawson, of Philadelphia, Pa., and Haight, Sandford & Smith, of New York City, for claimants.

DICKINSON, District Judge. Whatever the merits of the controversy between the parties concerned in this case may prove to be when the case is fully heard, the strong showing made by the libelant, both in respect to the flagrancy of the breach of contract on the part of the owners, and the amount of the damages sustained by the libelant, called in the first instance for a bond in a sum which would protect libelant in its claim. This was, of course, subject to the right of the owners to move for an order fixing the amount. Such motion was made. At the hearing of this motion the libelant's cause of action, its right to the process issued, its further right to security for its damages, and the reasonableness of the estimate of damage as made by libelant were all conceded. The motion was based solely on the proposition that the offer of the owners to permit libelant to have the use of their ship was in mitigation of libelant's damages, reducing them to an insignificant sum, and the bond required of the owners should be fixed in a nominal sum. To emphasize this the claimants made the above admissions arguendo. It is clear that the libelant is not obliged to accept of this promise, and that the court should not force its acceptance upon libelant. When this ship was chartered, the libelant had the promise of the owners to be allowed its use. That is all libelant had, and all it had bargained for, and therefore all to which it was entitled. When, however, the owners broke their contract (if they did break it), the libelant had no longer a contract with the owners, but a claim against them, and possibly against the ship, for the damages sustained by it for the breach of the contract. Libelant's further right was to have process issued and security in a reasonable sum for the payment of the damages which might be awarded.

The argument that the renewal by the owners of their broken promise put the libelant back exactly where it was before is more specious than sound. It affords the libelant no assurance (other than by the promise of the owners) that it will be saved from loss. Whatever ultimate effect these offers may have in mitigation of damages, the libelant's right is to security, and such a promise cannot be held to be the security which the law requires. The libelant's claim is very large in amount, and although it is given strong prima facie support by the present freight rates, the exaction of too large a bond would result in enforced idleness of the ship at a time when there is the most urgent need for her services. The court therefore expressed its willingness to lend an open ear to anything the claimants had to offer upon the question of the amount at which security should be fixed, and the hearing was continued for this purpose. The motion has come on to be heard before a full bench. It is now accompanied by a motion to dismiss and with a proposed amendment by the libelant of its libel. The original libel was in rem. The motion to dismiss is based upon the proposition that a ship is not subject to seizure for a claim for damages flowing from the breach of an executory contract of the owners. The amendment is to make the proceedings in personam, as well as in rem, with the usual attachment process against respondents not found within the jurisdiction. The allowance of the amendment makes the present discussion of the motion to dismiss unnecessary. We think

libelant has the right to amend and has leave to do so. Any security required, however, covers both features of the amended proceedings.

This brings us back to the only question before us, the fixing of the amount of the bond. The present market freight rates undoubtedly justify a high estimate of reasonably to be anticipated damages. Indeed, these high rates supply the charged motive for the breach of the charter party contract. There is nothing to show that libelant has any other prospect of redress than through a seizure of the ship. It is, however, likewise true that the present market conditions are exceptional. The fact which will ultimately, in all probability, determine the amount of damage, is the duration of the war. The market makes the best attempt possible to estimate this. We have examined with care all the supporting affidavits. This contract is for a long term. There is, as was to be expected, no real market rate for long term contracts. There is a market for short term contracts. There is also something of a market for long term contracts to begin in the future. The one assumes the war is likely to last; the other that it will be over during the life of the contract. These extremes give us something of a market guide.

Taking into account all the considerations involved, we fix the amount of the bond at $350,000.

In re CEFOLA. In re TOMBACH & McPHEE. In re URSONE.

(District Court, S. D. New York. April 8, 1915.)

1. BANKRUPTCY ⇐172—LIENS—PROCEEDINGS SUPPLEMENTARY TO EXECUTION. Code Civ. Proc. N. Y. § 2464, provides that, in supplementary proceedings, notice of the application for an order appointing a receiver must be given personally to the judgment debtor, unless he cannot with diligence be found within the state, in which case notice may be dispensed with or given, as the judge thinks proper; section 2468 provides that the property of the judgment debtor is vested in the receiver from the time of filing the order appointing him or extending his receivership; and section 2469, subd. 1, provides that, where an order requiring a debtor to be examined has been served before the appointment of a receiver or the extension of the receivership, the receiver's title extends back, so as to include the personal property of the judgment debtor at the time of the service of such order, and subdivision 3 provides that, where notice of the application for the appointment of the receiver was given to the judgment debtor, the receiver's title extends to the personal property of the debtor when the notice was served. *Held*, that where no order to appear for examination was ever served, and the order appointing the receiver was obtained without notice, or, if substituted service of the notice was made, the requirements of the order for such service had not been complied with when the receiver was appointed, the title vested in the receiver as of the date of his appointment, or as to a judgment to which the receivership was subsequently extended, as of the date of the order extending the receivership, which dates were within four months before the filing of the petition in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. ⇐172.]

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2. BANKRUPTCY ⊂⊃20—ENJOINING PROCEEDINGS IN STATE COURTS.

Whether the property of the bankrupt should be distributed in the state court or in the bankruptcy court, its distribution in the supplementary proceedings should be enjoined until the appointment of a trustee, who might take such proceedings as he might be advised to be necessary for his protection.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. ⊂⊃20.]

In Bankruptcy. In the matter of Donato M. Cefola, alleged bankrupt. On motion to vacate a stay of proceedings under executions on judgments obtained by Tombach & McPhee and Vincenzo Ursone. Stay modified.

Motion to vacate a stay issued on the motion of petitioning creditors by the bankruptcy court against two judgment creditors and their receiver, appointed by a state court in proceedings supplementary to two executions. The dates are as follows: The petition was filed March 11, 1915; receiver in supplementary proceedings was appointed on December 21, 1914, at application of Vincenzo Ursone upon a judgment obtained in the state court October 30, 1914; execution on Ursone judgment was issued November 19, 1914; order granted December 9, 1914, directing bankrupt to appear in proceedings supplementary to execution. The order was never served, but receiver was appointed upon showing that the bankrupt could not be found within state with diligence. This receivership was extended on January 11, 1915, to Tombach & McPhee judgment, on which execution issued July 2, 1914, and supplementary proceedings were commenced July 6, 1914.

Max Silverstein, of New York City, for Tombach & McPhee.

Isidor E. Schlesinger, of New York City, for Ursone.

Henry M. V. Connelly, of New York City, for petitioning creditors.

LEARNED HAND, District Judge (after stating the facts as above). [1] The question is certainly controlled by the state law, particularly sections 2468, 2469, of the Code of Civil Procedure. The first section says that property vests in the receiver in supplementary proceedings from the date of his appointment, or of the extension of the receivership to the judgment. These dates are too late concededly. The second section defines the relating back of the title. The first subdivision applies to cases where the judgment debtor is served with the order directing him to appear for examination before the receiver is appointed. The papers show that this was never done, but, on the contrary, that the order appointing the receiver was made in accordance with the second sentence of section 2464, authorizing an appointment without notice, when the debtor could not be found within the state. The third subdivision of section 2469 provides for the relating back of the title when the order was not personally served, but when notice was given of the application for a receiver, either personally or by substitution. This subdivision does not apply to the case at bar, because neither was personal service, nor any substituted service, ever made. If it be thought that substituted service was in fact made, it is not shown that the requirements of the order for substituted service had been complied with before December 11, 1914. It follows that none of the provisions of section 2469 apply, and that the title

vested under section 2468, as of the date of December 21, 1914, for Tombach & McPhee, and January 11, 1915, for Ursone.

[2] It is quite true that the Supreme Court has held that in the case of a judgment creditor's bill the levy relates back to the date of bill filed (Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122), at least when the bill is to set aside a fraudulent conveyance. Assuming the same to be true in cases of creditors' bills merely to reach assets not subject to levy, I think the matter is nevertheless clearly one of state law, as I have said, and that, when the state law prescribes the title of the judgment creditor through its receiver, it must be paramount. In re Tyler (D. C.) 104 Fed. 778. In any case, at the present time the question is not of distributing the money, whether in the state court or in this court, but only of an injunction against its distribution till a trustee is appointed, who can take such proceedings as he may be advised to be necessary for his protection. Clearly the case requires so much relief.

The stay will be limited to a period 20 days after the trustee has been appointed and qualified and after service on him of a copy of the modifying order; otherwise, it will be maintained.

In re LINKER.

(District Court, S. D. New York. December, 1914.)

1. BANKRUPTCY ⟸409—DENIAL OF DISCHARGE—FAILURE TO KEEP BOOKS.

Under Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (Comp. St. 1913, § 9598), providing for the discharge of a bankrupt unless he has, with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained, the failure to keep such books of account with intent to conceal his financial condition prevents a discharge, though the bankrupt's intent was not fraudulent, and though his acts were not done in contemplation of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752–757; Dec. Dig. ⟸409.]

2. BANKRUPTCY ⟸409—DENIAL OF DISCHARGE—FAILURE TO KEEP BOOKS—EVIDENCE.

Where it is shown that no books of account, or no proper books, were kept by a bankrupt, the court may infer, from such failure to keep books, an intent to conceal his financial condition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752–757; Dec. Dig. ⟸409.]

3. BANKRUPTCY ⟸409—DENIAL OF DISCHARGE—FAILURE TO KEEP BOOKS—EVIDENCE.

Where, though a bankrupt had his stock of goods insured for $4,000, and probably at times had a larger stock than that, and was doing a considerable business, he kept no stock book, sales book, slips of sales, nor record of moneys that came in, and no book at all, except a check book, and though he was indebted for borrowed money, no record thereof which would show any one that he owed debts of that kind was kept, and neither he nor any one else could have told his financial condition from the books, papers, or memoranda which he said he kept, the facts

showed a failure to keep books with an intent to conceal his financial condition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752–757; Dec. Dig. ⊜409.]

In Bankruptcy. In the matter of Joseph Linker, bankrupt. On report of the referee recommending a discharge. Discharge denied.

A. M. Potter, of Yonkers, N. Y., for bankrupt.

J. B. Stephens and Wm. Lesser, both of New York City, opposed.

HOUGH, District Judge. The referee's report dwells principally upon the specification which alleged the obtaining of property on credit upon a materially false statement in writing made by the bankrupt to any person for the purpose of obtaining credit from such a person. The very careful report on this head is a perfect instance of the importance of seeing and hearing witnesses. The referee has found as a fact that the bankrupt "did not knowingly make a false statement as a basis for procuring goods on credit."

[1] The gist of this finding is the word "knowingly," and I am not prepared to disagree with a conclusion so obviously based on the personality of the bankrupt. As to this specification the finding of the referee is sustained. The other specification, which was likewise overruled, related to the alleged failure of the bankrupt to keep any books of accounts from which his financial condition might be ascertained, "with intent to conceal (said) financial condition." As to this objection the referee says that he found "no evidence of any fraudulent intent in his failure to keep more perfect accounts." As was pointed out in Re Newbury & Durham (C. C. A. 2d Cir.) 31 Am. Bankr. Rep. 365, at page 366, 209 Fed. 195, at page 196, 126 C. C. A. 207, at page 208, the act as it stands at present has omitted the word "fraudulent," which was originally in section 14, so that:

"Under the act as it now reads it is no longer necessary to prove that the bankrupt's intent was fraudulent, or that his acts were done in contemplation of bankruptcy. It is enough to prevent his discharge if he has, with intent to conceal his financial condition, failed to keep books of account from which such condition might be ascertained."

[2] When it is once shown that no books of account, or no proper books, were kept by the bankrupt, the court may infer from such failure to keep books an intent to conceal his financial condition. In re Weston (C. C. A. 2d Cir.) 30 Am. Bankr. Rep. 647, 206 Fed. at pages 282, 283, 124 C. C. A. 345.

[3] It is evident from the testimony herein that no creditor or expert accountant could ever have discovered the bankrupt's financial condition from the books, papers, or memoranda which he says he kept, and I consider it obvious from the bankrupt's own evidence that he himself could not tell from such books, papers, etc., how he stood at any given time. He kept no stock book, nor sales book, nor slips of sales, nor record of moneys that came in, and no book at all except a check book. He was indebted for borrowed money, and finally went into bankruptcy on the petition of creditors of that kind (as has been

asserted in argument and not denied). Yet confessedly he had no sort of record which would show to any one that he owed debts of this kind.

When a bankrupt fails to keep a record of borrowed money (he being in mercantile business), I am still of the opinion expressed in Re Brenner (D. C., N. Y.) 20 Am. Bankr. Rep. 644, 166 Fed. 931. It is, of course, always open to a bankrupt to show that he was ignorant, careless, intended no wrong, etc.; but each case must stand upon its own facts, so that the inquiry always is whether the inference of intent is overset by the evidence given. In this case Linker transacted no small business, his stock was insured for $4,000, and he probably at times (on his own showing) had a larger stock than that. He scheduled a stock of that amount. It is to me inconceivable that a man doing the kind and amount of business that Linker did could have failed to keep books for any other reason than an intent to conceal.

It follows that, as to this ground of objection, I disagree with the referee and deny a discharge.

GALVESTON, H. & S. A. RY. CO. et al. v. UNITED STATES (INTERSTATE COMMERCE COMMISSION, Intervener).

(District Court, S. D. Texas, at Corpus Christi. April 8, 1915.)

No. 6.

1. INJUNCTION ⇐13—GROUNDS FOR DENIAL—LACK OF INJURY TO PLAINTIFF.
In a suit to restrain the enforcement of an order of the Interstate Commerce Commission, where, though the order was in operation for 3 months prior to the filing of the bill, and for 18 months prior to the trial, no preliminary injunction having been issued, plaintiff had sustained no substantial damage therefrom, and no such damage was likely to ensue therefrom during the remainder of the period of 2 years for which the order by its terms was to be effective, an injunction would be denied, as an injunction will not be granted against acts which, though irregular and unauthorized, involve no substantial injury to the party complaining.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 13; Dec. Dig. ⇐13.]

2. INJUNCTION ⇐129—APPEAL—DISMISSAL WITHOUT PREJUDICE.
Such bill should be dismissed without prejudice to plaintiff's right in the future to seek relief against such order, or a renewal of it, as under changed conditions substantial loss might be occasioned in the future.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 279–287; Dec. Dig. ⇐129.]

In Equity. Suit by the Galveston, Harrisburg & San Antonio Railway Company and others against the United States, in which the Interstate Commerce Commission intervened. Bill dismissed without prejudice.

J. W. Terry, of Galveston, Tex., Andrews, Ball & Streetman, of Houston, Tex., Alex. S. Coke, of Dallas, Tex., Baker, Botts, Parker

& Garwood and Wilson, Dabney & King, all of Houston, Tex., and Terry, Cavin & Mills, of Galveston, Tex., for plaintiffs.

Blackburn Esterline, Sp. Asst. Atty. Gen., of Chicago, Ill., for defendant.

Edward W. Hines, of Washington, D. C., for intervener.

Before WALKER, Circuit Judge, and MAXEY and BURNS, District Judges.

PER CURIAM. [1] The object of this suit is the restraint of the enforcement of an order of the Interstate Commerce Commission, which by its terms was to be effective for a period of 2 years commencing September 15, 1913. The order had been in operation more than 3 months when the bill was filed. It had been in force more than 18 months at the time of the trial, no preliminary injunction having been issued. In the course of the argument of counsel for the plaintiffs it was frankly admitted that the evidence failed to show that the plaintiffs had sustained any substantial damage in consequence of the order, or that such damage was likely to ensue therefrom during the remainder of the period for which the order by its terms was to be effective. The plaintiffs are in the attitude of complaining of the order as an unauthorized exercise of power by the Commission and at the same time admitting that they have not been harmed by it and are not likely to be harmed by it. In this situation they are not entitled to have the enforcement of the order restrained by injunction. There is no ground for granting such relief against acts which, though irregular and unauthorized, involve no substantial injury to the party complaining. Though there are some injurious consequences, if they are merely trifling, the relief is not to be granted. Consolidated Canal Co. v. Mesa Canal Co., 177 U. S. 296, 302, 20 Sup. Ct. 628, 44 L. Ed. 777; Davis v. Port Arthur Channel & Dock Co., 87 Fed. 512, 31 C. C. A. 99; State ex rel. Cranmer v. Thorson, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582; High on Injunctions (4th Ed.) p. 9; 22 Cyc. 760.

[2] It follows that the relief prayed for must be denied. As under future changed conditions the existing order, or a continuation of it, may occasion substantial loss to the plaintiffs, the bill will be dismissed without prejudice to their right in the future to seek relief against the order or a renewal of it.

The disposition of the case on the above stated ground makes it unnecessary to consider the question of the validity of the order.

LEWELLYN, Internal Revenue Collector, v. PITTSBURGH, B. & L. E. R. CO.

SAME v. PITTSBURGH, M. & Y. R. CO.

(Circuit Court of Appeals, Third Circuit. April 15, 1915.)

Nos. 1931, 1932.

1. INTERNAL REVENUE ⟸9—CORPORATE EXCISE TAX—CORPORATIONS LIABLE—"DOING BUSINESS"—"NET INCOME."

Where railroad companies leased their railroads, rolling stock, and other property, and surrendered possession thereof to the lessee, and the lessee thereupon assumed and maintained entire control and operation of the roads, the lessors agreeing to maintain their corporate existence in order to hold title to the properties and to exercise their power of eminent domain in acquiring additional property when the lessee might so request and furnish the money therefor, and the lessee agreeing to pay the taxes and interest upon the bonded indebtedness of the companies, and to pay dividends to the lessors' stockholders at an agreed rate, the acquisition of property by the lessors by purchase and condemnation pursuant to the request and direction of the lessee, which property was paid for with money furnished by the lessee and was immediately delivered into the possession of the lessee and used by it in operating the roads under the terms of the leases, was not such a doing of business as made the lessors liable for the special excise tax imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300–6307), providing that every corporation organized for profit and engaged in business shall be subject to a special excise tax with respect to the carrying on or doing business by it, equivalent to 1 per cent. upon its entire net income over and above $5,000 from all sources, as corporate acts performed by a corporation in the exercise of its primary franchises, as the maintenance of its corporate existence, or which relate strictly to the internal affairs of the corporation and do not include the exercise of its secondary franchises, do not constitute "doing business" within the statute, and though the acts of purchasing and condemning property were both corporate and business acts, the corporations merely acquired the instrumentalities to do the thing and to carry on the business for which they were incorporated, and, moreover, "net income" imports a gross income, and the difference between the two implies the expenditure of income for some corporate purpose, as that of carrying on or doing the business for which the corporation is organized, and such corporations received no income from railroads operated by them, and expended none in the operation of railroads, or for any other purpose.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.

For other definitions, see Words and Phrases, First and Second Series, Doing Business; Net Income.]

2. INTERNAL REVENUE ⟸9—CORPORATE EXCISE TAX—"ENGAGED IN BUSINESS"—"CARRYING ON BUSINESS"—"DOING BUSINESS."

Within Act Aug. 5, 1909, § 38, the expressions "engaged in business," "carrying on business," or "doing business" do not have different meanings, but separately or connectedly convey the idea of progression, continuity, or sustained activity, and "engaged in business" means occupied or employed in business, "carrying on business" does not mean the performance of a single disconnected business act, but means conducting, prosecuting, and continuing business by performing progressively all the

acts normally incident thereto, while "doing business" conveys the idea of business being done, not from time to time, but all the time.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ⊂⊃9.

For other definitions, see Words and Phrases, First and Second Series, Carry on Business; Engage.]

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Two actions by the Pittsburgh, Bessemer & Lake Erie Railroad Company and by the Pittsburgh, McKeesport & Youghiogheny Railroad Company against C. G. Lewellyn, Collector of Internal Revenue for the Twenty-Third District of Pennsylvania. Judgments for plaintiffs, and defendant brings error. Affirmed.

E. Lowry Humes, of Pittsburgh, Pa., for plaintiff in error.

George E. Shaw, of Pittsburgh, Pa., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. Against the plaintiff corporations, certain special excise taxes were assessed for the years 1910, 1911, and 1912. They were paid under protest, and after claims for their refund and abatement had been made and rejected these suits were brought to recover the amounts paid.

[1] The matter in controversy is whether a special excise tax, provided by section 38, Act Aug. 5, 1909 (36 Stat. 112), can legally be assessed against and collected from the plaintiff railroad corporations under the facts of these cases. The statute, under authority of which the taxes were assessed and collected, provides as follows:

"That every corporation * * * organized for profit * * * and *engaged in business* in any state * * * shall be subject to pay annually a special excise tax with respect to the *carrying on or doing business* by such corporation, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year."

The facts upon which the United States Commissioner of Internal Revenue acted in making the assessments, are as follows:

Upon different dates prior to the act of Congress of August 5, 1909, the Pittsburgh, Bessemer & Lake Erie Railroad Company and the Pittsburgh, McKeesport & Youghiogheny Railroad Company, corporations of the state of Pennsylvania, acting under authority of the Pennsylvania acts of April 23, 1861 (P. L. 410), and February 17, 1870 (P. L. 31), leased to the Pittsburgh & Lake Erie Railroad Company, for periods of 999 years, their main and branch lines of railroad and all rolling stock, equipment, and other property which they then owned or would thereafter acquire, whereupon the lessor companies surrendered, and the lessee company assumed, and has ever since maintained, the entire control and operation, as well as the possession, of the two leased roads. As rentals for the properties demised, the lessee company promised to pay the taxes, and to pay dividends at a certain rate upon

the capital stock and to pay the interest upon the bonded indebtedness of the two companies. The lessor companies, on the other hand, undertook to maintain their corporate existence in order to hold title to the properties leased, and to exercise their reserved power of eminent domain in acquiring additional property, when and as the lessee company might request and for which it would furnish the money.

The lessor companies maintained their corporate existence by annually electing boards of directors and corporate officials, and performed certain other corporate acts presently to be mentioned. They maintained no separate offices, employed no office force, paid no salaries, neither paid nor directly received rentals, kept no books of account or bank accounts, and received and disbursed no funds. Their taxes were paid by the lessee company directly to tax collectors, and the rentals in the form of dividends and interest, payable under the lease, were paid directly to their stockholders and to the trustees of the mortgages upon which their bonds were issued. It appears that during the periods for which the taxes in question were assessed the Pittsburgh & Lake Erie Railroad Company, the lessee, found it necessary or expedient in the operation of the leased roads to straighten and extend them, to which end it requested, and in fact directed, the lessor companies to acquire the necessary property either by purchase or by the exercise of their reserved power of eminent domain.

Properties in considerable number were purchased, and acquired by condemnation proceedings instituted and concluded by the lessor companies pursuant to resolutions by their boards of directors, proposed and passed in conformity with the statutes of Pennsylvania, but suggested in every instance by the lessee company and conducted under the direction of its officers. The costs and expenses were paid, and the consideration and condemnation money in all instances supplied, by the lessee company. While title was retained by the lessor companies, all properties, howsoever acquired, were immediately delivered into the possession of the lessee company, and were exclusively used by it in operating the roads under the terms of the leases.

The precise question presented is whether the bare acts of the plaintiff railroad companies in acquiring property by purchase and condemnation in the manner and for the purposes stated constitute "carrying on or doing business" within the meaning of the statute. The plaintiff railroad companies based their claim of exemption from the tax and their right to recover in these actions upon a line of cases culminating in the case of N. Y. C. & H. R. R. Co. v. Gill, 219 Fed. 184, 134 C. C. A. 558, decided by the Circuit Court of Appeals for the First Circuit on January 13, 1915. A somewhat detailed consideration of the cases is essential to a determination of the question presented.

In construing the statute under consideration, the Supreme Court has held that the special excise tax is imposed, not upon the property of a corporation, nor upon the franchises of a corporation irrespective of their uses, nor upon the income of a corporation, but upon the privilege of doing business in a corporate capacity. Corporation Tax Cases, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Stratton's Independence v. Howbert, 231 U. S. 399, 34 Sup. Ct.

136, 58 L. Ed. 285; United States v. Whitridge, 231 U. S. 144, 34 Sup Ct. 24, 58 L. Ed. 159. In defining the subject of the tax, the Supreme Court has distinguished between corporate acts which are confined to the maintenance of the corporate existence and the passive management of purely internal affairs of a corporation, and those which extend to the functions and the purposes for which a corporation is organized.

One of the earliest cases which required of the Supreme Court an expression of opinion as to whether corporate acts of a given character constituted "doing business" was the case of Cedar Street Co. v. Park Realty Co., embraced within the Corporation Tax Cases, 220 U. S. 107, 171, 31 Sup. Ct. 342, 357 (55 L. Ed. 389, Ann. Cas. 1912B, 1312). In that case, the Park Realty Company was organized to sell and lease real estate, to operate and manage hotels, and to make contracts in connection therewith. The Realty Company was engaged in no business except the management and leasing of one hotel. The court said:

"We think it is clear that corporations organized for the purpose of doing business and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, * * * dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law."

The next case before the Supreme Court presenting the same question was Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428. In that case it appears that the syndicate was originally organized for and at one time engaged in the business of renting space in an office building owned by it and collecting and receiving rents therefor. It leased all of its real estate for a long term at a fixed rental, and then procured an amendment to its charter which declared that the sole purpose of the corporation was to hold title to the property demised, receive the rentals, and distribute them among its stockholders. The court found that the corporation, after the lease of its property and the amendment to its charter, had wholly parted with control and management of the property, and decided that in holding title to the property subject to the lease, and in receiving and distributing the rentals, it was not "engaged in business" and was not "doing business" within the meaning of the act.

Out of the law of these two cases grew the case of McCoach v. Mine Hill & Schuylkill Haven Railroad Co., first heard in the Circuit Court for the Eastern District of Pennsylvania (192 Fed. 670), affirmed by this court, and finally decided by the Supreme Court (228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842), in which the question was whether, under the facts of that case, the Mine Hill Company was "doing business" in the sense in which the Park Realty Company was doing business, or had gone out of business in the sense that the Minneapolis Syndicate had done. The Mine Hill Company was incorporated by an act of the Legislature of the state of Pennsylvania of 1828 (P. L. 205) for the purpose of constructing and operating a railroad, with appropriate powers, including the power of eminent domain. Under its charter a railroad was built and for many years operated. Upon au-

thority of the same statutes of the state of Pennsylvania under which the railroad properties of the plaintiff railroad companies were leased, the Mine Hill Company in 1896 leased its entire railroad, rolling stock, and all other property to the Philadelphia & Reading Railroad Company for a term of 999 years at a yearly rental. The Mine Hill Company agreed to maintain its corporate existence and organization and to exercise for the benefit of the lessee company every right and privilege retained, among which was the power of eminent domain.

The corporate activities of the Mine Hill Company included the holding of stockholders' meetings, the election of officers, the maintenance of offices and clerical force at substantial cost, the collection of rentals, revenue, dividends, and interest on deposits, the investment of funds, and the payment of taxes, as well as the maintenance of its corporate existence. While retaining the power of eminent domain, to be exercised when requested by the lessee, the District Court upon the first consideration of the case, and the Supreme Court upon its final review, expressly called attention to the fact that during the taxing years in question the lessor company had not exercised that power; the latter court leaving for future adjudication the question now under consideration by expressly declaring that:

"We therefore do not pass upon the question whether, if it should do so, it would be taxable under the act in question."

The Supreme Court distinguished the Mine Hill Case from the Park Realty Co. Case, and, following the Minneapolis Syndicate Case, found that the Mine Hill Company during the period in question "was not engaged at all in the business of maintaining or operating a railroad, which was the prime object of its incorporation," and that the effect of the—

"legislation and the lease made thereunder was to constitute the Reading Company the public agent for the operation of the road, and to prevent the Mine Hill Company from carrying on business in respect to the maintenance and operation of the railroad so long as the lease shall continue. And it is the Reading Company, and not the Mine Hill Company, that is 'doing business' as a railroad company upon the lines covered by the lease, and is taxable because of it. The Corporation Tax Law does not contemplate double taxation in respect to the same business."

The case of Anderson v. Morris & Essex Railroad Co., 216 Fed. 83, 132 C. C. A. 327, heard and decided by the United States Circuit Court of Appeals for the Second Circuit, has an important bearing upon the question at issue, for the reason that the particular act relied upon in that case as constituting "doing business" did not relate to the maintenance of the existence nor to the purely internal affairs of the lessor corporation, but extended rather to one of the public purposes for which the corporation was organized, at least to the extent of providing payment for the construction and purchase of the instrumentalities by which the business of the railroad was to be done. The terms of the lease by which the entire property of the Morris & Essex Railroad Company was demised to the Delaware, Lackawanna & Western Railroad Company are so similar to the terms of the leases in the cases under consideration that they need not be recited, except to note an

additional provision by which the Morris & Essex Railroad Company, the lessor, was required, upon the request of the lessee company, to execute and deliver its bonds in such amounts as might be required by the lessee company for the completion of a certain part of its railroad then under construction and for the purchase of equipment. In pursuance of this provision of the lease, and in obedience to a request made thereunder, the lessor company pledged its property by issuing, and delivering to the lessee company, $1,400,000 of its bonds for the payment of the work done and equipment purchased by the lessee company. The execution and delivery of the bonds constituted the act, and the only act, under the decision of the court, upon which was based the claim that the lessor company was "doing business," and was therefore liable to assessment under the Corporation Excise Tax Act. In deciding whether the corporate act of the lessor company constituted "doing business," within the meaning of the statute, the court said:

"The lessor company, however, had retained the power to issue bonds and to execute deeds of the leased property, but such powers it could exercise only with the consent and at the request of the lessee company, which latter company guaranteed the payment of both the principal and interest, and alone derived any advantage from their issuance, as the income of the lessor's stockholders was definitely fixed by the lease for all time. The act done was a purely formal act done by the lessor to enable the lessee to raise money on the security of the property for its development and operation in the conduct of the railroad business. In doing it the lessor was not 'carrying on or doing business,' within the meaning of the Corporation Tax Act. The words 'carrying on or doing business' and 'engaged in business' must be given their ordinary and natural signification, and, given that signification, the act done is not within the meaning of the statute. The lessor company was not an actively operating concern. Under the terms of this lease the lessor corporation had practically gone out of business and was disqualified from any activity respecting the operation and management of the railroad business which it had been incorporated to carry on. The issuance of the bonds was an act done simply to enable the lessee to enjoy, use, and exercise the property, franchises, and rights which the lessor had previously demised, and did not amount to a resumption of business which the lease had transferred, or a 'doing of business' in the statutory sense."

In the case of N. Y. C. & H. R. R. Co. v. Gill, 219 Fed. 184, 134 C. C. A. 558, which is the last decided case upon the subject, the United States Circuit Court of Appeals for the First Circuit cited with approval and expressly followed the reasoning of the opinion of the United States Circuit Court of Appeals for the Second Circuit in Anderson v. Morris & Essex Railroad Co., supra. In the Gill Case the excise tax was assessed against the Boston & Albany Railroad Company, which had leased its property to the New York Central & Hudson River Railroad Company upon terms, we may assume, similar to the terms of the leases in the several cases considered. In this case the lessor company, besides issuing bonds as in the case of the Morris & Essex Railroad Company, "had on certain occasions taken steps in exercise of its right of eminent domain." How far these "steps" extended, and how far, therefore, they might distinguish that case from the cases at bar, does not appear. The steps so taken, however, were at the lessee's instance and request, in order to obtain additional land necessary for the proper operation of the leased railroad, at the lessee's sole expense and under its direction, and in accordance

with the provisions in the lease. The bonds were issued to pay for the land "thus acquired." The court held that there was no reason for regarding the "land takings" as "doing business" in the statutory sense, if, as held in the case of the Morris & Essex Railroad Company, the issuance of bonds is not to be so regarded, accepting the interpretation there given:

"Construing the words in this statute, 'doing business,' or 'engaged in business,' as having direct reference to the active business for which a railroad corporation is incorporated, as correct, [and] that these words had such relation in this statute that they must be given 'an ordinary and natural signification,' and in effect that the corporation must be *an actively operating concern.*"

It thus appears that in the First, Second, and Third judicial circuits cases have been presented calling for construction of the statute with reference to corporate acts which were not purely primary or internal as defined in the previous cases, and therefore present new questions for decision. In the case in the Second circuit the corporate act involved was the issuance of bonds by the lessor company, pledging its property as security for the payment of debts incurred by the lessee company in the extension, construction, and equipment of the leased road. In the case in the First circuit the lessor company acquired property to meet the requirements of the lessee company in the operation of the leased property and issued bonds to pay for the same. The cases in the Third circuit, being the two here under consideration, are distinguished from those in the other two circuits, in that the leased property was not pledged, nor were bonds issued by the lessor companies; the corporate acts, and the only corporate acts charged as "doing business," being the acquisition of property by the lessor companies, by purchase and condemnation, upon the request and at the expense of the lessee company, and for the use and benefit of the lessee company in operating the leased roads under the leases.

As income in a certain sense was derived from the operation of the leased railroads, we will briefly consider the sense in which the act employs the word "income," before proceeding to a discussion of the character of the corporate business intended by the act to be taxed. The statute classifies the corporations intended to be taxed by prescribing the essentials that bring them within its operation as follows:

First, "every corporation * * * organized for profit;" second, "having a capital stock represented by shares;" third, "organized under the laws of any state;" and, fourth, "engaged in business, * * * shall be subject to pay annually a special excise tax;" fifth, "with respect to the carrying on and doing business of such corporation."

The plaintiff corporations were organized for profit under the laws of a state, and their capital was represented by shares, and in these particulars and to this extent at least they were within the statute. Being organized for profit, the statute contemplates profits to be earned and income derived from "carrying on or doing business," not for the purpose of taxing either profits or income, but, first, to determine whether the corporation is within the class intended to be taxed, and, second, in order to have a means by which the tax may be calculated. The statute provides that the tax imposed shall be "equivalent to 1 per cent. upon the entire *net* income" over a certain amount. "Net in-

come" imports a "gross income," and the difference between the two implies the expenditure of income for some corporate purpose, as that of "carrying on or doing [the] business" for which the corporation is organized.

Now, while we make no point of the fact that in this case dividends on stock and interest on bonds were paid by the lessee company directly to the stockholders and bondholders of the plaintiff corporations, and not to the corporations themselves, nevertheless the income so received was not derived from railroads operated by them, but was the consideration paid for the right to exclusively possess, manage, and operate the leased railroads by the lessee company. The plaintiff railroad corporations received no income from railroads operated by themselves, and expended none in the operation of railroads or for any other purpose. Receiving no income and disbursing none, there was, of course, no gross income from which to determine net income, and no means to measure an excise tax as provided by the statute. Therefore, in being without income from operating their railroads, the lessor railroad corporations to this extent at least were outside of the scope of the statute, unless indeed it be decided that, because of their several disconnected acts of acquiring real estate, they were engaged in business and were carrying on and doing the business for which they were organized, within the meaning of the act.

From the decisions reviewed, it may be accepted as established that corporate acts performed by a corporation in the exercise of its primary franchises, as the maintenance of its corporate existence, do not constitute "doing business" within the meaning of the statute, nor do corporate acts which relate strictly to the internal affairs of the corporation and which do not include the exercise of its secondary franchises. The statute, therefore, distinguishes between corporate acts and discloses an intention to impose a tax for the privilege of doing only those acts which constitute "carrying on and doing business."

It is contended, however, that the transactions by which properties were purchased and condemned by the plaintiff corporations were something more than corporate acts—that they were in their nature business transactions, and being such, of necessity, constituted "doing business" within the meaning of the statute. But it is clear that the statute, as interpreted, distinguishes between business transactions, as well as between corporate acts, and the application of the statute to a given transaction or act, whether partly business or entirely corporate in its nature, must after all be determined by its character and purpose. By purchasing and condemning property the plaintiff corporations performed acts which were both corporate and business in their nature. The purpose of the acts is disclosed by what was accomplished by them. By the acts done the corporations merely acquired the instrumentalities to do the thing and to carry on the business for which they were incorporated. There is a distinction between acquiring the instrumentalities to do business and the doing of business with the instrumentalities acquired.

The primary purpose for which the plaintiff railroad companies were incorporated was the transportation of persons and property. When

they became incorporated, they proceeded under appropriate powers to acquire property, upon which and over which they built their lines of railroad. In acquiring property and in constructing railroads they doubtless engaged in business transactions under authority of their corporate powers, but not until they had acquired property and constructed their railroads can they be said to have engaged in and carried on the business for which they were primarily organized. Having acquired and constructed their lines of railroad, the plaintiff corporations proceeded to operate them, and after a time they disposed of them by lease, conveying in each instance all real and personal property within their ownership, and all rights in connection therewith, which, under the law they could convey. By disposing of their properties under the terms of the leases, the lessor railroad corporations parted with all control over and management of the same, and the right to possess, operate, and manage the roads became vested and exclusively vested in the lessee. Upon the transmutation of property there was a contemporaneous transfer of business activities. What the owners of the railroads had done before, the lessee of the railroads do now. The profits, which before went to the owners, now go to the lessee. All rights to direct the policy or participate in the operation and management of the roads have been transferred to and are now vested in the lessee, but in transferring their properties and their rights the lessor companies could not transfer the right of eminent domain which had been delegated to them. They therefore contracted, for the consideration given, to exercise the power of eminent domain, so reserved and retained, for the benefit of the lessee and for the lessee's use and enjoyment of the property leased, when requested so to do.

When the lessor railroad companies were requested to exercise for the lessee their power of eminent domain, and in response did the acts which it is claimed amounted to "doing business," their acts were purely formal, constituting the dry exercise of power, in which no profit inured to them, their rentals being established, and in which all advantage inured to the lessee, which was the one corporation then actually doing business in the sense of operating the roads to which the several companies bore different relations, and which, therefore, was the one corporation liable to be taxed for the privilege of doing that business.

[2] The manner in which the expressions "engaged in," "carrying on," or "doing" business are joined in the statute does not denote that the expressions are used in opposition to one another, or that separately they express different meanings. They are used in the conjunctive sense, and are employed to indicate the one character of corporate business intended by the statute to be taxed. Therefore the expression "engaged in business" means the same thing as "carrying on business," and the latter expression has the same meaning as "doing business." The three expressions, either separately or connectedly, convey the idea of progression, continuity, or sustained activity. "Engaged in business" means occupied in business; employed in business. "Carrying on business" does not mean the performance of a single disconnected business act. It means conducting, prosecuting, and continuing business by performing progressively all the acts normally in-

cident thereto, and likewise the expression "doing business," when employed as descriptive of an occupation, conveys the idea of business being done, not from time to time, but all the time. Such was the character of the business being done by the lessee company, but such was not the character of the business being done by the lessor corporations, when the excise taxes were assessed.

It is not claimed that the plaintiff corporations, the lessors, were operating the leased roads when the taxes were assessed, and it is not denied that they had gone out of the business of transportaion, and no longer received profits from the railroads otherwise than determined by the leases, nor is it denied that by the leases the plaintiff railroad companies had so placed themselves that they could not have engaged in the business of transportation over the leased lines, even had they wanted to. In other words, the plaintiff railroad companies, the lessors had disqualified themselves to carry on or do the business either of operating, managing, or conducting transportation over the leased lines. What they did with the power they had left, namely, purchased and condemned property at another's request, with another's money, for another's use, and for another's profit, was not, in our opinion, a resumption by the lessor companies of the control, operation, or business of the leased properties, and the particular acts done under the limitation of their reserved powers did not amount to "doing business" within the meaning of that expression as intended by the statute.

The judgments below are affirmed.

McPHERSON, Circuit Judge, took no part in the consideration and decision of these cases.

PARKER et al. v. PARKER.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1915. Rehearing Denied May 28, 1915.)

No. 2654.

1. DIVORCE ⟸79—PROCESS—SUBSTITUTED SERVICE.

In divorce proceedings, where the state is an interested party, constructive service is viewed strictly, and where there is no appearance every essential requisite of the statute for such service must affirmatively appear.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 258–263; Dec. Dig. ⟸79.]

2. DIVORCE ⟸327—JURISDICTION—MATRIMONIAL DOMICILE.

Where a husband deserted his wife in California, where they were married and had always lived subsequent to the marriage, moved to Missouri, where he established his domicile, and thereafter, without communicating with his wife or contributing anything to her support or the support of a child, obtained a divorce in Missouri on substituted service, the decree of divorce, even though valid in Missouri, was not entitled to full faith and credit in Texas, under the Constitution and laws of the United States, as the obligatory recognition of such a decree beyond the limits of the state depends upon whether there was jurisdiction of the matri-

monial relation, and the husband did not, under the circumstances, take the matrimonial domicile with him to Missouri.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 831–834; Dec. Dig. ⟸327.]

3. JUDGMENT ⟸818—FOREIGN JUDGMENTS—COLLATERAL ATTACK.

The record of a judgment in another state may be collaterally attacked, if the facts necessary to give the court jurisdiction did not actually exist.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1458–1481; Dec. Dig. ⟸818.]

4. EQUITY ⟸67—"LACHES"—NATURE AND ELEMENTS.

The doctrine of laches is based upon grounds of public policy, which requires for the peace of society the discouragement of stale claims, and laches is not, like limitations, a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced, and the application of the doctrine depends upon the circumstances of each case; the very gist of the doctrine being the failure or neglect to do something that by law the party is obliged or bound to do.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191–196; Dec. Dig. ⟸67.

For other definitions, see Words and Phrases, First and Second Series, Laches.]

5. HUSBAND AND WIFE ⟸273—COMMUNITY PROPERTY—SEPARATION OF HUSBAND AND WIFE—LACHES.

Under the laws of Texas, a wife's long delay in asserting her rights after her husband deserted her, attempted to obtain a divorce, and remarried, did not bar her community property rights upon his death, as the rights of the husband and wife in the community are a continuing and inseparable quantity, and, while the husband's interest is active, the rights of the wife are merely inchoate and passive during the marital relation, and, the husband having the absolute right to the control and management of the property, no duty devolved upon her to assert her rights until his death.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1008–1024; Dec. Dig. ⟸273.]

6. HUSBAND AND WIFE ⟸273—COMMUNITY PROPERTY—RIGHTS OF LAWFUL AND PUTATIVE WIVES.

Where a husband, after deserting his wife and obtaining a divorce invalid outside the state in which it was rendered, remarried, his first and lawful wife was entitled under the community property laws of Texas to one-half of all property acquired after his marriage to her, and prior to the remarriage, and to one-half of the property acquired after the remarriage remaining after the second wife's share of one-half had been carved out.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1008–1024; Dec. Dig. ⟸273.]

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by Barbara Parker against Leonard Cecil Parker and others. Decree for complainant, and defendants appeal. Reversed and remanded, with directions.

This is an appeal from the District Court of the United States for the Northern District of Texas from a decree in favor of appellee, which brings under review the validity of a decree obtained in a divorce proceeding in the state of Missouri 30 years ago, which was held void by the District Court: First, because no jurisdiction was acquired of the defendant, appellee here, by the statutory proceedings undertaken in Missouri; and, second, because no

jurisdiction was acquired by the Missouri court of the matrimonial domicile of the defendant, a citizen and resident of California. Consequently is involved the marital status and equitable rights of the California spouse in the estate of the husband, who subsequently married another, moved to Texas, where he accumulated a large estate, and died, leaving the widow of the third or putative marriage and nine children surviving him. A brief statement of the material facts will assist, perhaps, in an intelligent apprehension of the important questions involved here:

Walter M. Parker, whose estate this litigation concerns, lived originally in Missouri and first married in that state. We are informed from the record that his first matrimonial venture was unfortunate, and Julia Lee, the bride of his youth, left him early "in the voyage" to the solitudes of the "Moss Creek farm, in Carroll county, Mo." This venture, blissful or otherwise, was brief and certainly irrelevant to any issue in this case. Soon after the death of his first wife, history informs us, Walter M. Parker in 1871 removed to California, where he met and married Barbara Kraemer, complainant below, June 28, 1873, near Orange, Los Angeles county, Cal. He lived with her until December 12, 1877, when he exchanged his property in California for a Missouri farm, left his wife, then pregnant, to the care and maintenance of a destitute mother, and departed for Carroll county, Mo., avowedly to make it his future home and domicile. The motive for his departure, the manner and circumstances of his leaving, and their influence upon subsequent events become important, and will be discussed in the further consideration of the particular facts of the separation. Parker settled on his farm in Carroll county, Mo., but maintained an uninterrupted silence toward the wife in California, who on February 18, 1878, two months and six days after her alleged desertion, gave birth to Elnora Alice, the only child of said marriage. On March 4, 1879, Parker instituted a suit for divorce against Barbara, his wife, in Ray county, an adjoining county to Carroll, where he was, it appears, temporarily residing while engaged at farm work. The statutory ground alleged in his petition for divorce was "that the defendant, wholly disregarding her duties as the wife of the plaintiff, had absented herself without reasonable cause for the space of one year"; and furthermore, to support his petition, he swore "to his best knowledge and belief" that "there were no children born of said marriage," when as a matter of fact the child of the California wife was then a year and three months old. An order for service by publication was accordingly made upon Parker's affidavit. In the due course of procedure, on the attempted compliance with the requirements of the Missouri statutes in such cases, a final decree by default passed against the California wife. This decree is attacked in the present suit, among other grounds, because the order of publication was not directed to the complainant, that the affidavit for published notice omitted to state the known residence of the defendant therein, and, further, that the Missouri court did not have jurisdiction of the subject-matter of the suit, on the theory that complainant and appellee was the innocent party and was in fact deserted by the husband, and that in the particular circumstances of the case the matrimonial domicile was never transferred to Ray county, Mo. Subsequently to this divorce he married Mattie Parker, one of the defendants herein, in Iowa, in the year 1880 (March 17th), and after two years spent on the Carroll county farm removed with his wife Mattie to Wichita county, Tex., where the bulk of his estate was accumulated, and where Parker died May 14, 1908.

The complainant, Barbara Parker, first learned indirectly of her husband's divorce proceeding about 2 years after her desertion on December 12, 1877, when she caused an investigation to be made of the records of the circuit court in Carroll county, Mo., the known residence of Parker, but without confirmation of the report. Barbara Parker, about 30 years after the Missouri divorce, brought her bill in the United States District Court for the Northern District of Texas against the appellants, Mattie Parker, the putative widow, and Leonard Cecil Parker, executors, and the children of the putative marriage, charging that the decree of divorce obtained in Missouri was fraudulent and void ab initio; that Parker in truth and in fact deserted complainant and left her under the pretense that he would locate somewhere and send for her; that the grounds alleged in his petition for divorce were wholly false; that

complainant was never a resident of Missouri, and never had any notice of the divorce proceeding of Parker against her, and was totally ignorant of the Missouri proceedings and decree until after Parker's death, which occurred in Wichita county, Tex., on May 14, 1908. The bill further discloses that Parker left a last will and testament, dated March 12, 1908, in which Mattie Parker, the widow, and Leonard Cecil Parker, defendants, were named executors, devising the property to Mattie Parker and the children, share and share alike, and in which also is a bequest "to Elnora Alice Parker, daughter of my first wife Barbara of Anaheim, Orange county, California," etc. The complainant's bill also prays for a discovery and partition of the property, and that complainant be awarded one undivided half interest in all of the estate of Walter M. Parker, deceased, estimated at about $400,000. Mattie Parker, one of the defendants, waived her rights under the will and elected to take her interest under the laws of Texas relating to community property, and jointly answered with the defendant children of the last marriage, denying the material allegations of the bill.

In due course the cause came on to final hearing upon the pleadings and proofs, and the District Court found that Walter M. Parker willfully deserted Barbara Parker, at Anaheim, Cal., in an advanced state of pregnancy, with Elnora Alice, the first child, December 12, 1877; that Parker did not carry with him to Carroll county or to Ray county, Mo., the matrimonial domicile of himself and complainant, and that the latter was never either actually or constructively within the territorial limits of the state of Missouri; that the grounds alleged for divorce were false; that the affidavit as a basis for the order for substituted service was insufficient, and failed to meet the statutory requirements for such service; that the notice contained in such order was not addressed or directed to the nonresident defendant, as required by the statute; and that consequently the proceedings had in Ray county circuit court, and the judgments nisi and final attempted to be rendered therein, were null and void. A final decree followed in favor of the complainant below, awarding her an equal undivided one-half interest in all the property of which the said Walter M. Parker died seised and possessed. This decree is complained of because, as asserted, the District Court erred in its several findings enumerated, and further because the award of an undivided half interest in the estate was excessive.

Theodore Mack and Mike E. Smith, both of Ft. Worth, Tex., and J. Shirley Cook, of Vernon, Tex., for appellants.

S. B. Cantey, of Ft. Worth, Tex., Francis Marion Etheridge, Joseph Manson McCormick, and Henri Louie Bromberg, all of Dallas, Tex., for appellee.

Before PARDEE and WALKER, Circuit Judges, and SHEPPARD, District Judge.

SHEPPARD, District Judge (after stating the facts as above). Whether there was jurisdiction of the defendant acquired by the statutory proceedings in Ray county, Mo., as would affect a binding operative decree against the defendant in that state, we prefer to express no opinion, as it is unnecessary in view of the conclusion reached on the findings of fact by the chancellor. In the view we take of the case, the paramount question submitted for determination by this court is: Was there jurisdiction of the matrimonial res, or the subject-matter of the controversy, as would compel recognition of the decree in the state of Texas under the full faith and credit clause of the Constitution and laws of the United States?

[1] Assuming, but not deciding, jurisdiction in the Missouri court on the statutory proceedings for divorce instituted by Parker in Ray

county, Mo., whether or not the decree is entitled to full faith and credit beyond the territorial limits of the state of Missouri depends, it would seem, upon more than mere conformity with the requirements of the statutes of that state for substituted service. Of course, if an essential requisite of the statute for valid service was omitted in the jurisdictional proceedings, it is generally held that the decree based thereon is not merely voidable, but void, and subject to collateral attack. In divorce proceedings, particularly where the state is a silent, but interested, party, constructive service is viewed strictly, and where there is no appearance every essential requisite of the statute for such service must affirmatively appear. Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Kunzi v. Hickman, 243 Mo. 103, 147 S. W. 1002; Shrader v. Shrader, 36 Fla. 502, 18 South. 672.

It is not incumbent upon this court, however, in face of the findings of fact by the court below, supported as we believe by the evidence, to determine the validity of the decree rendered in the state of Missouri. The recognition of the decree in such cases beyond the limits of the state where granted, it is well settled, depends ultimately upon the jurisdiction of the subject-matter of the particular action. Extraterritorial recognition of divorce decrees, predicated on statutory proceedings for substituted service, depends, as we shall see, on whether or not there was jurisdiction over the matrimonial domicile in the state where granted.

[2] Adverting to the record for the facts to determine this ground of jurisdiction, we have the District Court's findings on a conflict in the testimony, supported as we think by a preponderance of the evidence that the complainant, Barbara Parker, went to California from Illinois November 8, 1867, and had never been out of the state of her adoption; that she was lawfully married to Parker in said state on June 28, 1873, from which time they lived together until December 12, 1877, when he deserted complainant, leaving her pregnant and destitute at the home of her impoverished mother; that the father never afterward saw the mother or child, and never communicated with them or contributed anything to the support of either. Ascertaining, moreover, from the evidence the motive and reasons for his desertion of the complainant, the chancellor summarizes the proof fairly borne out by the record:

"That Walter M. Parker did not take the matrimonial domicile of himself and complainant to the state of Missouri, and the complainant was never actually or constructively within the territorial limits of that state."

It seems well settled by federal authority that, when the wife is deserted by the husband without justification, the matrimonial domicile stays with her, the innocent party, and that she may in consequence acquire a new domicile, which may become, indeed, the matrimonial domicile, as was held in Barber v. Barber, 21 How. 582, 16 L. Ed. 226, and Haddock v. Haddock, 201 U. S. 570, text, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1. The Court of Civil Appeals of Texas, in the case of Montmorency v. Montmorency, 139 S. W. 1171, text, referring to the Haddock Case, says:

"The decision impresses us with the belief that the reasoning of that decision gives the court of the domicile of the innocent party jurisdiction to render a judgment binding everywhere, and deprives the court of the domicile of the guilty party of jurisdiction to render a judgment binding save in the state where rendered." Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 604; Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794.

[3] The record of judgment in another state may be collaterally attacked, if the facts necessary to give the court jurisdiction may be successfully contradicted. If the facts supporting jurisdiction did not actually exist, the record of the judgment may be impeached. Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154; Stuart v. Cole, 42 Tex. Civ. App. 478, 92 S. W. 1040. This is true, notwithstanding the decree may be valid and conclusive in the state where granted. Parker, having acquired a bona fide domicile in Missouri, would be entitled to have his status adjudicated in that state, as held in Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654:

"All governments possess inherent power over the marriage relation, its formation, and its dissolution as regards their own citizens; and where a court or a Legislature of a state has acted conformably with its laws concerning the marriage tie as to a citizen of that state, its action is binding in that state as to that citizen, and its validity under the due process clause of the Constitution may not be therein questioned."

And in Haddock v. Haddock, supra:

"As a corollary to the power of the state, irrespective of any extraterritorial effect, any other sovereign may, under the principles of comity, give to such a decree the efficacy which its own conception of duty and public policy may justify." Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

The obligatory recognition of such a decree beyond the limits of the state depends, however, upon whether there was jurisdiction of the matrimonial relation of the parties. That relation may not follow the domicile of the offending husband. If the adopted residence is intended to perpetrate a fraud on the innocent wife, or if the wife is without fault, and was deserted, the matrimonial domicile remains in the state of her residence. The law is well settled on this subject in Barber v. Barber, supra, that:

"Where the domicile of matrimony is in a particular state, and the husband, abandoning the wife, wrongfully goes into another state in order to avoid his marital obligation, such other state does not become a new domicile of matrimony, nor the actual or constructive domicile of the wife. That [the matrimonial domicile and that of the wife] continues in the original state until she actually acquires a new one."

In the Atherton Case, supra, it was held by the Supreme Court that a decree obtained in Kentucky against a wife resident in New York with the consent of her husband was entitled to full faith and credit in the jurisdiction of New York, because from the facts of that case it was ascertained that the matrimonial domicile was in Kentucky, notwithstanding the residence of the wife in Clinton, N. Y. In that case there was constructive service on the wife, and it was there held that, where the statute providing for substituted service was complied with in the state of the matrimonial domicile, jurisdiction would be complete. The distinguishing facts of that case from the instant case are that in

the Atherton Case the Kentucky court had jurisdiction of the matrimonial domicile as well as jurisdiction of the person of the defendant, and it would appear from the reasoning in that case that both are necessary to invest the decree with the character of compulsory extraterritorial recognition under the full faith and credit clause of the federal Constitution.

In the case of Haddock v. Haddock, 201 U. S. 572, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1, which we think is decisive of the question here presented, the husband abandoned the wife in New York and went to Connecticut where he acquired a domicile in good faith; the facts made out a case of desertion. The husband brought suit for divorce in Connecticut and perfected constructive service in accordance with the Connecticut statute; a final decree was entered on substituted service alone. The court held that the decree so obtained probably could be enforced within the jurisdiction of Connecticut, and that the state of New York could give it such effect as its public policy required, but that the decree based upon constructive service, and without personal jurisdiction over the respondent, was not such a decree as was entitled to obligatory enforcement in other states in virtue of the full faith and credit clause of the Constitution of the United States.

Coming next to the force and effect of the decree in Texas: The public policy of that state, settled by decisions of its ultimate courts, would, it seems, recognize only such decrees granted in other states where jurisdiction was predicated on the matrimonial res, as was held in the well-considered opinion of Montmorency v. Montmorency, supra; Griffin v. Griffin, 54 Tex. Civ. App. 619, 117 S. W. 910. It results, therefore, that the decree rendered by the District Court in the case at bar is not repugnant to the public policy of Texas as announced by the appellate courts of that state.

[4] Having determined, then, that the complainant's rights to a share in the estate of Walter Parker were not foreclosed by the decree of the Missouri court, the next question to be considered is what interest she is entitled to by the law of Texas, where the community system obtains, and whether or not her inertia and indifference, long after indirect notice of her husband's marriage in Missouri and her efforts to obtain confirmation of the report, would invoke the rule of laches to the extent of barring her recovery?

The doctrine of laches is based upon grounds of public policy, which requires for the peace of society the discouragement of stale claims. Mackall v. Casilear, 137 U. S. 556, 11 Sup. Ct. 178, 34 L. Ed. 776; Lansdale v. Smith, 106 U. S. 386, 1 Sup. Ct. 350, 27 L. Ed. 219. Laches is not, like the statute of limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced. Brown v. County of Buena Vista, 95 U. S. 157, 24 L. Ed. 422. The application by the court, however, of the doctrine of laches, depends upon the circumstances of each case; for the very gist of the doctrine is that failure or neglect to do something that by law the party is obliged or bound to do.

[5] As we understand the law governing rights in community property, there was no duty devolved upon complainant to assert her equi-

table rights in the estate until the death of her husband, since during the marriage relation, where the community system exists, the husband has the absolute right to the control and management of that property. The rights of each the husband and the wife in the community are a continuing and inseparable quantity. Holyoke v. Jackson, 3 Wash. T. 235, 3 Pac. 841. But as to the nature of these rights it is settled that, while the husband's interest is active, the rights of the wife are merely inchoate and passive, during the marital relation. Wright v. Hays, 10 Tex. 130, 60 Am. Dec. 200; Higgins v. Johnson, 20 Tex. 389, 70 Am. Dec. 394; Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170. It was said in Routh v. Routh, 57 Tex. 589, text 595:

"The law of our state then impresses upon the marriage relation inflexible and continuous durability. * * * We have adopted this civil-law rule as it applies to the marital relation, ingrafting it upon our common-law contract of marriage, which, as we have shown, recognizes no second contract, * * * nor conjugal relation with other persons, during the continuance of the lawful marriage, unless the relation is lawfully dissolved."

It is declared in the same decision that to the marriage there attaches as a sequence a continued right of the wife to an equal interest in the community property until that right in some mode recognized by law be forfeited.

[6] Having determined, therefore, that the complainant is entitled to share in the estate of Walter M. Parker, we now turn to ascertain what may be her interest in his accumulations under the community system before and after the putative marriage with Mattie Parker, the appellant.

Appellee contends for the application of the rule which it is claimed was followed in Patton v. Philadelphia, 1 La. Ann. 98, where it was held, in a contest between the lawful and putative wives, that they were entitled to divide the community estate to the exclusion of heirs. It is insisted that the Routh Case, supra, approves the doctrine there stated, and that it should control in a case like the present. We do not understand the views so expressed in that case to adopt the doctrine of the Patton Case, supra. Adverting to the Patton Case, the court said that:

"One-half of the acquêts and gains will go to each wife; that such half is a debt due to each wife by the husband, and his heirs can claim nothing until his debts are paid."

But, looking further to the decision of the court in the Routh Case, it will be seen that it neither approves of nor accepts the statement above as the rule for distribution, but expressly holds:

"The Supreme Court has thus far shown a willingness to pretermit, in advance of the necessity demanding it, the expression of an opinion as to what circumstances will be sufficient to deprive a wife living apart from her husband of her community interest in property acquired by him in this state after their separation." 57 Tex. text 598–599.

And again:

"It is not necessary to attempt to suggest what rule would most nearly conform to an equitable one, and be most consistent with the rights of parties under our laws, nor shall we make such effort." 57 Tex. text 601.

Mr. Justice Bonner, however, concurring with the court mainly on the legal questions necessary to a decision of the case, thought it expedient to express some opinion on the distribution of the estate which the Court had expressly waived, saying:

"I am of the opinion that, under the facts and circumstances of this case, N. T., in right of her putative marriage with Jonathan Routh, was entitled to one-half of the property acquired during that marriage in the nature of a partnership of acquêts and gains." "I am further of the opinion that only the remainder of the property of that marriage, or one-half of the whole, could constitute the net community property of Jonathan Routh and his legal wife, Elizabeth Routh, plaintiff below, and that all to which the latter should in any event be entitled would be one-fourth the whole, or one-half the net community property of herself and Jonathan Routh." Clendenning v. Clendenning, 3 Mart. (La. N. S.) 438; Succession of Navarro, 24 La. Ann. 298; Harrington v. Barfield, 30 La. Ann. part 2, 1297; Gaines v. Hennen, 24 How. 553, 16 L. Ed. 770; Gaines v. New Orleans, 6 Wall. 642, 18 L. Ed. 950; Smith v. Smith, 1 Tex. 621, 46 Am. Dec. 121; Lee v. Smith, 18 Tex. 141; Henderson v. Ryan, 27 Tex. 670, cited.

If this separate opinion may be criticized as dicta, it is nevertheless supported by sound reasoning, based on the eternal principles of equity, and is followed approvingly in Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154.

In the Morgan Case, supra, the bona fide wife sued for all the estate of which the husband had died seised and possessed, and recovered on the theory that, as there had been no divorce from the first marriage, the second marriage was void ipso facto, and that no community interest whatever inured to the putative wife of such a marriage. The appellate court rejected this theory, sustaining the equitable right of the putative wife, and on the subject of distribution quoted the separate opinion of Judge Bonner above referred to in full.

If, therefore, under the law as we find it, the rights under the putative relation begin only from the time of the de facto marriage, a fortiorari the prior accumulations would necessarily inure to the wife of the first or subsisting marriage.

It is our opinion that the facts of this case evolve two distinct estates. The first consists in the acquêts of Walter M. Parker prior to the putative marriage with Mattie Parker, and out of this estate complainant is entitled to an undivided one-half or community interest, and the residue would go to the heirs of that marriage.

The defendant Mattie Parker's interest in the property is limited to a community interest in the accumulations or the estate acquired after her attempted marriage with decedent, or to that estate which by her joint labor and sacrifice she contributed. Morgan v. Morgan, supra, approved in Hammond v. Hammond, 49 Tex. Civ. App. 482, 108 S. W. 1024, where the property was divided equally between the wives, no rights of children intervening.

Undoubtedly, by the settled law of Texas, Mattie Parker, the wronged spouse, is entitled to a free and unincumbered half of the property acquired by decedent after his marriage to her, March 17, 1880. Notwithstanding the fact that the property acquired after the putative marriage was due solely to the joint efforts of the parties to that marriage, yet by reason of there never having been a legal dissolution of the

prior legal marriage the law stamps it irrevocably with the community rights of Barbara Parker, the deserted spouse. Her rights, however, are relegated to the just and equitable claim of the putative wife. The remaining half of the second estate would, it follows, be divided between Barbara Parker and the children of the putative marriage.

We conclude, therefore, that the complainant is entitled to recover in this action one undivided half of the first estate, or the original acquêts of Walter M. Parker as it existed before the putative marriage; the remaining half of which to go to the heirs of that marriage. Of the second estate, the property acquired after the putative marriage, complainant is entitled to one-fourth of the whole second estate, or one-half of that remaining after Mattie Parker's share of one-half of the whole has been carved out; the residue of this second estate to go to the heirs of that marriage.

The decree of the District Court is therefore reversed, and the cause remanded, with directions to reform and enter therein a decree in conformity with the views here expressed.

It is so ordered.

LEW LING CHONG v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2559.

1. ALIENS ⟸32—DEPORTATION PROCEEDINGS—REVIEW BY COURTS—APPEALS.
A proceeding on an appeal to the District Court from a commissioner's order for the deportation of a Chinese person was properly taken to the Circuit Court of Appeals by appeal.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.]

2. ALIENS ⟸32—DEPORTATION PROCEEDINGS—SUFFICIENCY OF EVIDENCE.
In a proceeding to deport a Chinese person, admitted into the United States as the minor son of a Chinese merchant, evidence *held* sufficient to sustain the burden resting upon such person of showing that his father was a merchant.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.]

3. ALIENS ⟸32 — DEPORTATION PROCEEDINGS — REVIEW BY COURTS — EVIDENCE.
On appeal from a commissioner's order for the deportation of a Chinese person, statements in the commissioner's memorandum opinion could not be considered as evidence against the person sought to be deported.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.]

4. ALIENS ⟸23—CHINESE PERSONS EXCLUDED—MINOR SON OF MERCHANT.
The minor son of a Chinese merchant living in the United States was lawfully within the United States, he not being afflicted with any of the moral or physical infirmities justifying deportation, under Act March 26, 1910, c. 128, § 1, 36 Stat. 263 (Comp. St. 1913, § 4244), especially as the departmental rules governing the admission of Chinese persons for several years have extended the privileges of the exempted classes to their minor children.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76-90; Dec. Dig. ⟸23.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

5. ALIENS ⟸32—DEPORTATION PROCEEDINGS—REVIEW BY COURTS—APPEALS.
On appeal from a decree affirming an order of a commissioner for the deportation of a Chinese person, findings of the commissioner and the District Court that such person was unlawfully within the United States did not preclude a review of the facts in the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⟸32.]

6. ALIENS ⟸24—CHINESE PERSONS EXCLUDED—MINOR SON OF MERCHANT.
That a Chinese person, properly admitted to the United States as the minor son of a Chinese merchant living in the United States, thereafter worked in a laundry, did not defeat his right to remain in the country.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76–78; Dec. Dig. ⟸24.

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Deportation proceeding by the United States against Lew Ling Chong. From a decree affirming the commissioner's order of deportation, defendant appeals. Reversed and remanded, with directions.

P. M. Smith, of Wellsville, Ohio, for appellant.

J. B. Waterworth, Asst. U. S. Atty., of Cleveland, Ohio, for the United States.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. [1] The government commenced a proceeding October 12, 1912, before a United States commissioner, for the purpose of deporting Lew Ling Chong, and, on January 24, 1913, the commissioner ordered respondent to be forthwith removed from the United States to China. The case was appealed to the court below, where, April 17, 1913, the order of the commissioner was affirmed. It is said in the brief for the government that the case was brought here both on writ of error and appeal, and that a motion had been filed to dismiss. No such motion appears, and, according to the transcript, an appeal alone was perfected. Indeed, as we understood counsel in oral argument, the claim in respect of a writ of error was abandoned; moreover, the case is properly here upon appeal. United States v. Hung Chang, 134 Fed. 19, 20, 67 C. C. A. 93 (C. C. A. 6th Cir.).

The appellant, Lew Ling Chong, was arrested upon a warrant charging him with being "a Chinese person and a person of Chinese descent," "unlawfully in the United States," and "not lawfully entitled to be and remain" therein. This seems to be the complaint, and the only one, upon which appellant was tried and ordered to be deported; no pleading of any kind was filed by appellant. It appears, from the memorandum opinion of the commissioner, that at the hearing before him several witnesses were called by the government, and that only the father of appellant was called for the defense. The testimony there given is not embodied in the record. The cause was tried de novo in

the court below, and the government rested its case upon an admission that appellant "is a Chinaman." Both appellant and his father appeared at that trial as witnesses, and their testimony, as translated by an interpreter, is set out in the record. A certificate, called a certificate of identification, was in terms formally offered and received in evidence at this trial, though the instrument was then in the custody of the government at Washington, and, by leave of court, was inserted in the record after the decree had been entered. Nothing further was offered by either the appellant or the government.

[2] The question is whether the order of deportation should be sustained. Appellant entered the United States at the port of Seattle, July 21, 1910. He was admitted as a "minor son of Lew Wah solely because of his status as a merchant." The relation of father and son is not disputed. It is stated in the certificate that appellant was then 21 years of age. It is, however, claimed and practically admitted that this was a mistake which grew out of a Chinese custom to treat a child as two years of age upon the first birthday of the Emperor next succeeding the birth of the child, even though this results in treating a child born within a single month prior to such birthday as two years of age; and so it is in effect conceded that appellant was 19 years old at the time of his entry at the port of Seattle. The father, Lew Wah, entered the United States at the port of San Francisco in 1878, and has practically made this country his home ever since. He testifies in substance that some four years prior to the trial below—that is, in 1909—he purchased an interest, investing $500, in a Chinese store situated in Cleveland, Ohio; that in this store he was buying and selling Chinese drugs and general merchandise; and that the store and his interest therein are still maintained. True, he said in his examination in chief that "during the last four years" he had been in a "laundry and that store"; but in effect it appears in his cross-examination that he was in the laundry for only a few months within that period, and that this was within the 10 months next preceding the trial; and he adds that for a period of more than 10 years prior to that time he had not been engaged in a laundry at all.

The son, Lew Ling Chong, testifies that in August or September following his arrival at Seattle he began work in this store, giving its location by street and number, and stating that he was helping his father and "learning Chinese trade—business, that is—and selling goods"; that he was selling "Chinese drugs and general merchandise"; that "there are quite a few partners in the concern"; that his father was "buying and selling" in the store; that his "father's name appeared on the book of that company"; that he knew of his father being in the store for three years after the son's arrival; that he, the son, was in the store "a little over a year"; that on account of trouble (in the Chinese quarter) his father sent him to Youngstown, where he stayed about a year, taking private lessons from a woman who had married "a Chinese person." On cross-examination, he denied having worked in a laundry in Youngstown.

The testimony of these witnesses must be considered in connection with the facts that it was given through a Chinese interpreter, that the

translations are more or less confused, and that no attempt was made either to impeach the witnesses or to contradict their testimony. It is worthy of consideration, moreover, that the testimony accords with, if, indeed, it is not corroborated by, the certificate of identification. The certificate was attested and issued by the immigration official in charge of the port of Seattle, pursuant to a regulation governing the admission of Chinese, adopted March 19, 1909, by the Department of Commerce and Labor.[1] One provision of the rule enjoined upon the immigration official the duty carefully to observe its instructions "in issuing such certificates." The instructions were plain respecting the facts that should be embodied in such a certificate. It is stated in the certificate, as we have seen, that appellant was admitted as a "minor son of Lew Wah solely because of his status as a merchant"—i. e., the father's status; and it cannot be assumed that the official failed in the discharge of his duty. No inquiry appears to have been made touching the issue of the certificate, although appellant gave the certificate to a government official at the time of the arrest in Youngstown; and another provision of the rule clearly implies that the government keeps a record of such certificates, for it permits the issue of duplicates of "those unavoidably lost or destroyed." Still it is argued that at the time the certificate was issued the father was not a merchant, and that the certificate was obtained through fraudulent representation in that respect. Under the evidence, the argument cannot be sustained. It has no basis save some statements of the witnesses which on first view might seem inconsistent and excite suspicion, but on examination are reconcilable; and simply to suspect, is not to show, the existence of such a fraud. Pang Sho Yin v. United States, 154 Fed. 660, 662, 83 C. C. A. 484 (C. C. A. 6th Cir.); United States v. Foo Duck, 172 Fed. 856, 858, 97 C. C. A. 204 (C. C. A. 9th Cir.).

[3] True, counsel refer to statements found in the memorandum opinion of the commissioner; as we have seen, no part of the testimony of the witnesses there alluded to appears in the record; and the statements of the commissioner are not admissible and cannot rightfully be imposed upon the appellant. Liu Hop Fong v. United States, 209 U. S. 453, 462, 28 Sup. Ct. 576, 52 L. Ed. 888. Upon the whole, we are satisfied that, at the time of appellant's entry, his father was a merchant, within the meaning of the act of Congress. Tom Hong v. United States, 193 U. S. 517, 521, 522, 24 Sup. Ct. 517, 48 L. Ed. 772; Lee Kan v. United States, 62 Fed. 914, 10 C. C. A. 669 (C. C. A. 9th Cir., opinion by Mr. Justice McKenna, then circuit judge).

[1] Counsel for the government cite rule 19 of that department as the one under which the certificate was issued; but this was evidently an inadvertence, for rule 52a, adopted March 19, 1909, was in force at the time of appellant's entry. Yet this error is unimportant, since the two rules are substantially the same in the portions relevant here. And in our allusion to the rule we are not unmindful of the distinction urged between the effect of a departmental rule and that of an act of Congress, touching the evidential effect of a certificate. Liu Hop Fong v. United States, 209 U. S. 453, 463, 28 Sup. Ct. 576, 52 L. Ed. 888. This does not, however, prevent a certificate issued under the departmental rule from having some meaning, some probative significance, when it is considered in connection with a charge of fraud.

[4] It results that the case presented fixes the status of the father as that of a merchant, and of the son as that of a minor, on July 21, 1910. Admittedly such a fact as to the father placed him within the exempted class; and it is settled that the existence of this fact entitled his minor son to enter (United States v. Mrs. Gue Lim, 176 U. S. 459, 464, 468, 20 Sup. Ct. 415, 44 L. Ed. 544; United States v. Foo Duck, supra, 172 Fed. at pages 856, 858, 97 C. C. A. 204; United States v. Lim Yuen [D. C.] 211 Fed. 1001, 1004); indeed, ever since April 13, 1910, if not before, the departmental rules governing the admission of Chinese have distinctly extended the privileges of the exempted classes to their minor children (rule 2 in 1910; rule 9b in 1914). Furthermore, the father had lived in this country for 35 years, and the son had lived here upwards of 2 years, when the son was ordered to be deported to China. The only charge preferred against the son is, as already stated, that he was born in China and not entitled to remain in the United States. It is not suggested that he is afflicted with any of the infirmities, either moral or physical, which might justify deportation (36 Stat. 263–265, which is very comprehensive; United States v. Wong You, 223 U. S. 67, 69, 32 Sup. Ct. 195, 56 L. Ed. 354; Lewis v. Frick, 233 U. S. 291, 300, 301, 34 Sup. Ct. 488, 58 L. Ed. 967; Id., 195 Fed. 693, 699, 700, 115 C. C. A. 493 (C. C. A. 6th Cir.); nor is it intimated that either the father or the son has, since taking up his residence in this country, failed in any of the qualities of a law-abiding citizen. It is obviously a serious thing to sever the relations, as here proposed, which seem to exist between the father and son; and while it is incumbent upon the son, in such a case as this, to show his right to remain here, it is not too much to say that reasonable credence should be given to the testimony of such persons as these. We say this for several reasons:

[5] (1) It is insisted that, in view of the orders made by the commissioner and the District Court, this court should not reconsider the facts of the case, citing Chin Bak Kan v. United States, 186 U. S. 193, 199, 22 Sup. Ct. 891, 46 L. Ed. 1121; but the particular language in the opinion, which is quoted and relied on by counsel here, was used because of a claim there made that the commissioner was without jurisdiction by reason of section 6 of the act of 1892 (Act May 5, 1892, c. 60, 27 Stat. 25 [Comp. St. 1913, § 4320]); the Chief Justice saying (186 U. S. 201, 22 Sup. Ct. 895, 46 L. Ed. 1121):

"Except in cases under that section where the question of jurisdiction alone is certified, we have power to dispose of the entire case; but as the jurisdiction of the commissioner is sustained, we are of opinion that we cannot properly re-examine the facts already determined by two judgments below."

In Tom Hong v. United States, 193 U. S. 517, 24 Sup. Ct. 517, 48 L. Ed. 772, the contention of the appellants was that they were entitled to remain in the United States, and no question of jurisdiction seems to have arisen. There had been two judgments below, one of the commissioner and the other of the District Court, and in the course of the opinion Mr. Justice Day said (193 U. S. 522, 24 Sup. Ct. 520, 48 L. Ed. 772):

"It is true that the findings of the commissioner and in the District Court in cases of this character should ordinarily be followed in this court, and will

only be reconsidered when it is clear that an incorrect conclusion has been reached. Chin Bak Kan v. United States, 186 U. S. 193, 201 [22 Sup. Ct. 891, 46 L. Ed. 1121]."

Thus it is plain that the Supreme Court does not in a case such as this regard itself as precluded from reconsidering the facts. It is to be added, as counsel say of the decision of this court in Bak Kun v. United States, 195 Fed. 53, 55, 115 C. C. A. 55, that, under the act of Congress, it is incumbent upon a Chinaman, charged with being unlawfully within the United States, to establish his right to remain by affirmative proof. For reasons already stated, we think it clear that the appellant has discharged the burden of proof resting upon him, either under the act of Congress or under the rule laid down by Mr. Justice Day and before quoted.

[6] (2) It is urged that appellant worked as a laborer in Youngstown and was so working at the time of his arrest. We do not think this is shown by the record; but, since his communicated status and his resulting right to remain in this country had been previously established, the work he is said to have done in Youngstown could not have operated to forfeit his right to remain. United States v. Foo Duck, supra, 172 Fed. at page 858, 97 C. C. A. 204; United States v. Yee Quong Yuen, 191 Fed. 29, 30, 111 C. C. A. 500 (C. C. A. 8th Cir.); United States v. Lee You Wing, 211 Fed. 939, 941, 942, 128 C. C. A. 437 (C. C. A. 2d Cir.); United States v. Hom Lim (D. C.) 214 Fed. 456, 462; United States v. Lim Yuen (D. C.) 211 Fed. 1001, 1007, 1008. The decision in Low Wah Suey v. Backus, 225 U. S. 460, 476, 32 Sup. Ct. 734, 56 L. Ed. 1165, is inapplicable, since it is not shown, as counsel contend, that appellant has placed himself in a forbidden class.

The decree must be reversed, and the cause remanded, with direction to discharge appellant.

MUTUAL BEN. LIFE INS. CO. v. SWETT et al.

(Circuit Court of Appeals, Sixth Circuit. April 12, 1915.)

No. 2497.

1. INSURANCE ⟸586—BENEFICIARIES—VESTED RIGHTS.

Under an ordinary policy of life insurance, in which there is no reservation of the right to cut off or modify the interest of the beneficiary, the policy and the money to become due thereunder belong, from the time it is issued, to the person named in it as the beneficiary, and insured is without power by deed, assignment, will, surrender of the policy for a new one, or by any other act of his, to transfer to any other person the interest of the person so named as beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1470; Dec. Dig. ⟸586.]

2. INSURANCE ⟸586—BENEFICIARIES—VESTED RIGHTS.

Under a life insurance policy reserving to insured the right, without the consent of the beneficiary, to change the beneficiary, the beneficiary had no vested right, but only a mere expectancy during the lifetime of insured, and insured's control over the policy was, subject to its terms, as complete as if he himself had been the beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1470; Dec. Dig. ⟸586.]

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3. INSURANCE ⟸210—ASSIGNMENT BY BENEFICIARY—CONSIDERATION.
As a wife, designated as beneficiary in a policy on her husband's life, which reserved to the husband the right to change the beneficiary, had no vested right, but a mere expectancy only, she did not, by joining in her husband's assignment of the policy as security for his indebtedness, become a surety for him; the absolute right to assign the policy being lodged in him, and it was not necessary that she should receive a consideration for joining in the assignment in order to bind her.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 477; Dec. Dig. ⟸210.]

4. INSURANCE ⟸209—ASSIGNMENT OF POLICY—SUCCESSIVE ASSIGNMENTS.
Where, though an assignment of a $15,000 life insurance policy as security for a debt recited that it was to secure an indebtedness of $15,000, it was the intention to protect the assignee as to insured's entire liability to it, a letter subsequently written the assignee by him, directing that in case of his death the proceeds, after the satisfaction of a $10,000 note, should be applied to relieve an accommodation indorser from liability on account of another note for $6,000, was explanatory and confirmatory of the original intent, and passed by way of assignment whatever value the policy possessed after the delivery of the first assignment, as insured was not restricted to a single assignment of the policy, which by its terms was assignable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 479; Dec. Dig. ⟸209.]

5. INSURANCE ⟸213—"ASSIGNMENT" AND "CHANGE OF BENEFICIARY" DISTINGUISHED.
An "assignment" of a life insurance policy and a "change of beneficiary" are different things, as an "assignment" is the transfer by one of his right or interest in property to another, and rests upon contract, and, generally speaking, the delivery of the thing assigned is necessary to its validity, while the power to change the beneficiary is the power to appoint, and must be exercised in the manner agreed upon in the contract of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 483; Dec. Dig. ⟸213.

For other definitions, see Words and Phrases, First and Second Series, ASSIGNMENT.]

6. INSURANCE ⟸222—ASSIGNMENT—RIGHT OF ASSIGNEE TO ASSIGN.
Where insured, who had assigned the policy to secure an indebtedness to the assignee, wrote the assignee, directing it, in case of his death, to apply the proceeds in payment of a $10,000 note, and the balance to relieve an accommodation indorser from liability on another $6,000 note, such letter was sufficient authorization to the assignee to assign an interest in the policy to the executors of the accommodation indorser, who had been compelled to pay the note on which they were liable, and they thereby acquired such a title as was necessary to enable them to hold the policy as collateral security for the debt which they had paid, and to sustain an action upon the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 492; Dec. Dig. ⟸222.]

7. INSURANCE ⟸222—ASSIGNMENT—RIGHT OF ASSIGNEE TO ASSIGN.
Where a policy was assigned to secure certain notes, held by the assignee, an assignment of an interest therein to the executors of an accommodation indorser on one of the notes, who were required to pay the note, was valid and binding on the beneficiary, in the absence of any authorization from insured to make such assignment; the policy having reserved the right to insured to change the beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 492; Dec. Dig. ⟸222.]

8. INSURANCE ⊂=222—TRANSFER OF POLICY AS SECURITY—RENEWAL OF SECURED NOTE—EFFECT.

Where a life insurance policy was assigned to a bank to secure insured's notes held by it, the renewal of such notes did not destroy the assignment, in the absence of any intention on the part of the insured and the bank that the renewal should have that effect.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 492; Dec. Dig. ⊂=222.]

9. INSURANCE ⊂=217—ASSIGNMENT—FAILURE TO GIVE NOTICE TO COMPANY—EFFECT.

Where, after the assignment of an insurance policy to secure an indebtedness, insured wrote the assignee relative to the disposition of the proceeds of the policy in case of his death, such letter, considered as an additional assignment, was not ineffective as against a beneficiary, though neither it nor a copy of it was filed with or assented to by the company, as required by the policy, as the provision in the policy requiring notice to the company was for its protection, and could not be set up by any one else to defeat an assignment made without compliance therewith.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 487; Dec. Dig. ⊂=217.]

10. BANKRUPTCY ⊂=143—PROPERTY PASSING TO TRUSTEE—INSURANCE POLICIES.

As the holder of a life insurance policy reserving to him the right to change the beneficiary, and which by its terms was assignable, had a transferable interest in the policy, if, notwithstanding an assignment thereof by him, an interest in the policy still remained in him, such interest passed to his trustee in bankruptcy as of the date of the adjudication, and a purchaser of his right, title, and interest acquired a right superior to that of the beneficiary.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. ⊂=143.]

Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Suit by the Mutual Benefit Life Insurance Company against Myra M. Swett and others. From a decree against her, defendant named appeals. Affirmed.

Lewis Brucker, of Mansfield, Ohio, and E. L. Beach, of Saginaw, Mich., for appellant. Jacob Kleinhans, of Grand Rapids, Mich., and Wallace Foote, of Muskegon, Mich., for appellees.

Before WARRINGTON, Circuit Judge, and SATER and HOLLISTER, District Judges.

SATER, District Judge. The question for decision is: Are the Hackley National Bank of Muskegon, Mich., and the executors of Charles H. Hackley, deceased, entitled to the proceeds of the $15,000 policy issued by the Mutual Benefit Life Insurance Company of Newark, N. J., to Edward R. Swett on September 4, 1900, and made payable "to Myra M. Swett, his wife, if living, otherwise to the executors, administrators, or assigns of the said insured"; or do such proceeds belong to Mrs. Swett, who was named as his beneficiary and is now his widow? The case is here on her appeal from a decree against her.

The policy by its terms was assignable, but provided that no assignment of it should be effective until written notice of it was given

to the company. One of the special privileges accorded by it was that the insured, at any time while the policy was in force and not assigned, might change the beneficiary by returning the policy to the company with his written request for its appropriate indorsement of such change on the policy. The policy by apt language defines the owner of it to be either the person who is made such by its terms or who becomes such by its assignment. At the time the policy was issued, the bank held Swett's notes for borrowed money to the amount of $16,305, one of which, for $10,305, was unsecured. On the $6,000 note, Hackley was an accommodation indorser. Both were soon to mature. As Swett was not able to pay them, he agreed with the bank to take out a policy to secure them. He also agreed in 1896 to insure his life to protect his wife on her loan to him of some $14,000 or $15,000, which he had a few months previous given to her. She claims that the policy, whose proceeds are in question, was, in pursuance of such promise, for her benefit. On September 18, two weeks after the policy issued, Swett and his wife, without protest on her part, executed and delivered to the bank a written assignment of the policy and of "all sum or sums of money, interest, benefit and advantage whatsoever now due or hereafter to arise, or to be had or made by virtue hereof, to have and to hold unto the said Hackley National Bank to secure an indebtedness of $15,000." On September 28 the company filed a copy of the assignment in its office, and also indorsed on the original assignment the fact that a copy had been so filed, and that, if the assignment should be thereafter canceled, the bank should return the original to the company. The policy was delivered to the bank, and was never in the wife's possession, nor did she ever make any inquiry concerning it or her husband's bank indebtedness. On October 25 Swett by letter directed the cashier of the bank, in case of his death, to apply the proceeds of the policy, first, to the payment of the $10,000 note and interest; and, second, to the protection of Hackley on his indorsement of Swett's paper as he (Hackley) might direct. A copy of the letter was not transmitted to the company.

When the larger note became due, Swett paid $305 and renewed the note for the residue, which was the original principal sum. This note, and also that for $6,000, were periodically renewed, but neither of them was reduced or paid prior to his death, which occurred in October, 1906. Hackley died in February, 1905. The bank presented to his executors the $6,000 note as a claim; on June 3 following, it was paid. The bank subsequently executed and delivered an assignment of an undivided one-third interest in the policy to such executors. Shortly prior to his death Swett was adjudged a bankrupt. The trustee in bankruptcy, in consideration of $500, sold and transferred all of the right, title, and interest of Swett in and to the policy to the executors of Hackley. As the bank and Hackley's executors on the one hand, and the widow on the other, each claimed the entire proceeds of the policy ($17,448.41), the insurance company by its bill caused the respective claimants of the fund to interplead and deposited the value of the policy in court. Appropriate pleadings were interposed, and on the final hearing the result heretofore mentioned was obtained.

The contentions of the widow, in so far as they need be noticed, are that, upon the issuance of the policy, she became the sole owner, or, at least, acquired a vested interest in it, of which she could not be divested without her consent; that the assignment of the policy to the bank was, as to her, without consideration; that, if the assignment was valid, she occupied merely the position of a surety, in consequence of which the lien on the policy was released and discharged by the subsequent extensions, without her knowledge and consent, of the time of the payment of the notes held by the bank; that no change of beneficiary was possible after the policy had been assigned, and that, therefore, Swett's letter of September 25 to the bank was ineffective for any purpose; that the Hackley executors took nothing by the purchase of her husband's interest, if any, from the trustee in bankruptcy; and that in any event she is entitled to all of the funds in excess of $10,000, for the reason that the assignment of the policy was to secure only the $10,000 note due the bank. Her several claims are controverted by the bank and the Hackley executors.

[1-3] The rule is well settled that, under an ordinary policy of life insurance in which there is no reservation of a right to cut off or modify the interest of the beneficiary, the policy and the money to become due under it belong, from the time it issued, to the person named in it as the beneficiary, and that the insured is without power, whether by deed, assignment or will, or by surrender of the policy for a new one, or by any other act of his, to transfer to any other person the interest of the person so named as beneficiary. In such a policy the beneficiary acquires, the moment it is issued, a vested right which cannot be affected by any act of the insured subsequent to the execution of the policy, except it be a breach of condition. Washington Central Bank v. Hume, 128 U. S. 195, 206, 9 Sup. Ct. 41, 32 L. Ed. 370; May on Ins., § 399L (4th Ed.); Cooley's Briefs on the Law of Insurance, 3755. If, however, by the terms of the policy itself there is reserved to the insured the right, without the consent of the beneficiary, to change the appointee with the assent of the insurer, the beneficiary acquires only an expectancy and not a vested interest during the life of the insured. May on Ins., § 399M; Cooley's Briefs on the Law of Ins., 3755; Elliott on Ins., § 355; Kerr on Ins., §.231; Hopkins v. Northwestern Life Assur. Co., 99 Fed. 199, 40 C. C. A. 1 (C. C. A. 3); Hogan v. Fauerbach Brewing Co., 194 Fed. 846, 848, 114 C. C. A. 634 (C. C. A. 7); Lamb v. Mutual Reserve Fund Life Ass'n (C. C.) 106 Fed. 637; Robinson v. U. S. Mut. Acc. Ass'n (C. C.) 68 Fed. 825; Insurance Co. v. O'Brien, 92 Mich. 584, 52 N. W. 1012; Golden Star Fraternity v. Martin, 59 N. J. Law, 207, 216, 35 Atl. 908.

The right so reserved rests upon the terms of the contract, and is the same as that conferred on the insured by the certificate, charter, or by-laws of a mutual or benefit association, when insurance is effected in such an organization. As the policy to Swett stipulated that he might, on his written request of the company for its appropriate indorsement on the policy, change the beneficiary, his wife did not acquire a permanent or vested interest in it. The existence of such an interest during her husband's lifetime was made impossible by the

control over the contract of insurance given to him, independent of her will. Her right was inchoate, a mere expectancy during his lifetime, dependent on the will and pleasure of her husband as holder of the policy, and could not vest until his death happened with the policy unchanged. His control over the policy was, subject to its items, as complete as if he himself had been the beneficiary. Denver Life Ins. Co. v. Crane, 19 Colo. App. 191, 200, 73 Pac. 875. The wife had no vested interest which she could assign until the death of her husband—no assignable or transferable interest in the policy until some right of action on it accrued in her favor. May on Ins., § 399 F; Sabin v. Phinney, 134 N. Y. 423, 428, 31 N. E. 1087, 30 Am. St. Rep. 681. As she had but a mere expectancy at the time of the assignment, she did not become surety for her husband, because the absolute right to assign the policy was lodged in him. Having no property right in the policy (Golden Star Fraternity v. Martin, 59 N. J. Law, 207, 216, 35 Atl. 908), she pledged nothing for his debts; nor was it necessary that she should receive a consideration for her joining with him in the assignment in order to bind her, because in so doing she parted with nothing of appreciable value. The bank's rights were as secure without her joinder as with it. The ownership of the policy was not in her, but in her husband. The policy recognizes that ownership of it may be acquired by assignment. The bank by the assignment became its qualified owner, to the full extent necessary to satisfy the husband's indebtedness from its proceeds.

[4] The claim that the evidence of the cashier shows that the policy was assigned to protect only the $10,000 note cannot be sustained, whether his evidence, or the agreed statement of facts, or both, be considered. The assignment, it is true, named an indebtedness of but $15,000; but it is clear from the record that Swett intended to protect the bank as to his entire liability to it. His letter of September 25 to the cashier expressly directing that, after the satisfaction in full of the $10,000 note, the residue of the proceeds of the policy should be applied to relieve Hackley from liability on account of his indebtedness, was explanatory and confirmatory of his original intent and passed by way of assignment whatever value the policy possessed remaining after the delivery of the instrument jointly executed by himself and wife. He was not restricted to a single assignment of the policy. Manton v. Robinson, 19 R. I. 405, 34 Atl. 148.

[5] Whether, on account of Swett's indebtedness to the bank exceeding the amount of the policy, the assignment was in effect a change of beneficiary, is not in our judgment important to determine. However, the assignment of a policy and a change of beneficiary are not the same, but different, things. An assignment is the transfer by one of his right or interest in property to another. It rests upon contract, and, generally speaking, the delivery of the thing assigned is necessary to its validity. The power to change the beneficiary is the power to appoint. The power of appointment must be exercised in the manner agreed upon in the contract of insurance. Niblack, Benefit Societies & Acc. Ins. (2d Ed.) § 173. Swett made an assignment of the policy. He did not exercise or attempt to exercise the power to ap-

point another beneficiary. His wife still remained such. She takes nothing as beneficiary, but that is because the debts, which the policy was assigned to secure, consumed the entire proceeds of the policy.

[6, 7] The bank assigned an undivided one-third interest in the policy to the Hackley executors, for the reason that they had been obliged to pay to it Swett's $6,000 note which Hackley had indorsed. Swett's letter of September 25 was sufficient authorization for its so doing. The interest thus acquired by the executors vested the title in the executors, so far as that was necessary to enable them to hold the policy as collateral security for the debt which they had paid and to sustain an action upon the policy. In the absence of such an authorization, the assignment to them was valid and binding on the beneficiary. Corcoran v. Mut. Life Ins. Co., 183 Pa. 443, 39 Atl. 50.

[8] In the absence of any evidence of an intention on the part of the bank and Swett that the renewals of his notes evidencing his indebtedness to the bank should destroy the assignment of the policy, such renewals did not have that effect. Corcoran v. Mut. Life Ins. Co., supra.

[9] The claim that Swett's letter of September 25, considering it as an additional assignment, was ineffective to confer any right on the bank, because neither it nor a copy of it was submitted to, filed with, or assented to by the company, is not meritorious. A provision in a life insurance policy that an assignment of it shall not become effective until written notice of it is given to the company is for its protection, and cannot be set up by any one else to defeat an assignment made without compliance therewith. 19 Am. & Eng. Ency. Law, 96; May on Ins. § 396; Hewins v. Baker, 161 Mass. 320, 37 N. E. 441; Marcus v. St. Louis Mut. Life Ins. Co., 68 N. Y. 625.

[10] As Swett had a transferable interest in the policy and the authority to change the beneficiary at will, if, nothwithstanding his assignment to the bank, any interest still remained in him, such interest passed to his trustee in bankruptcy as of the date of adjudication. Loveland, Bank. (4th Ed.) 817, 818. Whether the Hackley executors believed the title which passed to the trustee to possess intrinsic value or merely desired to safeguard the interest in it which they had already acquired is immaterial. For a valuable consideration they purchased whatever the trustee had. His assignment and transfer to them of all of Swett's right, title, and interest in and to the policy gave them a right superior to that of his widow.

Other claims made by the widow have been considered, but need not be noticed. We find no error in the record.

The trial court is affirmed.

LOVELAND & HINYAN CO. v. BLAIR et al.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2569.

1. RECEIVERS ⟸151—PAYMENT OF CLAIMS—BURDEN OF PROOF.

On an application to the court, appointing receivers for a railroad company, to require the receivers to pay a judgment for loss and damage to freight, as it was claimed they were required to do by the order appointing them, where the claimants did not contend that they were entitled to payment out of anything but income, and there was no evidential showing that the receivers were in possession of the necessary funds, the application was properly denied.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 269–278; Dec. Dig. ⟸151.]

2. RECEIVERS ⟸151—PAYMENT OF CLAIMS—CONSTRUCTION OF ORDER OF APPOINTMENT.

An order appointing receivers for a railroad company, and authorizing them to pay, among other expenses, such loss and damage freight claims arising from the previous operation of the road as, in their judgment on examination, might properly be paid as expenses of operation, invested the receivers with a discretion concerning the payment of such claims, and did not purport to bind them, much less the court appointing them; and, while such discretion could not be arbitrarily exercised, the court's denial of an order requiring the receivers to pay indicated its belief that the refusal to pay was not an abuse of discretion.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 269–278; Dec. Dig. ⟸151.]

3. RAILROADS ⟸209—RECEIVERS—PRIORITY OF PAYMENT—OPERATING EXPENSES.

Where income from a railroad in the hands of receivers properly applicable to operating expenses has been diverted to the payment of a mortgage indebtedness, to the prejudice of claimants who have, within a limited time prior to the receivership, rendered services, furnished supplies, or the like, to the railroad, and to the enhancement alike of the property and the securities upon it, the bondholders may be required to reimburse the fund applicable to the payment of such claimants; but where there has been no diversion of current income, either before or after the appointment of a receiver, and no surplus income during the receivership out of which unpaid debts of the income can be paid, the contractual rights of the secured creditors afford them protection.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 692–695; Dec. Dig. ⟸209.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by the American Brake Shoe & Foundry Company against the Pere Marquette Railroad Company, in which Frank W. Blair and others were appointed receivers of the railroad company. From an order denying an application to require the receivers to pay a judgment against the railroad company, the Loveland & Hinyan Company appeals. Affirmed.

C. J. Hall, of Grand Rapids, Mich., for appellant.

J. C. Bills, of Detroit, Mich., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

WARRINGTON, Circuit Judge. On April 5, 1912, an order was entered in the court below, appointing receivers of the Pere Marquette Railroad Company, at the suit of the American Brake Shoe & Foundry Company. The nature of the claim of the plaintiff in that case does not appear, saving an inference that it was for supplies. On June 18, 1913, the Loveland & Hinyan Company sought, through intervention, to obtain an order requiring the receivers to pay petitioner $5,500, in satisfaction of a judgment theretofore recovered by it against the railroad company. The order was denied, and the petitioner appeals.

Petitioner's judgment grew out of loss and damage sustained upon 70 car load shipments of freight over the Pere Marquette Railroad and its connecting carriers, between September 27, 1909, and November 10, 1911. The shipments consisted of peaches, apples, plums, and potatoes. The shipments all originated in Michigan, 3 of them having been made to points within, and 67 to points without, the state. The entire loss ($8,914.32) appears to have been caused by faults of the initial road and its connecting carriers, through delays in furnishing cars and in transit, shortage, rough handling, and improper equipment. All freight charges were paid to the railroad company, and claims for such losses and damages seem to have been filed with the company, before the receivers were appointed.

On April 3, 1912, two days before appointment of the receivers, the petitioner commenced suit in the circuit court for the county of Kent, Mich., against the Pere Marquette Railroad, to recover these losses and damages. On April 12, 1913, in pursuance of a compromise, a judgment of confession was entered in the Kent circuit court in favor of the petitioner and against the railroad company (not the receivers) for the amount now claimed. The sole basis of the claim that the receivers shall be compelled to pay the judgment is a provision of the order appointing them. The order of appointment contains provisions authorizing the receivers to take possession of the railroad property, control and operate it, secure and develop the business, collect rates, etc., employ the income to preserve the property and the rights and interests of the company, and also:

"* * * To make appropriate payments from time to time in their discretion of current and unpaid pay rolls; also of bills for material and supplies incurred in the ordinary operation of said railroad system from time to time within six months prior hereto; also of such loss and damage freight claims arising from the previous operation of said property as in their judgment on examination may properly be paid as expenses of operation; also of expenses of maintaining and operating said railroads and properties from and after this date. * * *"

[1] It is alleged in the petition that the receivers have in their possession funds collected from rates, etc., sufficient to pay the judgment. This is in effect denied in the answer, where it is alleged that the funds in the hands of the receivers "are not and have not been sufficient to pay the receivership operating expenses, including taxes, labor, and material for repairs and replacements and other items which are clearly entitled to priority in payment"; but such "other items" are not specified. No evidence was offered by either side. Upon this state of the record the petitioner's insistence is that the portion of the appointing

order which relates to "loss and damage freight claims" is mandatory, and that, since the order in terms applies to claims "arising from the previous operation" of the road, the receivers are amenable to mandatory process. The petitioner does not claim, however, that it is presently entitled to an order of payment out of anything but income. The most obvious answer, then, to the contention that the receivers are open to peremptory order, is the absence of an evidential showing that the receivers are in possession of the necessary funds.

[2] Furthermore, it is to be observed that the insistence of petitioner is in effect aimed against the very court that made the appointing order; indeed, it amounts to a claim that, having made the order, the court is bound to enforce it; and this, too, regardless of consequences to the maintenance and operation of the railroad. Surely this could not have been the purpose of the appointing order. The argument overlooks the portion of the order which restricts payment of this class of claims to such as in the receivers' "judgment, on examination, may properly be paid as expenses of operation." This plainly invests the receivers with a *discretion* concerning the payment of such claims; it does not purport to bind the receivers, much less the court; it is a privilege, not a command. It may well be conceded that discretion so vested is not to be arbitrarily exercised; but the denial of the order here sought plainly implies that the court below did not believe that the receivers' refusal to pay the judgment was an abuse of their discretion.

Counsel for petitioner cite, in support of the validity of the provision relied on in the appointing order, decisions showing a broad power in a chancellor to impose conditions upon which an appointment of a receiver of a railroad will be made at the suit of a trustee for mortgage bondholders (Dow v. Memphis L. R. R. Co. [C. C.] 20 Fed. 260; Farmers' Loan & Trust Company v. Kansas City, etc., R. R. Co. [C. C.] 53 Fed. 182); and they claim the provision is not unusual, calling attention to a similar provision which appears, though it is not passed on, in Southern Railway v. Carnegie Steel Co., 176 U. S. 257, 267, 20 Sup. Ct. 347, 44 L. Ed. 458. Those cases, however, did not involve a question like the present one, nor do they intimate that the *form* of the appointing order is decisive of such a question. Counsel also rely on Fordyce v. Omaha, etc., R. Co. (C. C.) 145 Fed. 544, 547, 555, where, under an issue between a claimant and mortgage bondholders, it was held that, although the appointing order "may have directed that preferential claims for supplies and materials be paid out of the proceeds of the sale or the corpus of the property," the purchaser might contest the claims on the ground that they were subordinate in right to that of the prior mortgagee; and this was based on a ruling made in Louisville, etc., Railroad Co. v. Wilson, 138 U. S. 501, 506, 11 Sup. Ct. 405, 407 (34 L. Ed. 1023), where Mr. Justice Brewer said:

"We would not be understood as asserting, even by implication, that the terms of an order of appointment of a receiver vest in all claimants an absolute right as against the security holders. Such terms may be, and doubtless are, a protection to the receiver; and what he does and pays within those terms may be, thereafter, beyond the challenge of any party interested in the property. But when he has not acted, and the question is presented to

the court as to the liability of the property for any claim, the court is not foreclosed by the order of appointment, but may consider and determine equitably the extent of liability of the property to such claim, and what its rights of priority may be. Hence, as the receiver did not pay this claim, the parties in interest may rightfully challenge its priority, even if it were within the very letter of the order of appointment of the receiver."

See, also, Gregg v. Mercantile Trust Co., 109 Fed. 220, 226, 48 C. C. A. 318 (C. C. A. 6th Cir.).

[3] Thus the fallacy of the position taken by the petitioner is even more plainly revealed by its resort to decisions in which contests between unsecured and secured creditors of insolvent railroad companies are determined, for those decisions illustrate the relations of such creditors, respectively, to the income of the companies. Both of these classes of creditors are rightfully interested in the income—the first, in the portion required as operating expenses; and the second, in any surplus—and so the application which has been made of income frequently gives rise to important questions. The problem usually presented in such contests is whether income properly applicable to operating expenses has been diverted by the mortgagor to the payment of mortgage indebtedness, and to the prejudice of claimants who have, within a limited time prior to the receivership, rendered services, furnished supplies, or the like, to the railroad, and to the enhancement alike of the property and the securities upon it. Where such a diversion is shown, the bondholders may, under an appropriate issue, be required to reimburse the fund applicable to the payment of "debts of the income" to the extent of the diversion. Central Trust Company v. East Tennessee, V. & G. R. R. Co., 80 Fed. 624, 628–630, 26 C. C. A. 30 (C. C. A. 6th Cir.). This is upon the principle of restoration. Fosdick v. Schall, 99 U. S. 235, 254, 25 L. Ed. 339; Southern Railway v. Carnegie Steel Co., 176 U. S. 257, 274, 296, 297, 20 Sup. Ct. 347, 44 L. Ed. 458, and citations. Where "there has been no diversion of current income, either before or after the appointment of a receiver, and no 'surplus income' during the receivership, out of which unpaid debts of the income can be paid," the contractual rights of the secured creditors afford them protection. International Trust Company v. T. B. Townsend Brick & Contracting Co., 95 Fed. 850, 860, 37 C. C. A. 396 (C. C. A. 6th Cir.); Fosdick v. Schall, supra, at page 254 of 99 U. S. (25 L. Ed. 339). Conversely, if a diversion of income does take place during a receivership alone, it may form a basis for allowance of preferential claims even as against bondholders. Union Trust Company v. Souther, 107 U. S. 591, 595, 2 Sup. Ct. 295, 27 L. Ed. 488; Gregg v. Mercantile Trust Co., supra, at page 226 of 109 Fed. (48 C. C. A. 318). But we need not consider this class of cases farther, for the present intervention is lacking both in issue and parties necessary to present any question of diversion of income.

It is claimed by both sides that the losses entering into the judgment in question occurred for the most part upon the railways connecting with the Pere Marquette; and, as another reason why the judgment should be paid, counsel for petitioner urge that such losses are recoverable by the receivers under the Carmack amendment (34 Stat. 595 [1]). Presumably efforts of this kind have been made, but here again we are

[1] Act June 29, 1906, c. 3591, § 7, pars. 11, 12 (Comp. St. 1913, § 8592).

without evidence. We assume, without deciding, that there was some object beneficial to the railroad in making the provision relied on in the appointing order; we assume, also, that applicable funds may accrue during the life of the receivership; and so we are disposed to believe the petitioner should have opportunity to present its claim, upon appropriate intervention and evidence, during the proceedings to wind up the receivership, whether such proceedings shall be had upon sale and marshaling of liens, or otherwise.

The order is affirmed, without costs, but also without prejudice to the right to present the claim later.

S. B. & B. W. FLEISHER, Inc., v. ABBOTT.

(Circuit Court of Appeals, Third Circuit. April 13, 1915. Rehearing Denied April 26, 1915.)

No. 1912.

1. CUSTOMS AND USAGES ⟸7—REASONABLENESS—WOOL TRADE.
The custom of the wool trade, whereby if honest differences that cannot be amicably adjusted arise over the grading, which is done by one furnished by the buyer, either party may call the transaction off, is reasonable.
[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 7; Dec. Dig. ⟸7.]

2. SALES ⟸129—SALE OF WOOL—GRADING—CUSTOM—REJECTION.
Under the custom in the wool trade, whereby if honest differences that cannot be amicably adjusted arise over the grading, which is done by one furnished by the buyer, either party may call the transaction off, plaintiff having a contract to sell defendants 150,000 pounds of wool, and having offered, in part fulfillment thereof, a lot of 30,000 pounds, could reject or accept the grading thereof as a whole only, and could not require defendants to accept the part thereof with the grading of which he was satisfied, and to take wool from other lots to fulfill the contract.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 295; Dec. Dig. ⟸129.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by J. H. Abbott against S. B. & B. W. Fleisher, Incorporated. Judgment for plaintiff (217 Fed. 828), and defendant brings error. Reversed, and new trial awarded.

Frank P. Prichard, James Wilson Bayard, and John G. Johnson, all of Philadelphia, Pa., for plaintiff in error.

Reynolds D. Brown and Malcolm Lloyd, Jr., both of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The defendant below, S. B. & B. W. Fleisher, Inc. (hereinafter called Fleisher), was a manufacturer of

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

yarns, doing business in Philadelphia. The plaintiff, J. H. Abbott, was a dealer in wool, living in the state of New York. He did not grow the wool himself, but was a middleman, buying fleeces from the farmers and selling them to the mills. His method of operation was to go from place to place contracting for the delivery of fleeces at designated points, and usually submitting the fleeces to inspection at these points by the buyer. The wool in controversy may be divided into two classes, a superior grade subdivided into three varieties known as one-fourth, three-eighths, and one-half blood, and an inferior grade, also subdivided into three varieties, known as common, fine, and rejections. Common wool is clipped from sheep having no merino blood; fine is the wool of a full-blood merino sheep; rejections is the name of wools having certain defects that need not be specified; while one-fourth, three-eighths, and one-half blood come from crosses between a full merino and a coarse wool sheep, these admixtures being preferred even to the fine or full blood.

Not very long before January 6, 1913, Abbott had an interview with Fleisher in Philadelphia, in which the purchase and sale of wool during the coming spring was discussed. No contract was made at that time, but the contingency of their coming to terms afterwards was contemplated, and, since fleeces must always be separated or graded according to their quality, the subject of grading was taken up and the parties agreed that if a sale should be made, the wool should be graded at the various places in New York where the fleeces might be found, and the grading should be done by one of Fleisher's agents. The obligation to grade fairly would have been implied even if it had not been mentioned, but this requirement seems to have been expressly agreed upon. On January 6 Abbott opened a correspondence, and two or three letters were exchanged, the result being that on January 13 Fleisher ordered—

"100,000 lbs. of strictly choice New York State wool at 22¢ for the ¼, ⅜, and ½ blood, and 17¢ for the common, fine, and rejections, net f. o. b. cars, point of shipment * * * delivery to be made on or before May 1."

Abbott accepted the order, and shortly afterwards obtained an extension of time to May 20. By January 24 he had contracted for about half the quantity, and so notified Fleisher. On February 6 he wrote again to say that other buyers were offering higher prices than he could afford, and asked to have the contract price increased. Several communications followed on this subject, both by letter and by telephone, and on March 19 the prices and quantities were so changed as to be 22 cents and 17 cents for 47,000 pounds and 24 cents and 18 cents for 78,000 pounds (afterwards increased to 93,000 pounds), the other terms of the agreement remaining unchanged. About the same time Abbott began to make arrangements for grading and shipping the wool. On March 17 he asked Fleisher to send 260 bags immediately to Pavilion, N. Y., and on March 21 gave directions about forwarding bags to five other places, saying that he hoped to begin taking in wool at Pavilion the first week in April, and that he would let Fleisher know when to have the grader there. On March 26 he wrote, saying:

"I will want your man to load wool—at Pavilion the morning of April 5th, 2 days, at Le Roy, 9th, at Kent, 12th, 2 days, at Holcomb, 15th, at Hemlock, 22d, at Moscow, 24th, at Castile, 26th, at Avon, 28th"

—requesting Fleisher to:

"Please let your man have 2 or 3 New York drafts to fill out in payment for the wool when loaded at Pavilion and Le Roy so that I may have funds to take in the wool at other points."

In accordance with these requests the bags were sent, and Davies the grader reached Pavilion in readiness to begin the work of grading on Saturday, April 5.

At Pavilion the disagreement took place that has brought this dispute into court, but before recounting what happened there it will be advisable to determine the exact situation and the rights of the parties. And first we may note that no controversy has ever existed about the meaning of the letters, or about quantities or prices; the whole dispute is about the grading of the wool and the agreement in reference thereto. It appears that official inspection or grading is not known in this trade. And we are not advised whether expert graders are available who may be hired by any one desiring their services; the only evidence before us is that under the custom of the trade the grader is furnished by the buyer. As the buyer usually selects one of his own employés for this purpose, it is obvious that opportunities for friction are likely to occur, and we may be sure that the situation has not escaped the attention of all parties in interest. Being in the buyer's employ, the grader is inevitably in a difficult position. Even if this relation did not exist, his position would still be difficult, for in any considerable quantity of wool several grades will almost certainly be found, perhaps as many as six, and it is hardly possible that two minds would agree about the quality of every fleece. With the most thorough effort to be perfectly fair in the exercise of his judgment, the grader is almost certain to find himself in frequent conflict with the seller. What the grader may regard as an inferior fleece the seller may regard as superior, and each may be wholly honest in his opinion. If then we add the fact that the mind of the grader can hardly be completely free from the influence of the buyer's interest, owing to the relation between them, we may see good reason to believe that the most earnest effort of the grader may not succeed in keeping his judgment from going somewhat astray. Moreover, the seller is sure to suspect him of partiality, either conscious or unconscious, and this attitude of the seller is likely to affect his own judgment unfavorably. As each party is thus urged by his interest toward a hostile state of mind, it is easy to see that occasions for conflict need not be sought; they are constantly at hand, and may readily lead to explosions and irreconcilable differences of opinion. Fraudulent grading also is possible, and may sometimes take place.

Now, how are these disputes to be settled? As already stated, there is no trade authority to settle them, and the only other resource is to provide a remedy by agreement or custom, which in effect is agreement, or a course of conduct often repeated. We may be certain that acute men of business have understood the situation thoroughly, and have

used their best efforts to meet it. Conceivably it could be met in several ways. Official graders might be provided whose judgment should be final; but this course has not been adopted, no doubt for excellent reasons. Or it could be met by having, say, three graders who should be chosen as arbitrators usually are; but this course also has its own objections, and at all events has not been adopted. Or the buyer's grader might be given authority to decide finally, a course to which we may be sure the seller would hardly agree. Or finally the trade might gradually settle down upon a course of proceeding that on the whole appears to present the most advantages and the fewest objections. The evidence indicates that the problem has been worked out in this way, and has been solved by the following custom: The buyer furnishes the grader, who may be and usually is his own employé; the grader must act honestly, and he must also do his best to be impartial; but if differences arise that defy amicable adjustment, since they cannot possibly be decided on the spot, either party is at liberty to call the transaction off.

[1] At the trial there was some dispute whether such a custom was reasonable, and as the question is raised upon this writ of error we may say briefly that we see no sufficient ground to condemn it. The parties are dealing with an executory contract, which cannot be carried out until the wool is graded and the prices are thereby ascertained; and therefore we think it not only commendable, but almost essential, that the parties (either expressly, or by the implied acceptance of a well-known custom) should agree in advance how to meet such controversies as are likely to arise while they are engaged in the effort to execute the contract fully. On the whole, this custom seems to be fair and reasonable. In some respects it may perhaps be objectionable, but the situation is perplexing, and we shall not try to propose a better solution. The problem is a business problem, and when business men find some better course than has yet been discovered the courts will be ready to sanction it; for the present we take the custom in the stage it has thus far reached. Only a word or two more need be said about it. Obviously it offers at least one temptation to the buyer, namely, a way to escape an imprudent bargain. If such a bargain has been made, the grader may be tempted to grade so unfairly as to drive the seller to cancel the contract, but we need hardly point out that this would be fraud, a breach of the contract to grade fairly, and that for such a breach the buyer would be liable in damages adequate to redress the wrong. As we understand the custom, it does not apply to fraudulent grading, but to fair grading, meaning a situation where an honest and irreconcilable difference of opinion has developed.

[2] Thus understanding the rights of the parties, we may now turn to the occurrences at Pavilion. At this point from 25,000 to 30,000 pounds were awaiting inspection, this being the first quantity offered by Abbott in partial fulfillment of his contract. The grader examined the fleeces singly, and divided them into one-fourth, three-eighths, and one-half blood, and also into the inferior grades. The superior wool was sacked, hauled to the station, and put into cars for shipment, but Abbott would not consent to deliver the inferior grades because he

believed the pile to contain many fleeces that ought to have been put among the more expensive wools. The statement of claim does not aver that the grading was fraudulent, and no such theory was put to the jury except in the way of merely incidental mention; the case was tried, and has been argued, on the assumption that while the parties differed decidedly about the correctness of the grading, the difference of opinion was honest. That fraud is not charged appears from the plaintiff's brief, in which it is stated that:

"The plaintiff has consistently * * * taken the position that all that occurred at Pavilion was simply a difference of opinion between the plaintiff and the grader Davies as to the propriety of the grading of a portion of the wool. If, as the verdict of the jury establishes, the plaintiff was right and Davies wrong in the matter of the grading, possibly the plaintiff might, had he chosen, have called the contract off or have demanded a regrading. He, however did neither, but simply said, in effect, to the defendant: 'As we do not agree about this lot, let us go on and complete our contract out of the numerous other lots that I have purchased at other places.'"

This quotation shows the plaintiff's theory of the case, and it is consistent with what he did at Pavilion. He was willing to ship the wool that had been graded as superior, but he declined to ship the rest. Whereupon Fleisher demanded that he should ship either the whole of the Pavilion wool as graded, or none of it; and upon this crucial point the contract broke down. Was the plaintiff right or wrong? If the whole 150,000 pounds had been at Pavilion, it is hardly open to controversy that he would have been wrong. In that event the custom would have justified him in refusing to accept the grading as a whole if he were dissatisfied with it, but he would not have had the right to accept it in part and refuse it in part. And we do not think the principle has been changed by the fact that only some of the wool was there. Whatever the quantity was, he was offering it as a whole in fulfillment of the contract; that is, he was offering a definite quantity of wool to be graded, and although the grading could not bind him if he disagreed with it, he could not accept the part he regarded as advantageous and reject the part he regarded as disadvantageous. We do not say that he might not have rejected the grader's work at Pavilion as a whole, taking the position:

"It is true we cannot agree about this particular lot, but I have enough wool elsewhere to fulfill my contract, and I offer you that. Let us try to agree about the other lots, although we cannot agree about this."

He did not take this course, however, but adopted the wrong position deliberately, and thus justified Fleisher in refusing to accept a method of grading that he had not agreed to, either expressly or by force of the custom.

We need not take up the assignments of error in detail. What we have said will indicate sufficiently the rules that should have been applied in the district court; they will serve as a guide in case there should be another trial.

The judgment is reversed, and a new trial is awarded.

WORK MIN. & MILL. CO. v. DOCTOR JACK POT MINING CO.

(Circuit Court of Appeals, Eighth Circuit. February 17, 1915.)

No. 4070.

MINES AND MINERALS ⇐38—ACTION TO ESTABLISH EXTRALATERAL RIGHTS—CONSTRUCTION OF JUDGMENT—EVIDENCE.

A judgment for plaintiff in an action to recover the value of ore alleged to have been taken by defendant from two veins apexing in plaintiff's mining claim, but extending on their dip beyond its vertical side lines beneath the surface of defendant's adjoining claim, rendered under a stipulation that only the issue of title and right to possession of "the veins and ores in controversy" should be tried, leaving the question of damages to be later disposed of, construed, and *held* to relate only to the title and right to possession of the ore in the two veins which were put in issue by the pleadings, lying beneath the surface of defendant's claim and within the limits defined by the verdict and judgment, leaving it open to defendant on the subsequent trial of the issue of damages to show that a portion of the ore taken from its claim within such limits was from other veins; and also *held*, that evidence offered by defendant for that purpose was material and sufficient to require its submission to the jury.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½–113; Dec. Dig. ⇐38.]

In Error to the District Court of the United States for the District of Colorado; John A. Riner, Judge.

Action at law by the Doctor Jack Pot Mining Company against the Work Mining & Milling Company. Judgment for plaintiff, and defendant brings error. Reversed.

Charles S. Thomas, of Denver, Colo. (George L. Nye, of Denver, Colo., and J. L. Bennett, of Colorado Springs, Colo., on the brief), for plaintiff in error.

William V. Hodges, of Denver, Colo. (Mason A. Lewis and James B. Grant, both of Denver, Colo., on the brief), for defendant in error.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. This writ of error challenges a verdict of $400,000 for ores extracted by the Work Mining & Milling Company, the defendant below, from Number One vein and the Timber Drift vein, which had their apices in the Lucky Corner lode mining claim, which was owned by the Doctor Jack Pot Mining Company, the plaintiff below, but extended on their dip outside the vertical side lines of the Lucky Corner claim and beneath the surface of the adjoining Little Clara lode mining claim, which was owned by the defendant. In its complaint the plaintiff alleged that it was the owner of the Lucky Corner lode mining claim, of the Number One vein, and of the Timber Drift vein, that these veins had their apices in its claim, that these veins extended on their dip outside the vertical side lines of its claim, that it was in possession and entitled to the possession of these veins or lodes throughout their entire depth, but that the defendant entered into and upon them, ousted the plaintiff therefrom, has ever since held and con-

tinues to hold possession thereof, and that it has extracted therefrom ores of the value of $980,000. In its answer the defendant denied that the plaintiff was the owner of that part of either of the two veins lying outside the vertical side lines of the Lucky Corner claim, denied that the defendant had ousted the plaintiff from the possession thereof or had extracted any ore therefrom, and alleged that it was the owner of the Little Clara lode mining claim, which was senior in location and discovery to the Lucky Corner claim, that the ores it had taken out had been taken from within the vertical side lines of the Little Clara claim, and that they were the property of the defendant.

After the issues had been joined the parties stipulated:

"That the issue of title and ownership and right of possession of the veins and ores in controversy herein shall be alone tried and determined by the court and jury at the trial of said cause about to be had. The issue of damages to the plaintiff shall be reserved for further trial and proceedings, and nothing herein shall be permitted to prejudice or affect said issue of damages, but the same may be thereafter tried, determined, and disposed of in all respects as though this stipulation had not been made."

Accordingly the issues of title and ownership were first tried, and the jury returned a verdict that the plaintiff was "the owner and entitled to the possession of that portion of the Lucky Corner lode mining claim, U. S. Sur. No. 9209, Cripple Creek mining district, Colorado, known and described in the complaint herein as the Number One vein, and in the answer as Lower Forty-Five vein, lode, or ledge, throughout its entire depth, between two vertical planes both parallel to the end lines of said Lucky Corner claim, one drawn through the point where the apex of said vein crosses into the patented surface of said Lucky Corner claim, being at a point south 35 degrees west 60 feet from the southerly corner No. 4 of Little Clara claim, and the other drawn through a point on the western side line 3–4 of the Mountain Monarch claim south 28 degrees 47 minutes west 440 feet from the northwest corner, No. 4, of the Mountain Monarch claim," and that the plaintiff was the owner and entitled to the possession of that portion of the Timber Drift vein throughout its entire depth between two vertical planes parallel to the end lines of the Lucky Corner claim specifically described in the verdict. The vertical planes specified in this verdict, which constitute the northern and southern limits, respectively, of the portions of the veins found to be owned by the plaintiff, will be hereafter called the extralateral planes. After the judgment upon this verdict had been affirmed by this court, the trial of the question of damages was had, and it resulted in the verdict of $400,000 against the defendant, which is now here for consideration.

It is assigned as error that at this second trial the court below excluded evidence tending to show that some of the ore extracted by the defendant from the Little Clara claim between the extralateral planes described in the verdict on the trial of the title was not taken from either Number One vein or the Timber Drift vein, but was extracted from other separate and independent veins within those extralateral planes that were the property of the defendant, that some of this ore was taken from the space of intersection of Number One vein with another vein or veins to which, under section 2336, Revised Statutes, the

ore in this space belonged, and that the court held that the trial, verdict, and judgment on the question of title had finally adjudged that all the ore extracted by the defendant from beneath the surface of the Little Clara claim between the extralateral planes specified in the verdict on the question of title was the property of the plaintiff. In support of these rulings counsel for the plaintiff argue: (1) That the stipulation was that the title and ownership of the "veins and ores in controversy" should be determined at the first trial, that the determination thereof involved the location of the apices of the two veins, their continuity from these apices through the vertical side planes of the Lucky Corner claim beneath the surface of the Little Clara claim to their entire depth, and hence through their intersections and the adjudication of the ownership of all the ores beneath the surface of the Little Clara claim between the extralateral planes specified in the verdict on the title, and that all these issues were tried and adjudicated; (2) that, if any of them were not so determined, the defendant might have had them adjudicated at that trial, and is therefore as fully estopped from contesting them as though they had been tried and determined; and (3) that, if these issues were not determined by the trial of the title, the evidence offered by the defendant on the last trial was insufficient to require the court to receive and submit it to the jury.

The record of the trial of the title is in hand, and has been thoughtfully examined and considered in the light of the arguments of counsel. The determining question is: Does that record and the record at the last trial present substantial evidence that at the trial of the title the question whether or not all the ore extracted by the defendant from beneath the surface of the Little Clara claim between the extralateral planes described in the first verdict was tried and adjudged in favor of the plaintiff at the trial of the title? While the stipulation for the trial of the title is that the issue of title and right of possession "of the veins and ores in controversy" shall be first tried, it is also that "the issue of damages to the plaintiff shall be reserved for further trial and proceedings, and nothing herein shall be permitted to prejudice or affect said issue of damages, but the same may be thereafter tried, determined, and disposed of as though this stipulation had not been made." And here in this provision of the stipulation is the answer to the contention that, even if the issue whether or not all the ores extracted from beneath the surface of the Little Clara claim within the extralateral planes was not tried at the first trial, the defendant is estopped from trying it at this trial because it might have been tried at the first. Conceding that such would have been the legal effect of the first trial in the absence of the stipulation, the plaintiff is estopped from maintaining that such is the legal effect of that trial in this case by its stipulation that after that trial of the title the issue of damages shall be tried without any prejudice from the preceding trial and determination of the title. If by the trial of the title the defendant was estopped from contesting the amount of the plaintiff's ore it extracted, although that issue was not tried, by the same mark it would be estopped from contesting the value of that ore and all other questions relative to the amount of the damages, for all these questions might have

been litigated at the trial of the title under the pleadings in this case, in the absence of the stipulation.

We return to the question: Was the issue whether or not all the ore extracted by the defendant from beneath the surface of the Little Clara claim between the extralateral planes of the first verdict actually tried and determined at the first trial? There was no allegation in the complaint that the plaintiff was the owner of all that ore. There was no direct testimony to that effect at the trial. The evidence at that trial was directed to the location of the apices of the two veins, to the continuity of these veins, and to their extension on their dip beyond the vertical side lines of the Lucky Corner claim beneath the surface of the Little Clara claim. There was no evidence of the amount of ore extracted from these veins by the plaintiff, nor of the amount of ore extracted from beneath the surface of the Little Clara claim between the extralateral planes of the first verdict. There was evidence at that trial that there were several other veins besides the Number One vein and the Timber Drift vein beneath the surface of the Little Clara claim and within the extralateral planes of the verdict on the title. But the plaintiff did not allege in its complaint, and the verdict and the judgment did not find or adjudge, that the plaintiff was the owner of all the ore beneath that surface and between those planes, but adjudged that it was the owner of the Number One vein and the Timber Drift vein only throughout their entire depth between the respective extralateral planes specified in the verdict, but, as the judgment took care to declare, "without prejudice to said issue of damages, or the trial and adjudication thereof in this cause." The state of this record, to which we have now briefly referred, has forced our minds to the conclusion that the legal effect of the judgment on the trial of the title was that the plaintiff was the owner of the two veins specified therein throughout their entire depth, that these veins had their apices in the Lucky Corner claim, that on their dip they passed beyond the vertical side lines of the Lucky Corner claim into the Little Clara claim beneath its surface, that the plaintiff was the owner of all the ore beneath the surface of the Little Clara claim between the extralateral planes of the verdict on the title which, under section 2336 Revised Statutes (Comp. St. 1913, § 4644), and the other provisions of law, was the property of the owner of those veins, that the issues whether or not it was the owner of all the other ore under the surface of the Little Clara claim between the extralateral planes mentioned, whether or not it was the owner of the ore in other veins than these two or in the spaces of intersection of other veins by those veins within the limits specified above, what the amount and value of the ore of the plaintiff which the defendant had extracted were, were not actually tried or determined by the trial, verdict, and judgment regarding the title, and the defendant is not estopped from litigating those issues on the trial of the question of the plaintiff's damages in this suit.

This conclusion has not been reached without a consideration of the fact that the defendant made a motion for a new trial of the issue of title on many grounds, some of which were that no provision was made in the verdict for reserving to the defendant that part of Number One

vein and the ores therein occurring at the space of intersection thereof with the Basalt or Flat vein and the ores in the veins other than the Number One or Timber Drift veins. But as these questions were not, in our opinion, tried or adjudged by the trial and judgment of the title to the two veins, but were expressly reserved for future trial by the stipulation, the denial of the motion for the new trial was not inconsistent with the view which has already been expressed. The fact that in the last trial of this case the plaintiff excluded from the ores whose value it sought the ore which the defendant extracted from a vein in the Little Clara claim between the extralateral planes of the verdict on the title called the east and west vein indicates that there was a time during the last trial when the plaintiff had not fully decided that the earlier trial had adjudged that all the ores in the Little Clara claim between those extralateral planes were its property. The record satisfies that the view which the plaintiff then had was correct.

Was the evidence offered by the defendant sufficient to require its submission to the jury? The plaintiff produced testimony of the amount of the ore extracted by the defendant from the Little Clara lode mining claim within the extralateral planes of the verdict on the title, deducted from the amount of that ore about 400 tons taken from the east and west vein, and claimed a verdict for the value of the remainder. Thereupon the defendant offered testimony tending to prove that, of the ores extracted by the defendant and its lessees from within the limits just stated, many thousands of tons were derived from separate and distinct veins other than the Number One or the Timber Drift, and that several thousand tons were taken from the space of intersection of the Number One vein with the Basalt or Flat vein, which latter vein the defendant contended was prior in title to the veins of the plaintiff. All this testimony was rejected. There can be no doubt that if, as has been determined, the defendant was not estopped by the trial and judgment regarding the title from litigating the question of the amount and value of the ore it extracted from the plaintiff's two veins, this evidence was both material and sufficient to present an important issue for the determination of the jury, and that it was error to reject it.

There are other alleged errors in the record, but those already considered necessitate a reversal of the judgment and the presentation of evidence upon new issues, which may avoid the present legal issues and raise others at the coming trial. In view of this fact, it is thought useless to prolong this opinion.

Let the judgment below be reversed, and let the case be remanded to the trial court, with directions to grant a new trial.

TEXAS & P. RY. CO. v. RIGSBY.

(Circuit Court of Appeals, Fifth Circuit. April 29, 1915.)

No. 2638.

1. COMMERCE ⟸27—REGULATION—SAFETY APPLIANCE ACT—VALIDITY.
Congress may, as a means of securing the safety of persons and property transported in interstate commerce, prohibit, as is done by Safety Appliance Act March 3, 1893, c. 196, 27 Stat. 531 (Comp. St. 1913, §§ 8605–8612), the movement of a defective car, unless necessary to move it to a repair point, though the movement is not an act of interstate commerce, nor a use of the car in interstate commerce.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟸27.]

2. COMMERCE ⟸27—REGULATION—SAFETY APPLIANCE ACT—MOVING DEFECTIVE CAR.
Where a switchman, employed by a carrier engaged in interstate commerce, was injured because of a defective rung or grabiron constituting the ladder to the top of a box car, which at the time was standing on the main line at a point while switching was going on which was required to complete a movement previously started of that with other cars, from another track in the yard, to the carrier's repair shop at that point, but there was nothing to prove that the defect could not have been repaired or removed without making the movement of the car which had been partially executed when the injury occurred, the carrier was liable under the Safety Appliance Act.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟸27.]

Pardee, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action by A. R. Rigsby against the Texas & Pacific Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

F. H. Prendergast, of Marshall, Tex., for plaintiff in error.

S. P. Jones, of Marshall, Tex., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

WALKER, Circuit Judge. [1] We understand that the provisions of the Safety Appliance Act are made applicable to any common carrier engaged in interstate commerce by railroad, that that act forbids such carrier to haul or to permit to be hauled or used on its line any car defective in a particular specified in the act, and penalizes such a movement unless it is one from a place where the equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, even that movement being penalized unless it is necessary to get the required repairs made, and such repairs cannot be made except at such repair point. And we understand that the civil liability which may result from a violation of the act attaches if the movement of the car is a prohibited one, though it is not

one which subjects the carrier to the criminal penalty prescribed by the act. U. S. Comp. St. 1913, §§ 8605, 8613, 8617, 8618, 8621, 8622. The hauling of such a car over the line of such a carrier is within the prohibition of the act, though that movement does not constitute a use of the car in interstate commerce. It was a purpose of the statute to prevent the movement of such a car over such a line. Congress had the power to prescribe this prohibition as a means of securing the safety of persons and property transported in interstate commerce. Southern Railway Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72. The prohibited movement need not be an act of interstate commerce in order to render the carrier civilly liable to one injured as a result of the car being defective in a particular specified in the act. In this respect there is a marked difference between the Safety Appliance Act and the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]).

[2] The evidence in this case was without conflict to the effect that the injury to the defendant in error, a switchman employed by the plaintiff in error, a common carrier engaged in interstate commerce by railroad, was due to the defective condition of one of the rungs or grabirons constituting the ladder to the top of a box car which at the time was standing on the plaintiff in error's main line at Marshall, Tex., while switching was going on which was required to complete a movement previously started of that with other cars from another track in the yard to the plaintiff in error's repair shop at that place. There was an absence of evidence tending to prove that the defect which caused the injury could not as well have been repaired or removed without making the movement of the car which had been partially executed when the injury occurred. We are of opinion that the evidence showed a right of recovery in the defendant in error, and that there was no reversible error in any ruling complained of.

It follows that the judgment should be affirmed; and it is so ordered.

PARDEE, Circuit Judge (dissenting). The first section of the act of March 2, 1893 (27 Stat. at Large, c. 196, p. 531), provides that after the 1st day of January, 1898:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving * * * brake and appliances * * * operating the train-brake system," etc.

Section 2 of the same act provides that after the same date:

"It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 4 of the same act providing for safety appliances, grabirons, etc., provides that:

"It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

With this statute in force, and referring to the same by act approved March 2, 1903 (32 Stat. at Large, c. 976, p. 943), it was provided that the above-mentioned act of March 2, 1893, "shall be held to apply to common carriers by railroads in the territories and in the District of Columbia and shall apply in all cases, whether or not the couplers brought together are the same kind, make or type," and, further, "that the provisions and requirements hereof and of said acts" (referring to act of March 2, 1893, and amendment of April 1, 1896, amendment, however, not pertinent here) relating to train brakes, automatic couplers, grabirons, and the height of drawbars, "shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith."

It was these provisions that were under consideration in Southern Railway Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, which was a case in which cars were hauled over a railroad engaged in interstate commerce, part of the cars involved being loaded with interstate traffic and part intrastate traffic, and all charged with having defective couplers. In that case the Supreme Court held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles USED (capitals mine) on any railroad which is a highway of interstate commerce. The word "used" refers to use in moving interstate traffic, as well as in moving intrastate traffic, for just following, in considering the question of the constitutionality of the act as so interpreted, the court said:

"We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is: Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way: Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce." Southern Railway Co. v. United States, 222 U. S. 26, 27, 32 Sup. Ct. 4, 56 L. Ed. 72.

In the Rigsby Case it is not proven nor claimed that the car in which Rigsby was injured was at the time being used in either interstate or intrastate traffic, or even being used at all. The undisputed facts ap-

pear to be that the car was out of use because of defective condition, and had been for more than a month, and at the time Rigsby was hurt was not being moved for use. It was marked or labeled on each side with "bad order" tag, and was being moved from the bad-order track to the railroad shop for the purpose of being repaired and put in order for use. The liability of the railroad company in moving the car is not in any wise claimed as based upon *use* of the same, and only because in moving the car to the shop for repairs it was for a very short distance required to be removed over a portion of the main track, so as to reach the railroad shop. To move the car to the shop was the only way the car could be put in order for use in any traffic. It could hardly have been intended by the Congress that a railroad company under heavy penalties should keep its cars in perfect order, with certain specific safety appliances and otherwise, and yet that, after a disabled car has been taken entirely out of commerce, not to be used for any traffic whatever, the railroad company is to be penalized in favor of employés fully advised and warned that the car was in bad order and was to be moved only to the shop for repairs, for taking the only practical means at hand to have the car repaired and put in order.

Certainly, under the harshest view to be taken of the requirements of the act of Congress, to penalize the railroad the out-of-order or disabled car must be *used* on a railroad engaged in interstate commerce; and in the Rigsby Case the question was whether the disabled car on which Rigsby was injured was at the time being *used* within the meaning and purview of the said act of Congress, and this under the evidence in the case was a question of fact which should have been submitted to the jury.

For error in directing the verdict, the case should be reversed.

KING HARDWARE CO. v. J. G. CHRISTOPHER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1915.)

No. 2743.

1. ATTORNEY AND CLIENT ⇐71—AGREEMENTS SIGNED BY ATTORNEYS—CONCLUSIVENESS ON PARTIES.

An intervening creditor, who in contesting the report of the master to hear and report findings on issues after denial of an involuntary petition in bankruptcy, claimed the benefit of a stipulation signed by his counsel of record without questioning the authority of the counsel, could not question the authority of counsel for the first time in the Circuit Court of Appeals on petition to superintend and revise the decision of the District Court, and the authority of the counsel to sign the stipulation will be assumed, in the absence of any evidence in the record to the contrary.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 97–101; Dec. Dig. ⇐71.]

2. BANKRUPTCY ⇐477—DENIAL OF INVOLUNTARY PETITION—STIPULATION OF PARTIES—CONSTRUCTION.

A stipulation executed by the respective counsel of record of the petitioning and intervening creditors and the alleged bankrupt, pending refer-

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ence to a master to hear evidence and report findings on issues as to receiver's compensation, counsel fees, and expenses of the proceedings, which provides that the agreement shall not affect the correctness of the receiver's accounts and the liability on his bond, or the right of the receiver and his agent and accountants to compensation, and how the same shall be paid, and that all costs and allowances shall be taxed, one-half against the petitioning and intervening creditors, and one-half against the alleged bankrupt, relieves the petitioning creditors of primary liability imposed by Bankr. Act July 1, 1898, c. 541, § 3e, 30 Stat. 546 (U. S. Comp. St. 1913, § 9587), and leaves to the court to determine what allowances shall be made on the claims mentioned, and how the allowances shall be taxed as between the petitioning and intervening creditors according to equity rules and principles, and if the petitioning creditors are unable to respond to the costs and expenses allowed, it may also determine whether the intervening creditors shall pay the same.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 900; Dec Dig. ⊂⊃477.]

3. BANKRUPTCY ⊂⊃477—DENIAL OF INVOLUNTARY PETITION—STIPULATION OF PARTIES—CONSTRUCTION.

Where the petitioning and intervening creditors and the alleged bankrupt stipulated that the costs and expenses should be taxed, one-half against the petitioning and intervening creditors and one-half against the bankrupt, and it appeared that the receiver made use of materials of a third person, but he realized a specified sum from the use of the materials by renting them or part of them, the use of the materials cost the receivership the difference between the amount awarded to the third person and the amount received by the receiver for their use, and the net amount must be charged between the petitioning and intervening creditors and the bankrupt, as required by the stipulation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 900; Dec. Dig. ⊂⊃477.]

4. BANKRUPTCY ⊂⊃476—PETITIONING AND INTERVENING CREDITORS—STIPULATIONS—VALIDITY.

The petitioning and intervening creditors and the alleged bankrupt may stipulate for an apportionment of the costs and expenses of the proceedings resulting in denial of the involuntary petition, and when that is done an intervening creditor may not be allowed to set off against the amount of costs and expenses taxed against him his demand against the alleged bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 898, 899; Dec. Dig. ⊂⊃476.]

5. BANKRUPTCY ⊂⊃474—EXPENSES—STIPULATION OF PARTIES—EFFECT.

Where an alleged bankrupt stipulated with the petitioning and intervening creditors that one-half of the allowances made to the receiver, his agent, and accountants should be taxed against the petitioning and intervening creditors, and one-half against the alleged bankrupt, the latter could not escape liability for an allowance to the accountants on the ground that their services were of no benefit to it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. ⊂⊃474.]

Petition to Superintend and Revise from the District Court of the United States for the Southern District of Georgia; William T. Newman, Judge.

Petition by the King Hardware Company, an intervening creditor, and cross-petition by the Beach Manufacturing Company, an alleged bankrupt, to superintend and revise the decree of the District Court as to receiver's compensation, counsel fees, and expenses of bankruptcy

proceedings. Decree complained of by petitioners reversed, and cause remanded for further proceedings, and cross-petition denied.

Alex W. Smith, of Atlanta, Ga. (Smith, Hammond & Smith, of Atlanta, Ga., on the brief), for petitioner.

A. W. Lane, of Macon, Ga. (R. C. Jordan, of Macon, Ga., on the brief), for respondent Commercial Nat. Bank of Macon.

Frederick T. Saussy, of Savannah, Ga., for respondents Wilson & Pullen and Reppard Iron Co.

Edward S. Elliott, of Savannah, Ga., for respondent Crovatt.

George S. Jones, of Macon, Ga. (Wilson & Bennett, of Waycross, Ga., V. E. Podgett, and Hardeman, Jones, Park & Johnston of Macon, Ga., on the brief), for Beach Manufacturing Co.

John S. Walker, of Waycross, Ga., pro se and for certain petitioning and intervening creditors.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. After the adjudication in favor of the Beach Manufacturing Company on the involuntary petition in bankruptcy against it, and after the court had made a reference to a special master to hear evidence and report his findings of fact and conclusions of law on issues raised as to the receiver's compensation, counsel fees, and expenses of the proceedings, if any, for which the defendant may be liable, as to the payment and protection of outstanding receiver's certificates, and as to the taxing of costs, expenses, and damages, if any, of the defendant against the petitioning creditors, and the bond given by them at the time of the appointment of the receiver; and before the special master had executed that order of reference the petitioning and intervening creditors and the Beach Manufacturing Company, the alleged bankrupt, by their respective attorneys of record, entered into a written agreement which provided as follows:

"The parties hereto mutually agree as follows:

"(1) That this agreement shall not affect or dispose of the following questions pending before the special master, but the same shall proceed to hearing, finding, and report by him: (a) The correctness or incorrectness of the receiver's accounts, and the liability upon his bond as receiver. (b) The right of the receiver, R. L. Moss, the receiver's agent, Henry G. Rucker, and the accountants, Wilson & Pullen, to compensation, the amount of such compensation, and how the same shall be paid.

"(2) Isaac & Heyward agree that they will not claim anything for fees or expenses as attorneys for the receiver, either in the main case in Georgia or the ancillary case in Florida.

"(3) The attorneys for the respondent the Beach Manufacturing Company agree that they will not claim anything as a part of the costs for fees or expenses as attorneys for the alleged bankrupt.

"(4) No claim shall be made for damages upon the bond given by the petitioning creditors.

"(5) All costs in the above-stated bankruptcy case proper, both in Georgia and Florida, as distinguished from the ancillary proceedings, shall be taxed against the petitioning creditors and the intervening creditors, and not against the respondents.

"(6) All costs and expenses, including receiver's certificates, and such allowances as may be made as a part of the costs of administration to the re-

ceiver, the receiver's agent, and the accountants, if any, including the costs of the present hearing before the special master, whether in the receivership proceedings in Georgia or in the ancillary receivership proceedings in Florida, shall be taxed, one-half against the petitioning creditors and the intervening creditors, and one-half against the alleged bankrupt."

Attorneys who were attorneys of record of the King Hardware Company as an intervening creditor signed this agreement "as attorneys of record for petitioning and intervening creditors."

[1] The petition of the King Hardware Company to this court, praying that it superintend and revise the action of the District Court which is complained of, seeks to raise a question as to the authority of those attorneys to bind it by the agreement above set out. So far as the record discloses, no suggestion of a lack of authority in those attorneys to bind the petitioner by that agreement was brought to the attention of the District Court. On the contrary, the petitioner, in excepting to the master's report and in contesting the correctness of certain features of it, claimed the benefit of that agreement. Certainly the record does not indicate that the District Court was made aware that the petitioner questioned the binding effect upon it of the agreement. The question of the authority of the petitioner's attorneys of record cannot be raised here for the first time. An attorney or solicitor may consent to whatever his client authorizes. His authority from his client to make an agreement in the latter's behalf will be assumed in an appellate court, in the absence of any evidence in the record to the contrary, or that it was questioned in the trial court. Harniska v. Dolph, 133 Fed. 158, 66 C. C. A. 224; Pacific Railroad v. Ketchum, 101 U. S. 289, 296, 25 L. Ed. 932.

[2] Finding that the petitioner is concluded by the stipulation entered into by his counsel of record, the meaning and effect of the stipulation will now be considered. It is contended in behalf of the petitioner that the respective provisions of paragraphs 1 and 6 of the stipulation are inconsistent, and that the exceptions stated in paragraph 1 are controlling; a result being to leave open the question of the receiver's compensation, and the claim of the accountants, Wilson & Pullen, for such direction by the court as to the payment of these items, if allowed, as may be consistent with the equitable principles governing in the situation disclosed. We do not think that the suggested inconsistency exists. An effect of the exception stated in subdivision b of paragraph 1 is to leave the question as to what, if any, compensation should be allowed to the receiver, the receiver's agent, and the accountants, to be determined, not by the agreement, but in the way contemplated by the court when it referred that question to the special master. There is no inconsistency between this provision and the explicit provision of paragraph 6 to the effect that such allowances, if any, on the three claims mentioned, as may be made by the court as part of the costs of administration, should, as between the parties to the agreement, be taxed, one-half against the petitioning and the intervening creditors and one-half against the alleged bankrupt. The result was to leave it to the court to determine what, if any, allowances should be made on the three claims mentioned; the agreement stipulating, however, that, if such allowances should be made, the parties to

the agreement were to be taxed with the stipulated proportions of the amounts so allowed.

The stipulation provides, as to the division of costs and expenses, that all costs in the bankruptcy case proper, both in Georgia and Florida, as distinguished from the ancillary proceedings, shall be taxed against the petitioning creditors and the intervening creditors, not against the respondent, and that all costs and expenses, including receiver's certificates, allowances, etc., shall be taxed, one-half against the petitioning and intervening creditors, and one-half against the alleged bankrupt; but there is no provision in said stipulation in regard to or regulating the apportioning of costs and expenses, etc., as between the petitioning and the intervening creditors themselves, and the court is left free to follow equity rules and principles in taxing and apportioning the costs, expenses, etc. Without the stipulation the petitioning creditors are liable for counsel fees, costs, expenses, and damages. This is the law as stated in section 3e of the Bankruptcy Act. Certainly, up to the date of the consent order continuing the receivership, each of the intervening creditors was liable only for the expenses and costs attending his own intervention. The court seems to have assumed that the stipulation controlled, so as to require a judgment in solido against all the creditors. The court, in the third, fifth, and seventh paragraphs of the decree under review, made no discrimination as between the petitioning and intervening creditors, but, following the stipulation, taxed them one-half of the costs and expenses therein allowed. In the eighth and eleventh paragraphs of the decree all the items are brought together, and the petitioning and intervening creditors are condemned to pay the same jointly and severally; that is, as between the said creditors, payment is required one for the other, which, as pointed out, is not in accordance with the ordinary rules of the court, nor in any way provided for in the stipulation in the case. It does not seem to be equitable to compel a late intervening creditor in a bankruptcy case, not only jointly but severally to pay costs of court, expenses, and damages incurred long before he presented his claim in the case. And particular stress is given to this suggestion by the fact that in this case some 52 labor claimants, with liens upon the property of the Beach Manufacturing Company, whose claims run in various amounts from $3.65 to $259.75, are condemned jointly and severally to pay all the regular costs of the bankruptcy and one-half of the expenses incurred by the appointment of the receiver and his administration of the property, while what, if any, part they took in the proceedings does not appear. If, peradventure, the petitioning creditors, who under the law are primarily liable for all costs and expenses, etc., shall not be able to respond, it may then be in order for the court to inquire whether under the stipulation the intervening creditors can be called on to pay.

[3] Furthermore, we think that the court fell into error in its ascertainment of the amount of one item of the expenses of the receivership, one-half of which was adjudged against the petitioner. We refer to the item disclosed by the claim made by the Reppard Iron Company. That claim was based on the fact that the receiver made use of certain

iron rails found on a lumber tramway of the alleged bankrupt, the Beach Manufacturing Company, which rails did not belong to it, but the possession of which it had acquired under a contract with the owner, the Reppard Iron Company. The correct amount of that item of expense is the ascertained net cost or outlay consequent upon the receiver's making use of that property which belonged to a third party. By the decree of the court it was ascertained that the total amount recoverable by the owner of the rails for the use of them by the receiver was $1,117.94. But the use of these rails did not cost the receivership the amount so ascertained to be due to the owner of them, as it is disclosed that the receiver realized $700 from the use of the rails by renting them or a part of them. The result was that the use of the rails cost the receivership the difference between the amount awarded to their owner, $1,117.94, and the amount received by the receiver for their use, $700, and that the net amount of this item of the expenses of the receivership was $417.94. Instead of taxing against the petitioning and the intervening creditors one-half of the amount allowed the Reppard Iron Company, to wit, $558.97, the amount to be taxed against them on that score is $208.97, that amount being one-half of the net expense or outlay incurred by the receiver by taking possession of and using the rails mentioned. The remaining one-half—$208.97, plus $700, the latter representing the amount realized by the receiver from renting the rails and chargeable against him; total, $908.97—should be charged against the Beach Manufacturing Company, if, as we assume, though this does not clearly appear, the receiver's account of his receipts and disbursements not being set out in the record made for this court, that $700 item was included in the total of $3,956.35, the ascertained amount of the assets of the Beach Manufacturing Company which had been applied toward the expenses of the receivership, and which was allowed as a credit on the total of $6,127.08 taxed against that company.

[4] A question of set-off is raised by the petitioner. We understand the contention to be that the petitioner should be allowed to set off against the amount of costs and expenses taxed against it its demand against the Beach Manufacturing Company. This claim cannot be recognized. The amount that may be adjudged against the several parties to the agreement is for the costs and the expenses incident to the receivership. These costs and expenses are in effect due to the court or its officers from the party or parties to the proceeding found to be liable for them. Between this liability to the court or its officers, and the liability to the petitioner of its debtor, the Beach Manufacturing Company, there is no mutuality, and the one demand is not subject to be set off against the other. It was competent for the parties to the agreement above set out to stipulate for an apportionment as between themselves of the costs and expenses of the court proceedings, but nothing they could do could enable one of them to set off its demand against the other against the liability which the court adjudged against it on account of the court costs and the expenses of the receivership.

[5] In reference to the complaint made by the cross-petition of the Beach Manufacturing Company that it was not liable for any part of

the amount allowed to the accountants because the services of the accountants were of no benefit to it, no more need be said than that this feature of the decree was in accordance with the agreement to which the Beach Manufacturing Company was a party. Under that agreement one-half of the amount ascertained to be due to the accountants was to be taxed against the Beach Manufacturing Company. That amount being so taxable was not conditioned upon a finding that the Beach Manufacturing Company was benefited in any way by the services rendered by the accountants. By that agreement the Beach Manufacturing Company saved itself, so far as concerned certain items in dispute, the trouble and expense of a trial before the special master under the decree of reference to him and of a contest of his finding in that regard, and is in no position to sustain a claim against the propriety of a feature of the decree rendered which was in conformity with that agreement.

It follows that the Beach Manufacturing Company's cross-petition to superintend and revise must be denied; and it is so ordered. On the petition of the King Hardware Company, the decree complained of is reversed, and the cause is remanded for further proceedings not inconsistent with the conclusions above stated. The costs resulting from the petition and the cross-petition are to be taxed against the Beach Manufacturing Company.

THE LUGANO.

(Circuit Court of Appeals, Fifth Circuit. March 16, 1915.)

No. 2712.

SALVAGE ⊂=40—CUSTOMS DUTIES—CARGO SALVED FROM WRECK—PRIORITY OF CLAIMS.

In dealing with the proceeds of property salved from a vessel wrecked or abandoned at sea, brought into a port of the United States by the salvors and sold under order of the court, both under the authorities and under Rev. St. § 3058, as amended by Act Feb. 23, 1887, c. 221, 24 Stat. 415 (Comp. St. 1913, § 5760), which provides that in such case the property may be regarded as the property of the salvors, and the valuation thereof and payment of duties thereon can be made accordingly, "and with due reference to the condition of the said merchandise as thus saved and the necessities of the case," the court has power to give the claims for salvage priority over that of the government for customs duties.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 105; Dec. Dig. ⊂=40.]

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit in admiralty by Dunham Albury and others against cargo salved from the British ship Lugano; James Penwill and others, claimants. From the decree of distribution the United States appeals. Affirmed.

For opinion below, see 215 Fed. 963.

H. S. Phillips, U. S. Atty., of Tampa, Fla., for the United States.

G. Bowne Patterson, of Key West, Fla., and Frederick M. Brown, of New York City (Butler, Brown, Wyckoff & Campbell, of New York City, on the brief), for appellees Penwill and others.

George W. Allen, of Key West, Fla., and Eugene O. Locke, of Jacksonville, Fla., for appellees Albury and others.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. The decree of the District Court is presented for review by an appeal sued out by the United States. No other party in interest is complaining. For the material facts of the case reference is made to the statement of them found in the opinion rendered by the District Judge. Albury et al. v. Cargo of The Lugano (D. C.) 215 Fed. 963.

Complaint is made of that feature of the decree which gave to the claim for salvage priority over that of the government for customs duties. For support of its ruling to this effect the court referred to the decision rendered in the case of Merritt v. One Package of Merchandise, etc. (D. C.) 30 Fed. 195. Because the controversies in the case arise out of conflicting claims to the proceeds of the sale under the orders of the court of "merchandise saved from a vessel wrecked or abandoned at sea, or on or along the coasts of the United States, and promptly brought into a port of the United States by or in possession of the salvors of the same," we think that ruling has the additional support of a statute which was enacted not long after the decision mentioned was rendered. That decision was made in December, 1886. In February, 1887, a statute was enacted which contained the following:

"Under such regulations as the Secretary of the Treasury may prescribe, merchandise saved from a vessel wrecked or abandoned at sea, or on or along the coasts of the United States, and promptly brought into a port of the United States by or in possession of the salvors of the same, can, for the purpose of its title, be regarded as the property of such salvors, and the valuation thereof and payment of duties thereon can be made accordingly and with due reference to the condition of the said merchandise as thus saved and the necessities of the case: Provided, however, that such bringing in by salvors shall be in good faith and without intent to evade the just payment of duty: And provided further, that nothing herein contained shall be so construed as to prejudice in any other respect the rights of property, or of or through abandonment or allowance of the owner, or any other person interested in said merchandise." U. S. Comp. Stat. 1913, § 5760.

It may be of some significance that the provision just quoted, though it dealt with a subject which had very recently been dealt with in a litigation which, because of the circumstances of the shipwreck out of which it grew, it may be supposed attracted considerable public notice, does not manifest a purpose to change the rule which had been applied by the court in that litigation, with the result of subordinating the government's claim against the saved goods for duties thereon to the claim of the salvors for rescuing them from the sea. But whether the then recent rendition of such a decision in such a case is or is not to be re-

garded as shedding light on the somewhat ambiguous terms of the above-quoted provision of the statute, we think that the language of the provision, considered with reference to the subject dealt with, makes it sufficiently plain that in such cases as are provided for the court is vested with authority to accord to the claim of a salvor priority over that of the government for duties on merchandise so saved. This authority is found in that part of the provision which empowers the court, in ascertaining the value of the merchandise and in providing for the payment of duties thereon, to do so "with due reference to the condition of the said merchandise as thus saved and the necessities of the case."

Among the things which it is permissible to recognize as necessities of such cases as are provided for are the rescue of the goods as a prerequisite of the court's being afforded an opportunity to deal with them and of there being anything upon which the government's claim for duties could attach, and the recognition of such claims against what is saved as must be allowable if those who might be in a position to render required service in the rescue are to have a motive impelling enough to induce the undertaking of the service. The circumstances of a shipwreck may well be such that any one who may be in a position to save the cargo or a part of it would not have the requisite motive to incur the outlay, labor, and perils of the undertaking if any claim of a reward therefor had to be subordinated to the government's claim against what might be saved for duties thereon, and that the owners of the wrecked cargo or those in charge of the ship which had carried it might be expected to abandon both to their fate if it was likely that any efforts on their part to procure or effect a rescue would be permitted to inure to the sole or joint benefit of a government asserting a claim to duties or of a salvor whose services were sought or availed of. While it is not to be denied that what the lawmakers intended by the enactment above quoted might well have been made clearer, yet we think it is to be gathered from the language used that a court charged with the administration of property coming into its custody in the circumstances mentioned was thereby empowered so to deal with claims asserted against it or the proceeds of the sale of it as not only to give a preference to the one allowed as compensation for rescuing the property from the sea, but to recognize that the government's claim on the residue for duties is affected, and the amount which would have been demandable on this score if the importation had been in the ordinary way is made subject to substantial reduction, by the fact that the property to which such claim attached was brought in damaged from a shipwreck, and, further, that the owner of the property should have some substantial benefit from the salvage. In permitting its disposition of the conflicting claims to be influenced by such considerations, the court is to be regarded as acting "with due reference to the condition of the said merchandise as thus saved and the necessities of the case."

It is not to be inferred from what has been said that we think that the statute above mentioned was required to empower the court to give such effect to the salvor's claim upon or interest in what was saved, acquired by the rendition of the salvage service, as was involved in

according to it priority over the subsequently attaching claim of the government for customs duties. United States v. Wilder, 3 Sumn. 308, Fed. Cas. No. 16,694; The Marquis of Huntly, 3 Haggard, 246; The Bee, 1 Ware, 332, Fed. Cas. No. 1,219; United States v. Cornell Steamboat Co., 202 U. S. 184, 190, 26 Sup. Ct. 648, 50 L. Ed. 987; Benedict on Admiralty (4th Ed.) § 227; Cohen's Admiralty Law, 22, 185; Marvin on Wreck & Salvage, § 122; Flanders on Maritime Law, 316.

The decree appealed from, and the opinion which accompanied it, show that the court undertook to dispose of the claims asserted substantially in the manner sanctioned by the statute. We have not been convinced that the appellant has any just ground of complaint against what was done. With reference to the appellant's complaint of the disallowance of the item for expenses incurred by it, nothing need be added to what was said by the District Judge in disposing of that item.

The decree appealed from is affirmed.

ARMOUR & CO. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. April 20, 1915.)

No. 1900.

FOOD ⊂=12—MEAT INSPECTION—VIOLATION OF STATUTORY REGULATIONS.

Defendant, maintaining a plant in Chicago where animals were killed and their flesh prepared for market under the supervision of the Department of Agriculture, bearing the official designation of "Establishment 2 A," and also maintaining selling or distributing agencies, not under government supervision, one of which was in Pittsburgh, and who shipped to the Pittsburgh distributing agency from the Chicago plant hams which had been inspected and passed, and which were thereafter boiled and smoked and then wrapped in a paper bearing labels, approved by the Department, reading "Armour's 'Star' Boiled Ham," and "U. S. Inspected and Passed * * * Establishment 2 A," was guilty of a violation of the provision of Meat Inspection Act June 30, 1906, c. 3913, 34 Stat. 669, 677, that no person, firm, or corporation shall without proper authority use any of the marks, labels, or other identification devices provided for in that act, or in the rules and regulations prescribed thereunder, though there was no intent to violate the act, and though the hams when wrapped were sound, healthful, wholesome, and otherwise fit for human food, as the labels indicated that the "boiled" ham had been inspected and passed at Establishment 2 A, and were therefore untrue.

[Ed. Note.—For other cases, see Food, Dec. Dig. ⊂=12.

What constitutes a violation of pure food regulations, see note to Brina v. United States, 105 C. C. A. 559.]

In Error to the District Court of the United States for the Western District of Pennsylvania; William H. Hunt, Judge.

Armour & Co. was convicted of an offense, and brings error. Affirmed.

A. B. Stratton, of Chicago, Ill., for plaintiff in error.

E. Lowry Humes, of Pittsburgh, Pa., for the United States.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

McPHERSON, Circuit Judge. In January, 1914, an indictment comprising two counts was preferred against Armour & Co. in the Western district of Pennsylvania. The first count charged an offense against the Meat Inspection Act of 1906, and the second count charged an offense against certain regulations ordained by the Secretary of Agriculture under the authority of the act. The facts were agreed upon and the trial judge instructed the jury to render a verdict of guilty upon both counts, afterwards imposing a fine of $200. No evidence was offered that the offenses charged had been deliberately or intentionally committed, but we agree that no such intent is essential. Although the acts complained of may have been mistaken or inadvertent, nevertheless an offense may have been committed.

The facts appeared by a written stipulation, from which the trial judge struck out certain paragraphs and sentences as irrelevant. We condense what remains:

Armour & Co. is a corporation engaged in killing cattle, hogs, and sheep, preparing the meat for market in many forms, and selling as a wholesale dealer. It maintains plants in the United States where the animals are killed and their flesh is prepared for market, its Chicago plant being under the supervision of the Department of Agriculture and bearing the official designation of Establishment 2 A; and it maintains also many selling or distributing agencies through the country where the meat products are sold, one such agency being at Twenty-First and Carson streets, in the city of Pittsburgh, Pa. This Pittsburgh house is not under government supervision, and has no official designation. On September 12, 1913, 20 cooked hams were wrapped by the defendant's agents at the branch house in Pittsburgh, each wrapper being a sheet of paraffin paper on which were printed two disconnected labels, one label reading, "Armour's 'Star' Boiled Ham, Armour and Company," and the other reading, "U. S. Inspected and Passed Under the Act of Congress of June 30, 1906, Establishment 2 A." Each wrapper was secured upon the ham by a cord or tape.

These hams had been shipped to the Pittsburgh house from Establishment 2 A. Before they left the Chicago plant each ham had been inspected and passed by an official inspector of the Department, and under his supervision the skin of each had been branded by a hot iron with the words "Armour's *Star* U. S. Inspected and Passed, Estab. 2 A"—the meaning of these words being that the ham was one of Armour's "Star" grade or brand, and had been inspected and passed by the Department at Establishment 2 A. These hams had been pickled, boned, and tied (but not wrapped) at the Chicago plant before being sent to Pittsburgh, and on arrival there they had been subjected to the following process before being wrapped, namely: They had been immersed in clear water in an open kettle and cooked for a period of from four to six hours, and afterwards had been hung in a smokehouse for a period not exceeding two hours.

All the labels and brands used by the defendant have been approved by the Department, the particular form of wrapper hereinbefore referred to having been approved in July, 1912. As already stated, the branch house or distributing agency at Pittsburgh is not an official es-

tablishment within the meaning of the Meat Inspection Act and the Department's rules and regulations, and the wrappers on which the labels were printed were not put around the hams under the supervision of a government inspector. At the time these hams were wrapped at the Pittsburgh house, they were sound, healthful, wholesome, and otherwise fit for human food.

It is true that the facts concerning the case in hand disclose no actual harm, and probably the government's present objection could have been promptly removed without an appeal to the courts; but the case is here, and we must dispose of it according to the letter of the law. In our opinion the letter has been violated, and we recognize the government's right to insist on exact compliance with a statute whose beneficent object is to safeguard the wholesomeness of food. The act impliedly promises the public that government stamps and labels may be relied on to tell the truth, and therefore special care must be taken to maintain the scrupulous accuracy of their statements. Even innocent mistakes may have dangers; carelessness is usually likely to lead to mischief. These marks and labels must therefore be protected, and no one must be allowed to use them, except in accordance with the act and the regulations; otherwise, their value will be immediately impaired or lost and a chief purpose of the act will be frustrated. Accordingly Congress has declared:

"That no person, firm, or corporation * * * shall, without proper authority, use * * * any of the marks, stamps, tags, labels, or other identification devices provided for in this act, or in and as directed by the rules and regulations prescribed hereunder by the Secretary of Agriculture, on any carcasses, parts of carcasses, or the food product, or containers thereof, subject to the provisions of this act. * * *"

Now what the defendant did was this: It brought certain hams from Chicago to Pittsburgh. They had been properly branded, and the brand expressed the exact truth, for each ham was a "Star" ham and each had been inspected and passed at Establishment 2 A. The government does not contend that the defendant was debarred from boiling these hams and selling them branded and unwrapped, or from boiling them and wrapping them in plain paper. Apparently neither of these courses is forbidden by the law. But the defendant adopted neither course; instead, it boiled the hams and then covered them with wrappers on which were printed the labels referred to above, and these labels should not have been used for they no longer told the truth. The ham was still a Star ham, but it had now been "boiled," and that fact appeared for the first time on the wrapper. By itself the use of the word would not have been objectionable, but it was coupled with the statement that the ham—that is, the "boiled" ham—had been inspected and passed at Establishment 2 A, and this was a use of the label without proper authority, and was therefore a violation of the act. In a word, the wrapper did not tell the truth about the government inspection, and when this is said we think enough has been said.

It is unnecessary to pass upon the second count charging a violation of the Department's regulations; the sentence can be supported by the first count alone.

The judgment is affirmed.

CENTRAL TRUST CO. OF NEW YORK v. CHICAGO & O. P. ELEVATED R. CO.

DEVINE v. INSULL.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2150.

MASTER AND SERVANT ⊂=236—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Deceased was employed as a carpenter by an elevated railway company, and at the time of the injury which caused his death was working with another between the southern and central of the three tracks. There was a board walk three feet wide between such tracks, on which he was standing facing toward the west or southwest and stooping to pick up a plank, when a train approaching from the east on the central track gave a signal whistle, being then 150 or 200 feet distant. Deceased did not turn to face the train, but when it was 15 or 20 feet away turned with face toward the south, still stooping, and was struck by the train. A person could safely stand on the walk when trains were passing on both tracks at the same time, and there was testimony that, if deceased had not changed his position at the last moment, his body would have been in the clear. He had been engaged in similar work for at least a month and was familiar with the situation. *Held*, that the evidence did not show any negligence on the part of the motorman in charge of the train, but that the injury was due to the negligence of deceased, which barred a recovery for his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 723–742; Dec. Dig. ⊂=236.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Suit in equity by the Central Trust Company of New York against the Chicago & Oak Park Elevated Railroad Company. From an order confirming the report of the master, rejecting the claim for damages of John F. Devine, administrator of the estate of Harry A. Egan, deceased, against Samuel Insull, receiver of defendant, claimant appeals. Affirmed.

Appellant filed his petition to recover damages for the death of his intestate, alleged to have been caused by the gross negligence of the defendant elevated railway company. Upon a hearing before a master, the issues were determined adversely to the petitioner; and this appeal is from the order confirming the master's report. The case is thus stated by the master in his written opinion:

"This claim is filed to recover damages for the death of Harry A. Egan, who was killed on the 11th day of November, 1910, while in the employ of the defendant company as a carpenter. It appears that on the day in question Egan was working on the structure of defendant company at the intersection of Lake street and Central Park avenue, engaged in installing a cable box cover. The superstructure upon which deceased was working is about 30 feet above the street level and at this point there are three tracks of defendant company. The north track is used for east-bound local trains, the middle track for express trains, and the south track for west-bound local trains. About a foot north of the north rail of the south track is a wooden guard rail, and immediately north of the guard rail is a live rail. Between

the south or west-bound track and the middle or express track, and just north of the live rail above referred to, there is a wooden sidewalk about 3 feet in width running parallel with the tracks. North of the sidewalk is the wooden guard rail for the express track and at a distance to the north of about a foot and a half is the south rail of the express track.

"The accident happened about 5 o'clock in the evening. Egan and a fellow carpenter named James Hollinger were getting ready to quit for the day, and were engaged in picking up boards which were lying on the sidewalk between the two tracks and carrying them west to a point about a block distant, where they were to work the next morning. Egan was standing on this sidewalk between the south and middle tracks, stooping over to pick up some of these boards, and facing in a southwesterly direction, when he was struck by a west-bound express train on the middle track, and received the injuries which caused his death.

"At the time of the accident Hollinger was about 70 feet west of the deceased and walking east toward the point of the accident. His testimony was to the effect that he saw the train when it was about 175 feet away from him, his attention being attracted by the whistle; that at this time Egan was in a stooping position and facing a little south of west; that when the express train was about 15 feet away from Egan, Egan changed his position, bringing his head around toward the south, still in a stooping position, and he was struck in the hip by the front part of the passing train and his head thrown against the rail of the south or west-bound track. Hollinger further testified that prior to Egan's change of position just before the train struck him his body was in the clear. Other witnesses testified that as the train approached Egan, and prior to his change of position, Egan's feet were about the middle, or south of the middle, of the sidewalk, and his body from 2½ to 3 feet south of the south rail of the express track.

"It was dusk at the time the accident happened, and the headlight on the train was lighted. It appears from the testimony that the train had slowed down for the switch at St. Louis avenue, about 350 feet east of the point of the accident, and that the train was running at less than full speed and about 18 or 20 miles an hour at the time the accident occurred. It appears without dispute from the record that the motorman blew the whistle when the train was from 150 to 200 feet east of the point where Egan was working. As the train approached, Egan remained in a stooping position, with his face toward the west or southwest, and with his back to the train, and did not look toward the east.

"Egan had been working as a carpenter for defendant since the month of December preceding the accident, and had been engaged in work similar to that which he was doing on the day in question for at least a month prior to his death. The testimony shows that the sidewalk upon which Egan was standing was of ample width to permit one to occupy the same safely, even though trains were passing simultaneously on the south and middle tracks. During the period while Egan was at work on the structure and had occasion to use this sidewalk, trains on the south or local track, and on the middle or express track would pass simultaneously the point where Egan and his fellow carpenters were working three or four times daily. The middle track was used for express trains east-bound in the morning and for express trains west-bound in the evening, and the train which caused the accident was either the first or second west-bound express train on the evening in question.

"The contention of claimant is that the conduct of the motorman in running his train without any effort to slacken his speed when he saw Egan in a position of danger was negligence so gross as to amount to willfulness. The defense to the claim on the part of the receiver is contributory negligence of the deceased, and, further, that negligence of the motorman, if any, was that of a fellow servant. I can find no foundation in the record to sustain claimant's charge of willful negligence on the part of the defendant. The express train was not run at any unusual speed and warning of the approach of the train was given. It seems clear from the evidence that until the train was within 10 or 15 feet of deceased he was in no danger therefrom, and that his change of position then, and immediately prior to the accident, brought

him in the way of the passing train. I am, therefore, unable to find any such wanton or reckless conduct on the part of the motorman as amounts to willfulness.

"Egan was a man of mature years and of good hearing and eyesight. He had worked on the structure of defendant company for a sufficient length of time to be chargeable with knowledge of the surroundings, and the danger to him in his employment from passing trains was obvious. Against such known and obvious dangers Egan manifestly assumed the ordinary risks of his employment. His work took him between the south or west-bound local track and the middle track, and Egan is presumed to have known that at the hour of the day when the accident happened the middle track was used for west-bound express trains. Despite his knowledge of existing conditions, Egan turns his back to the east, the direction from which the approach of trains on both tracks is to be expected, and apparently without looking or taking any precautions for his safety assumes a position of danger with an approaching train from 10 to 15 feet distant from him. No reason is apparent why the deceased should not have faced east as he picked up the material from the sidewalk, the direction in which danger [from] passing trains [was] to be apprehended.

"A party has no right knowingly to expose himself to danger, and then recover damages for the injury which he might have avoided by the use of reasonable precaution, and I cannot escape the conclusion that the facts in this record disclose contributory negligence on the part of the deceased which bar any right of recovery for his death. Wilson v. I. C. R. R. Co., 210 Ill. 603 [71 N. E. 398]; Chicago, Rock Island & Pacific R. R. v. Miller, 135 Ill. App. 26; Aerkfetz v. Humphrey, 145 U. S. 418 [12 Sup. Ct. 835, 36 L. Ed. 758]."

Elmer A. Roat, of Chicago, Ill., for appellant.

Henry S. McAuley, of Chicago, Ill., for appellee.

Before BAKER and SEAMAN, Circuit Judges, and GEIGER, District Judge.

PER CURIAM. Upon the fundamental issues respecting the gross negligence of the railroad company, the assumption of risk by, or the negligence of, the deceased, the evidence and the principles governing its consideration are well stated by the master; and we adopt his views. This renders unnecessary a consideration of the other questions discussed before the master or upon the hearing in this court.

The order is affirmed.

CITY OF CHICAGO v. CHICAGO TRANSP. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2141.

NAVIGABLE WATERS ⊂⊃2—BRIDGES—MUNICIPAL REGULATIONS.

The city of Chicago by ordinance provided that its drawbridges over the Chicago river should be marked by an elevated red ball by day and a red lantern at night, and prohibited any vessel from approaching a bridge until invited by the lowering of the ball or lantern, providing that "at all other times such signals shall remain elevated." *Held*, that it was not within the power of the city, maintaining bridges which were an obstruction to navigation, by so posting a universal denial of the right of approach, to relieve itself of the duty of having bridge tenders on duty, who should answer a vessel's requests for passageway by giving promptly the information that was appropriate to the immediate occasion.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 2, 63; Dec. Dig. ⊂⊃2.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

Suit in admiralty by the Chicago Transportation Company and T. Bernstein against the steam tug Fitzgerald and the City of Chicago. Decree for libelants against the City of Chicago, and the City appeals. Affirmed.

S. A. T. Watkins, of Chicago, Ill., for appellant.

J. Sidney Condit and Charles E. Kremer, both of Chicago, Ill., for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. The schooner Skeele, in tow of the tug Fitzgerald, was proceeding south with the current in the South branch of the Chicago river. Bridges at Randolph and at Washington streets were of the jackknife type, and consisted of two leaves that could be swung upward by electric power. Each bridge had two tenders, one for the operation of each leaf. When the tug signaled for the Randolph bridge to open, both leaves started to rise; but the movement, by failure of the electric apparatus, was not completed. To maneuver the schooner through the partially opened Randolph draw, the tug increased her speed. Before entering that draw, or while therein, she signaled for the Washington bridge to open. At that time, and until after the collision occurred, the tender of the west leaf of the Washington bridge was absent. No direct answer to the tug's request was given; but the street bell was rung and the bridge was cleared of traffic. Immediately after clearing the Randolph draw, the tug decreased her speed. There was then abundant time for the Washington draw to open, if both tenders had been at their posts. Seeing that the bridge was not starting to open, the captain of the tug reversed her engines, and the tow lines (new and heavy ones provided by the schooner) broke under the strain. And so the schooner drifted with the current against the closed bridge and received the injuries complained of.

Manifestly the schooner was blameless; and ample evidence is in the record to support the finding of the trial judge, who heard and saw the witnesses, that the tug was properly navigated and was free from fault. A question of law is all that merits notice.

By an ordinance the city has undertaken to forbid vessels to approach its drawbridges while a red ball by day or a red lantern by night is displayed in an elevated position thereon. If the city, through its bridge tenders, is ready and willing to permit a vessel to pass, the lowering of the elevated ball or lantern is an invitation to approach and pass through. "At all other times such signals shall remain elevated." And the question of law is: May the city, by posting a universal 'No,' excuse itself from having bridge tenders on duty who shall answer a vessel's requests for passageway by giving promptly the information that is appropriate to the immediate occasion? We think not, and the reasons briefly are as follows:

Where the subjects over which the national power to regulate commerce are local in their nature or operation, the authority of the state

and its municipal agencies may be exercised until Congress speaks. And so, prior to congressional action, vessel owners could not complain of dams and immovable bridges in navigable waters wholly within a state, which had been built under the state's authorization. Willson v. Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; Gilman v. Philadelphia, 3 Wall. 713, 18 L. Ed. 96. Likewise, in the absence of national control, ordinances of Chicago closing navigation on the Chicago river for an hour in the morning and also in the evening, and dividing the residue of the time into ten-minute periods between navigation and street traffic, were found not to be violative of the commerce clause of the Constitution. Escanaba Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442. That case was decided in 1882. From shortly thereafter to the present time there have been acts of Congress covering the construction of bridges, dams, etc., in navigable waters. With national authority paramount, the respective rights of navigators and of local municipalities operating bridges were admirably stated by Judge Jenkins in Clement v. Metropolitan West Side El. Ry. Co., 123 Fed. 271, 59 C. C. A. 289:

"A bridge spanning a navigable river is an obstruction to navigation, tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights, giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (City of Chicago v. Mullen, 54 C. C. A. 94, 116 Fed. 292), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (Manistee Lumber Company v. City of Chicago [D. C.] 44 Fed. 87; Central Railroad Company of New Jersey v. Pennsylvania Railroad Company, 8 C. C. A. 86, 59 Fed. 192), when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern."

In City of Chicago v. Mullen, 116 Fed. 292, 54 C. C. A. 94, the bridge tender, in pursuance of an ordinance, moved a red ball as an invitation to approach in answer to the vessel's inquiry. The consequences of failing or declining to answer were not considered. And in Munroe v. City of Chicago, 194 Fed. 936, 114 C. C. A. 572, we approved as reasonable an ordinance which required the bridge tender to elevate a red ball or a red lantern if he "for any reason cannot open the bridge." But that ordinance was the exact converse of the present one. Under that ordinance the bridge tender could answer a vessel's inquiry by saying: Keep away; I cannot open the bridge now. The

red ball or lantern, however, normally elevated in advance of any inquiry, gives no answer to a present question, conveys no information beyond that furnished by the closed bridge itself by day, and by the lights required by government regulations at night. To exercise reasonably its subordinate power the city should have bridge tenders at their posts of duty and should provide them means for answering definitely and promptly the inquiries of vessels desiring to pass through the drawbridges.

The decree is affirmed.

TROWBRIDGE v. CHANDLER.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 85.

1. INNKEEPERS ⟸10—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries to a guest in a hotel, caused by falling down a stairway while going to her room through an unlighted hallway, evidence *held* to make questions for the jury as to defendant's negligence and plaintiff's contributory negligence, and the court therefore erred in directing a verdict for defendant on the ground that plaintiff was negligent as a matter of law.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 14–16; Dec. Dig. ⟸10.

Liabilities for personal injuries to guests, see notes to Clancy v. Barker, 66 C. C. A. 483, and Trulock v. Willey, 112 C. C. A. 5.]

2. NEGLIGENCE ⟸136—QUESTIONS FOR JURY—UNDISPUTED FACTS.

Where reasonable men might differ as to the conclusion to be drawn from undisputed facts, the question of negligence is one for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. ⟸136.]

3. EVIDENCE ⟸123—HEARSAY—RES GESTÆ.

In an action for injuries to a hotel guest, caused by falling down a stairway while going to her room through an unlighted hallway, the testimony of a witness that, after plaintiff fell, a woman from whom plaintiff had just separated at the door of her own room called to the witness to bring a light, and said that she could not find a match, was properly excluded as hearsay; it not being any part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351–368; Dec. Dig. ⟸123.]

In Error to the District Court of the United States for the District of Vermont.

This cause comes here upon writ of error to review a judgment of the District Court, District of Vermont, in favor of defendant in error, who was defendant below. Defendant was an innkeeper; plaintiff was a guest who sustained injuries from falling down a flight of stairs when going to her bedroom.

Batchelder & Bates, of Bennington, Vt. (N. L. Robinson, of New York City, of counsel, for plaintiff in error.

Buttles & Botsford and T. W. Moloney, all of Rutland, Vt., for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

LACOMBE, Circuit Judge. [1] The door to plaintiff's room was close to an open stairway with which she was familiar. During her stay at defendant's house up to the night of the accident, plaintiff had retired at about 9:30 or 10 p. m., before the lights in the hallways were extinguished. The hotel was a small one, remote from the lines of travel, lit with kerosene lamps; the boarders kept early hours, and it was customary, in order to avoid fire risk, to put these lamps out when the boarders had retired. On the evening in question plaintiff and another boarder, Miss Curtis, had been visiting a friend on the floor below, and left there about 10:45, at which time all the hall lights were out. The two ladies went up a nearby stairway to the upper floor, into a large writing room 20 by 30 feet which was then in total darkness, except for some light which came through windows opening on a piazza. They groped their way by this light diagonally across the writing room to a corridor which led to their respective rooms. That corridor, entirely unlighted, was about 25 feet long; on the left of it were two bedrooms, on the right two more, the one furthest to the right being Miss Curtis'. Just beyond the corridor ran into an open hall. On the right-hand side of this hall was a bedroom; on the left-hand side, another bedroom. Across the hall, opposite to the corridor, was the stairway; on its right hand there was another corridor leading to other bedrooms. On the left hand of the stairway was the door of plaintiff's room, distant about 18 feet from Miss Curtis' door. This hall was also entirely unlit, there being no windows to it. In the nearby left-hand corner of the hall there was one of plaintiff's trunks; except for that the hall was unobstructed. The ladies went down the corridor, feeling their way along the wall, till they came to Miss Curtis' door, when they said good night. A step or two more brought plaintiff to the place where the corridor opened into the hall, through which she undertook to walk diagonally to her own door. She testified:

"My thought was that I must avoid those stairs which came right down close by my door, so I will bear well to the left, going slowly with my hands out in front of me, feeling so that I might feel the wall and also feel my own door, as I came to it, and just slipping my feet slowly with a small step. * * * The first I knew I was going down [the stairs]."

Further on she stated that she did not continue to guide herself by the wall on the left as she entered the hall, keeping along it and the side wall (to the left) till she reached her own door, because she feared she would have tumbled over her trunk.

At the close of the trial the court directed a verdict for the defendant on the ground that plaintiff was guilty of contributory negligence as matter of law.

The question whether or not defendant was negligent was fairly one for the jury; we do not understand that there is any dispute about that proposition. We are of the opinion, however, that the question of plaintiff's negligence should have been left to them for decision. It is contended that, being fully aware of the danger to be apprehended, she should have waited by the door until Miss Curtis had lit her light, or until she could have obtained a match from Miss Curtis to light her own way across the hall. It may further be contended that the safer

course would have been to continue feeling her way along the walls to her left, when, if she walked slowly, the only mishap she would encounter would be to stub her toe against the trunk.

[2] This court had occasion recently to consider the general question when the inference of negligence from undisputed facts is for the court and when it is for the jury to determine. N. Y., N. H. & H. R. v. Visvari, 210 Fed. 118, 126 C. C. A. 632. Upon the facts in the case at bar reasonable men might differ as to the conclusion to be drawn; in such cases the determination as to what reasonable care and prudence required is for the jury. We think the court erred in holding that plaintiff was negligent as matter of law; i. e., that "a recovery is impossible upon any view that can properly be taken of the facts." Dunlap v. Northeastern R. R., 130 U. S. 649, 9 Sup. Ct. 647, 32 L. Ed. 1058; Kane v. Northern R. Co., 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339.

[3] Since there is to be a new trial, another assignment of error should be disposed of. The testimony of Miss Milliken was taken de bene esse. The witness was one of the party who had been visiting in the room below; she left with the other two ladies and went to her own room on another corridor leading out of the writing room. She heard a crash, and then Miss Curtis called to her to bring a light as quickly as possible; that Miss Trowbridge had fallen down stairs. The witness testified that "she [Miss Curtis] said she could not find a match." This testimony was excluded, and error is assigned. We think it was properly excluded, being hearsay, and not any part of the res gestæ.

The judgment is reversed.

KJAER & ISDAHL et al. v. ETIER.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1915.)

No. 2680.

SHIPPING ⟸80—LIABILITY OF VESSEL—INJURY TO CARETAKER.

Libelant's husband, while employed as caretaker of a freight steamer in the custody of the marshal, was killed by falling through the trap or opening in the floor of the fidley leading to the stokehold. It was dark, the doors of the fidley were open, and there was no railing around the opening. It was shown that, while there was a railing around three sides in some vessels, it was not usual in vessels of such class. Deceased had been employed by the marshal in such service for several years and was familiar with vessels. *Held*, that the owners, not being in possession and not having invited deceased on board, owed him only ordinary care, and were not shown to be negligent; that they were not liable for the open doors, or absence of lights, which were matters to be attended to by the marshal and his employé.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 106; Dec. Dig. ⟸80.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit in admiralty by Marie Etier against Kjaer & Isdahl and the National Surety Company. Decree for libelant, and respondents Kjaer & Isdahl appeal. Reversed.

This is an appeal from a decree in favor of Marie Etier, appellee, and against Kjaer & Isdahl, appellants, owners of the Norwegian steamship Hero, and the National Surety Company, surety, for the sum of $2,000. Marie Etier filed a libel against Kjaer & Isdahl, owners of the Norwegian Steamship Hero, demanding $12,500, damages alleged to have been sustained as a result of the accidental death of her husband, Octave Etier, who was on board the Hero as keeper for the United States marshal; the vessel being then under seizure in a cause of salvage now pending in the United States District Court. It was alleged that the accident was due to the fault and negligence of the vessel, her officers, and owners. The following is a summary of facts not disputed:

Libelant, 69 years of age, is the widow of Octave Etier, who died on October 22, 1913. Octave Etier was a keeper on the Hero for the United States marshal, and as such had possession of the ship, which was a freighter. He fell through the opening in the floor or platform of the fidley or stokehold entrance of the vessel. Etier was 75 years old, and for 14 or 15 years had been a keeper for the marshal and had served on all sorts of ships. He was not always working, but when employed made $2.50 a day. He may have averaged from $300 to $400 a year, and he went on the Hero the afternoon of October 17th. He slept in the ship's cabin. At about 6:30 p. m. of October 18th he had eaten supper on the ship, and was on the starboard side of the bridge deck, when he walked into the fidley, fell through the opening in the platform, and was found lying in the stokehold, injured. When the accident happened, both doors leading from the bridge deck to the fidley were open, the opening in the floor or platform of the fidley was open, and the fidley and stokehold had no light inside. The fidley is the entrance to the stokehold; the latter being the room where the firemen fire the ship. A door leads from either side of the bridge deck into the fidley. To get into the fidley, it is necessary to step over a threshold or coaming. After entering one steps onto a platform or flooring made of round steel bars. In this flooring there is an opening about 6 feet from the starboard door and 3 feet 9 inches from the port door. The opening is about 2 feet square. From this opening a steel ladder goes down to the bottom of the stokehold.

Not a single witness testified that the fidley was a passageway. That it was not a passageway was testified to by the following: Ruiz; Ship's Carpenter John Olsen; Chief Engineer Anton Olsen; Captain Olaf Olsen; Captain J. E. Roop, a British shipmaster; Captain R. W. Lewis, port captain of the Porto Rico Line. All of the above witnesses likewise testified that the doors from the bridge deck to the fidley or stokehold entrance are usually left open, except in bad weather, and that nobody but firemen, mechanics, or engineers ever entered the fidley.

As to having a barrier around the opening in the platform, Captain Lewis testified that not all, but some, modern ships had a railing three-quarters of the way around the opening, but that the ships he had been master of had no railing around this opening. This was explained by the fact that nobody but firemen ever went into the fidley, and they knew perfectly well where the opening was. There is no proof whatever of anything requiring, or even suggesting, that Etier should go into the stokehold.

The opinion of the court below was as follows:

"This is a libel for damages for the death of Octave Etier, the husband of libelant, who fell through an opening on the steamship Hero and was killed. There is no dispute as to the facts. The hold through which Etier fell was in a compartment called the 'fidley.' It was not protected by any railing or other guard of any kind, and there was no light in the fidley. There was a ladder leading down through this hole into the engine room or stokehold, and it was habitually used by the members of the crew in going down into that part of the ship. The fidley is a compartment in the main house on the steamer with doors opposite each other, one on each side, and opening out on the deck.

At the time of the accident the vessel was under seizure by the marshal, and Etier was the keeper. Etier was standing on the starboard side of the ship, which was against the dock, and stepped into the fidley. It was after dark, and he had just finished his supper. The supposition of some of the witnesses is that he stepped inside in order to light his pipe or a cigarette. I do not know that he was warned to keep out of the fidley, and it is evident that he attempted to pass through it to the other side of the ship, and fell into the trap awaiting him.

"It seems to me that under the circumstances his widow should be allowed to recover. Conceding that the vessel was a freight carrier, and that the hole was intended for the use of the crew only, it was gross negligence to leave the doors in each side open, and not to have some light in the fidley, or some protection around the opening. Etier was lawfully on the ship. The passage offered an attractive means of getting from one side of the ship to the other, especially to a man such as Etier, who would naturally take the shortest way, and it should have been anticipated that any person on the ship would so make use of it. The deceased was 75 years old. His widow is 69. He had been employed more or less steadily by the marshal as a keeper, and earned on an average $300 to $400 a year. It is quite probable that he would have continued to be so employed as long as he was able to get about, as, for the purpose of maintaining the seizure of a ship, he would be just as well qualified as a younger and stronger man.

"Considering these facts, it seems to me that an award of $2,000 would do justice in the case. There will be a decree for that amount, with interest from the date of the decree."

George Terriberry, of New Orleans, La., for appellants.
Armand Romain, of New Orleans, La., for appellee.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). This is a libel in personam, which is prosecuted on the theory that, as Etier was lawfully on the ship, the owners were negligent in not providing for his safety, in that the trapdoor or coal chute was negligently left open by the officers in charge, that no light nor lights were placed at or near the opening, that no guard rail was placed around the said opening in said passageway or gangway, that no warning was given to Etier of the dangerous premises, and that no lights of any kind, with the exception of one dim lantern located a great distance away, were used or furnished on the ship, so that all the passageways or gangways were rendered dark or unsafe.

Considering the evidence in this aspect, we are not satisfied that liability was established. Etier was a man of experience, familiar with ships and their construction, and it is to be presumed knew that necessarily on all steamships there were many dangerous places and passageways, and that it was unsafe, without specific knowledge or light, to wander around the ship at night. He was not a passenger nor invited guest on the ship, nor an inexperienced employé; and having no contract relations with the owners, they owed him in the most favorable light only ordinary care, and that he received. The owners were not negligent in the ship's construction; the trapdoor of the coal chute and the doors to the fidley were left open to give air to the stokehold, and no light was required in the fidley, because it was not a passageway, and only people having duties therein, such

as firemen, engineers, and officers, could have any business or occasion to enter therein.

The authorities cited by the libelant all appear to be cases where the injured party was either on board as a passenger or on the invitation or business of the ship, and are not applicable to the instant case. Taking the case as a whole, the transcript shows that at the time of the injury to Etier the owners' possession had been for some time and was then divested. The ship was in custodia legis, and the marshal, representing the United States, was in possession and charge thereof, and was represented on board by Etier, libelant's intestate, to whom the owners owed no other duty than not to willfully injure him. If the doors of the fidley were left open, and the fidley was not lighted, and the place was dangerous and ought to have been lighted, it was the fault and negligence of the marshal, represented by Etier, and the owners were not responsible.

As to authority of owners when a ship is in custodia legis, see The Esteban De Antunano (C. C.) 31 Fed. 920.

The decree of the District Court is reversed, and the libel dismissed.

ST. BERNARD CYPRESS CO., Limited, v. JOHNSON.

(Circuit Court of Appeals, Fifth Circuit. April 27, 1915.)

No. 2726.

1. CARRIERS ⊂⊃240—MASTER AND SERVANT ⊂⊃198—LIABILITY FOR INJURIES—NEGLIGENCE OF "FELLOW SERVANT"—"PASSENGER."

Where an employer, after the day's work was done, carried its employés by train from the swamp where they were employed to its plant and quarters, charging them nothing for the transportation and making no deduction from their wages, an employé, while being so carried, was not a "passenger," the relation of employer and employé still continuing; and the engineer of a train following that on which an employé was riding was a "fellow servant" with such employé, for whose negligence, under the fellow servant doctrine prevailing in Louisiana, the employer was not liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 976; Dec. Dig. ⊂⊃240; Master and Servant, Cent. Dig. §§ 493–514; Dec. Dig. ⊂⊃198.

For other definitions, see Words and Phrases, First and Second Series, Fellow Servant; Passenger.

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 86 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

2. APPEAL AND ERROR ⊂⊃1026—REVIEW—HARMLESS ERROR.

In an action for injuries sustained by an employé while riding on a train, where the evidence had a tendency to prove that plaintiff would not have been hurt, except for the negligence of an engineer, and it was not a necessary inference from either the admissions in the answer or from the evidence that the injury would have been inflicted if the negligence of the engineer had not concurred with that of a track walker, the court's erroneous rulings that the engineer was not a fellow servant of the injured employé were not harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4029, 4030; Dec. Dig. ⊂⊃1026.]

Maxey, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by Thomas C. Johnson against the St. Bernard Cypress Company, Limited. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Irving R. Saal, H. Generes Dufour, and George Janvier, all of New Orleans, La. (Robert E. Milling, of New Orleans, La., on the brief), for plaintiff in error.

A. A. Calongne, of New Orleans, La., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. This was an action by the defendant in error (who will be referred to as the plaintiff), who was employed as a skidder in the swamp from which his employer, the plaintiff in error (which will be referred to as the defendant), was getting out logs, to recover damages for a personal injury, a proximate cause of which was the negligence of the engineer of a train of the defendant, which was following another of its trains upon which the plaintiff was being carried, after his day's work was done, from his place of work in the swamp to the defendant's plant and quarters, in accordance with the custom of the defendant to transport its laborers to and from their place of work, charging them nothing for that transportation and making no deduction from their wages on that account.

[1] The court made rulings to the effect that at the time the plaintiff was hurt he was a passenger on the train upon which he was riding, that the relation of fellow servant did not exist between him and the negligent engineer of the following train, and that the fellow servant rule did not apply, so as to exempt the defendant from the liability asserted against it because of that negligence. We are of opinion that the rulings to this effect were erroneous. The relation of employer and employé continued while the latter was being carried by the former in its own conveyance on its own premises, with the results that the plaintiff and the negligent engineer were fellow servants when the injury was sustained, and that the defendant is not chargeable with liability for the negligence of the engineer which is relied upon. These propositions are abundantly supported by authorities, a discussion of which is not deemed necessary. Dayton Coal & Iron Co. v. Dodd, 188 Fed. 599, 110 C. C. A. 395, 37 L. R. A. (N. S.) 456; San Pedro, etc., Co. v. Davide, 210 Fed. 870, 127 C. C. A. 454; Martin v. Atchison, Topeka & Santa Fé R. R. Co., 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; 26 Cyc. 1087. The master not being in fault with reference to the negligent engineer, the fellow servant doctrine, which prevails in Louisiana, was applicable. See Hubgh v. New Orleans & Carrollton R. R., 6 La. Ann. 495; Merritt v. Victoria Lumber Co., 111 La. 159, 35 South. 497; Cross v. Lee Lumber Co., 130 La. 66, 57 South. 631.

[2] It was not a necessary inference from either the admissions contained in the defendant's answer to the plaintiff's petition or from the evidence adduced that the injury complained of would have been

inflicted if the negligence of the engineer had not concurred with that of the track walker. On the contrary, the evidence introduced, in connection with that offered by the defendant and excluded, had a tendency to prove that, but for the engineer's negligence, the plaintiff would not have been hurt. So it cannot properly be said that the defendant was not prejudiced by the rulings to the effect that it was liable to the plaintiff for consequences of that negligence.

It follows that the judgment of the District Court should be reversed, and the cause be remanded for a new trial; and it is so ordered.

MAXEY, District Judge (dissenting). The answer of the defendant contains the following admissions:

"That the accident was caused (1) by the carelessness of the track walker in not noticing the defect in the rail which caused the derailment of the first train, and (2) by the carelessness of the engineer of the second train in following too closely behind the first train. Respondent admits that the action of both of these parties, to wit, the track walker and the engineer of the second train, was in violation of the rules of the company."

The answer in plain language admits that the accident to the defendant in error was due to the negligence of the track walker, combined with that of the locomotive engineer. Hence the negligence of the track walker concurred with the carelessness of the locomotive engineer in producing or causing the accident. The duty of providing a safe place for an employé to work is the duty of the master, which cannot be delegated, so as to relieve the master of responsibility. That duty the master in the present case failed to discharge, and it should be held liable to the defendant in error for the injuries sustained by him, notwithstanding the negligence of the locomotive engineer. Thus it was said by the court in Deserant v. Railroad Company, 178 U. S. at page 420, 20 Sup. Ct. at page 972, 44 L. Ed. 1127:

"It is undoubtedly the master's duty to furnish safe appliances and safe working places, and if the neglect of this duty concurs with that of the negligence of a fellow servant, the master has been held to be liable."

In Kreigh v. Westinghouse & Co., 214 U. S. at page 257, 29 Sup. Ct. at page 622, 53 L. Ed. 984, the rule is stated in the following language:

"If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff, the master would be liable, notwithstanding the concurring negligence of those performing the work."

That the duty of the master to provide for his employés safe appliances and a safe place to work cannot be delegated, see Railroad Company v. Herbert, 116 U. S. at page 647, 648, 6 Sup. Ct. 590, 29 L. Ed. 755.

The writer is of the opinion that the judgment should be affirmed.

GOODWIN FILM & CAMERA CO. v. EASTMAN KODAK CO. et al.

Appeal of WETMORE.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 181.

ATTORNEY AND CLIENT ⊂=177—LIEN—PERSONS ENTITLED TO LIEN.

Where complainant's solicitor of record conducted a suit, consulting from time to time with counsel retained by him to the date of the final hearing, when both he and the counsel participated in the argument, and on appeal from a decree for complainant the preparation for the argument was made almost entirely by the counsel on account of the solicitor's illness, and the appeal was argued by the counsel, who also opposed an order to show cause why the injunction obtained by complainant should not be suspended, and made suggestions which were adopted by the court on the hearing of the show-cause order, and which resulted in a settlement by defendant for a large sum without the knowledge of the counsel, he did not acquire a charging lien upon the decree and its proceeds, though he signed the bill pursuant to old equity rule 24, providing that every bill shall contain the signature of counsel, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, as the purpose of this rule is to insure good faith, and it does not vary the relation of counsel to client, or make the counsel who signs the bill a counsel of record.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 386; Dec. Dig. ⊂=177.]

Appeal from the District Court of the United States for the Western District of New York.

For former opinion, see 216 Fed. 831.

Wetmore & Jenner, of New York City (Samuel H. Ordway, of New York City, of counsel), for appellant.

Charles A. Brodek, of New York City, for complainant.

J. J. Kennedy, of New York City, for defendant.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. The petitioner asks that he may be declared to have a lien upon the decree in favor of the complainant herein and the proceeds thereof for the reasonable value of his services as counsel; that the decree be vacated, and a master be appointed to take proofs on the subject and report to the court.

The bill was filed in December, 1902, and the petitioner retained as counsel for complainant in March. Edward C. Davidson, the solicitor of record, conducted the case, consulting with the petitioner from time to time down to the date of final hearing, May 6, 1913, when both solicitor and counsel participated in the argument before Judge Hazel, who entered a decree for the complainant. An appeal from this decree was taken by the defendant, and preparation for the argument made almost entirely by the petitioner on account of the illness of the solicitor. January 5, 1914, the case came on for argument in the Circuit Court of Appeals, was argued by the petitioner, and the decree of the

District Court affirmed. Subsequently the defendant obtained an order upon the complainant to show cause why the injunction should not be suspended for six months upon the ground of public convenience and to enable the defendant to dispose of its large stock of films. This was opposed by the petitioner, whose suggestions as to terms were substantially adopted by the court, and were such that the case was settled for a very large sum without his knowledge. Thereupon he sent in a bill to the complainant for $100,000, which the complainant refused to pay, tendering $5,000 in full settlement.

As between the complainant and the petitioner, the question is whether counsel has any lien upon the decree and its proceeds. We cannot agree that the petitioner, as counsel, has a charging lien for the reasonable value of his services upon the decree and the proceeds thereof which equity will enforce, without regard to statute or possession of property. The cases relied upon, when examined, do not sustain this contention. In Barcus v. Gates et al. (C. C.) 130 Fed. 364, it is quite plain that, although Barcus is spoken of in the opinion as counsel, he was actually attorney. In Dodge v. Schell (C. C.) 12 Fed. 515, the petitioner, though a custom house broker, was treated as an attorney, and the court made it a condition of the substitution of new attorneys for the plaintiffs that his fee should be paid. In Frink v. McComb (C. C.) 60 Fed. 486, the award seems to have been made to solicitors, though they are sometimes spoken of in the opinion as counsel. In Buell v. Kanawha (D. C.) 201 Fed. 762, the solicitors for the complainant also acted as counsel for the receivers. They were allowed no compensation as attorneys for complainant on the ground that he had created no fund, and they were denied compensation for services to the receivers out of the fund because it belonged to prior claimants, viz., mortgagees. In Tuttle v. Claflin (C. C.) 86 Fed. 964, and 88 Fed. 122, 31 C. C. A. 419, the situation was one of a fund created by one Wooster who was by agreement entitled to his costs and expenses. Judge Lacombe held that it made no difference whether the counsel fees which he incurred as part of his expenses were paid to him or to the counsel directly. This is quite in line with what the court said in Central R. R. Co. v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915, as to a fund created by intervening creditors:

"It is clear that, within the principles announced in Trustees v. Greenough [105 U. S. 527, 26 L. Ed. 1157], Branch, Sons & Co. and their co-complainants are entitled to be allowed, out of the property thus brought under the control of the court, for all expenses properly incurred in the preparation and conduct of the suit, including such reasonable attorney's fees as were fairly earned in effecting the result indicated by the final decree. And when an allowance to the complainant is proper on account of solicitors' fees, it may be made directly to the solicitors themselves, without any application by their immediate client."

Counsel for petitioner attached much significance to the fact that he signed the bill as counsel, in accordance with old rule in equity 24, which reads:

"Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed."

The purpose of this rule is to insure good faith. It does not in any respect vary the relation of counsel to client. It does not make counsel who signs the bill a counsel of record, who cannot be changed except on terms, as is the case with the solicitor of record. The petitioner's remedy for his manifestly valuable services is at law.

The order is affirmed.

FAURIE v. BOARD OF DIRECTORS OF CITY SCHOOLS OF NEW ORLEANS.

QUINLAN v. SAME.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1915.)

Nos. 2734, 2735.

GARNISHMENT ⟸17—PROPERTY SUBJECT TO GARNISHMENT—SCHOOL FUNDS.

Under Rev. St. La. § 1320, providing that property dedicated to the use and belonging to public schools, or employed by municipal corporations for that purpose, shall be and is thereby exempted from seizure, and Act La. 1912, No. 214, § 68, requiring school boards to adopt a budget of revenues, and a budget of expenditures not to exceed 100 per cent. of the budget of revenues, or in the parish of Orleans 95 per cent., and providing that in the parish of Orleans at the end of the year, after payment of all indebtedness budgeted, the school board shall apply the surplus of 5 per cent. to any indebtedness of previous years reduced to final judgment, the proceeds of a loan to a school board in the parish of Orleans, for the repayment of which loan all the revenues had been dedicated, was not subject to garnishment under a judgment against the school board, which had not set aside 5 per cent. for the payment of old judgments as required.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 32–34, 44; Dec. Dig. ⟸17.]

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Actions by Edith Faurie and Eugenia Quinlan against the Board of Directors of the City Schools of New Orleans. Judgments adverse to plaintiffs, and they bring error. Affirmed.

The two foregoing causes were submitted together in pursuance of the following stipulation of counsel: "It is understood and agreed between counsel representing the plaintiff, the Whitney Central National Bank and the Board of Directors of the Public Schools, Parish of Orleans, that the same judgment which may be rendered by this honorable court shall also be rendered in the case of Quinlan v. Board of Directors of the City Schools of New Orleans, No. 2735 of the honorable court, mutatis mutandis, and due regard being had to the amount involved in the case of Quinlan, which is different from that in the Faurie case; briefs in the Faurie case to serve in the Quinlan case.

The plaintiffs, holding judgments for quite large amounts, originally against the Board of Directors of the City Schools of New Orleans, but revived against the Board of Directors of the Public Schools, Parish of Orleans, November 27, 1914, served writs of garnishment on the Whitney Central National Bank to subject certain moneys held by the bank to the payment of their judgment. Among other defenses the bank in its answer interposed the following: "And, further answering, this respondent says: That at the date of the service of the interrogatories aforesaid it had on hand to the credit of the corporation

designated as Board of Directors of the Public Schools, Parish of Orleans, a sum of money aggregating more than thirty-five thousand dollars ($35,000.00). That respondent is advised and believes, and so answers, that the said corporation known as the Board of Directors of the Public Schools, Parish of Orleans, is a corporation created by Act 214 of the Louisiana Legislature of 1912, and is another and different corporation from the defendant in the judgment and writ herein. Further answering, respondent avers that it is informed and believes, and so answers, that the funds of the Board of Directors of the Public Schools, Parish of Orleans, which it has answered that it had in its possession, are funds which are dedicated, under the provisions of the Constitution of the state of Louisiana, to a governmental purpose, to wit, school purposes, and which are therefore exempt from seizure by the process of garnishment or otherwise. For further answer, your respondent avers that the corporation known as the Board of Directors of the Public Schools, Parish of Orleans, is, as respondent is informed and believes, an arm of the state government of the state of Louisiana, and as such is not subject to garnishment process." There are numerous other pleadings between the parties, but reference to them is unnecessary.

Upon conclusion of the evidence, counsel for the plaintiffs in error requested an affirmative charge in their favor. The request was denied, and the following instruction was given by the court: "Gentlemen: In this case it appears that the funds garnished are the result of a loan, but that all of the revenues have been dedicated to the repayment of the loan; that the board has never set aside 5 per cent. for the payment of old judgments as required by the Act of the Legislature, No. 214 of 1912, section 68, paragraph "B." Therefore I am of the opinion that there is no difference in the funds, although they may have been derived from a loan; that the loan could not be a source of revenue, merely a matter of convenience to anticipate the revenues derived from the usual sources, which would not be seizable under the fi. fa.; and I will maintain the exception of the garnishee, and discharge the rule to traverse the answers of the garnishee. I decline to give the first request of the plaintiff, and consider that the other two requests are not applicable, and deny them also."

To the instruction given, counsel for plaintiffs in error excepted, and to revise the judgments, rendered in behalf of the defendant in error, the case has been brought to this court.

Charles Louque, of New Orleans, La., for plaintiffs in error.

I. D. Moore, City Atty., John F. C. Waldo, Asst. City Atty., and Hall, Monroe & Lemann, all of New Orleans, La., for defendants in error.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The District Judge was right in the conclusion announced in his charge to the jury. The funds were held by the bank in trust for school purposes, and were not subject to garnishment; and this clearly appears from section 1320 of the Revised Statutes of Louisiana of 1870. That section is in the following words:

"Property dedicated to the use and belonging to public schools, or employed by municipal corporations for that purpose, shall be and is hereby exempted from seizure."

See, also, Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197.

The record discloses that, at the time the garnishments were served and the judgments rendered against the plaintiffs in error, the judgments in their favor stood, as they were originally rendered, against the organization known as the Board of Directors of the City Schools

of New Orleans. The bank denied having funds of this board, but admitted that it held more than $35,000 to the credit of the Board of Directors of the Public Schools, Parish of Orleans. As to this particular phase of the case we express no opinion, preferring to rest our decision upon the merits of the question submitted.

The judgments should be affirmed; and it is so ordered.

J. C. STEWART & CO. v. McLEOD.

(Circuit Court of Appeals, Fifth Circuit. April 27, 1915.)

No. 2771.

BANKRUPTCY ⊂=348—CLAIMS—PRIORITY OF PAYMENT—CLAIMS FOR LABOR—SUBROGATION.

Where an employer, before pay day, gave laborers in payment of wages earned, but not due, orders on the claimant payable in trade, under an arrangement with the claimant whereby on pay day 90 per cent. of the amount which would have been collectible by the laborer was paid the claimant, the employer thereby obtaining a practical reduction of 10 per cent. of its labor expense, as well as the right to buy its own supplies from the claimant at cost prices, while the claimant obtained a practical monopoly of the furnishing business at the employer's camps, with no limit to the profits on goods sold the laborers, the claimant was not entitled, upon the bankruptcy of the employer, to subrogation to the laborers' right to priority of payment, as compliance with the orders by it did not amount to an assignment of the laborers' claims to it, but had the effect of satisfying their claim and creating a new demand for a different amount in favor of the claimant, and moreover the facts showed a combination or quasi partnership between the employer and the claimant, resulting in their mutual advantage and profit, at the expense and against the interests of the laborers, and there were therefore no equitable considerations to support the claim to subrogation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊂=348.]

Appeal from the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge.

Proceeding in bankruptcy by J. C. Stewart & Co. against William McLeod, trustee in bankruptcy of the W. G. McGowin Lumber Company. From a decree denying priority to claims against the bankrupt estate, the claimant appeals. Affirmed.

Gregory L. Smith, of Mobile, Ala. (H. T. Smith, of Mobile, Ala., on the brief), for appellant.

Gessner T. McCorvey, of Mobile, Ala. (Stevens, McCorvey & McLeod, of Mobile, Ala., on the brief), for appellee.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. We do not think that the decree appealed from was erroneous. In addition to the reasons stated in the opinion of the District Judge in support of the conclusion he reached, we have to say that it seems to us that the arrangement between the appellants

and the bankrupt, under which the former filled orders payable in trade given on them by the latter to its laborers for the amounts of wages earned at the time the orders were given, but not then due, the orders being given before pay day, distinctly negatives the conclusion that the payment in whole or in part of such an order had the effect of an assignment to the appellants of the whole or a part of the laborer's wages represented by the order. One of these orders was in effect a request by the bankrupt to the appellants to pay in trade to the payee named in the order all or a part of the amount for which the order was given, according as the surrender made by the payee was of the order as a whole or of detachable coupons accompanying the blank on which it was filled out. The compliance by the appellants with one of these orders was not under any contract or arrangement with the laborer who held it, but under an arrangement with the bankrupt by which the latter obligated itself to pay to the appellants on pay day, not the amount which then would have been collectible by the laborer in cash if he had retained his time check, as it was called, but 90 per cent. of that amount. Under the arrangement between the bankrupt and the appellants, the result of the latter's compliance with one of those orders was to satisfy, in whole or in part, as the case might be, a debt owing to the laborer in whose favor the order was issued; this satisfaction having the effect of creating a new demand for a different amount in favor of the appellants against the bankrupt. The claim of the laborer was extinguished, and a new demand for a different amount in favor of the appellants against the bankrupt came into existence; the consideration supporting it being the satisfaction of the demand for a larger amount which the laborer had held.

And it may be further noticed that the case shows a combination or quasi partnership between the bankrupt and the appellants (apparently antedating the bankruptcy for considerable time), resulting in their mutual advantage and profit at the expense of and against the interest of the laborers; the bankrupt getting its advantage in a practical reduction of 10 per cent. of its labor expense and the right to buy its own supplies from the appellants at cost prices, while the appellants secured a practical monopoly of the furnishing business at the bankrupt's camps without any limit on profits from goods sold to the laborers. If the combination had been made between the appellants and the laborers, under which credit had been given to the laborers, and thereunder they had been furnished goods at fair prices, there might have been some equity in the claim of the appellants that in taking up the laborers' time checks or trade orders it should be subrogated to the laborers' liens for wages. There is a notable absence of equitable considerations to support the contention made in behalf of the appellants.

It was correctly decided that the demands acquired by the appellants in the manner above indicated were not claims against the bankrupt estate which were entitled to priority.

It follows that the decree appealed from should be affirmed; and it is so ordered.

BRISTOL NAVAL STORES CO. v. FLORIDA PINE LAND CO.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1915.)

No. 2736.

TRIAL ⊂=260—REQUESTED INSTRUCTIONS—REFUSAL—INSTRUCTIONS ALREADY GIVEN.

Where the bill of exceptions did not include all, or substantially all, of the evidence, and did not include all of the written instruments in evidence, but recited that there was evidence tending to prove that, prior to the attornment by a tenant to a third person representing the title relied on by defendant in an action for the recovery of land, limitations had run for the period required to give title by adverse possession, it was not error to refuse to charge on the question of the effect of the lease by the third person as an attornment, and an eviction of the adverse holders before their holding had continued for the statutory period; and a charge requiring a verdict against plaintiff on the jury finding that the lease was made before the adverse possession had continued for the required period to confer title was sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⊂=260.]

In Error to the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

Action by the Florida Pine Land Company, for the use of Edward Weston, against the Bristol Naval Stores Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

S. Pasco, Jr., and Wm. H. Watson, both of Pensacola, Fla., for plaintiff in error.

Young L. Watson, of Quincy, Fla., and T. L. Clarke, of Monticello, Fla., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. The claim of the defendant in error to the land sued for was based upon an asserted adverse possession of it under color of title for the time requisite to confer title. A principal contention, made in the trial below and here in behalf of the plaintiff in error, is that, before such period had elapsed, there was an eviction, which stopped the running of the statute of limitations in favor of the adverse holders, as a result of the attornment by their tenants in possession, by the latter taking a lease of the land from one Davis, who was representing the title relied upon by the plaintiff in error. The plaintiff in error complains of the refusal of the court to give certain written instructions bearing upon the question of the effect of that lease as an attornment to the lessor and an eviction of the adverse holders before their holding had continued for the length of time required to vest title in them.

In support of this complaint, it is claimed in behalf of the plaintiff in error that it was entitled to have the jury definitely instructed to the effect that there was such an attornment by the tenants in possession as

amounted to an eviction, which prevented the acquisition of the asserted title by adverse possession. This claim cannot be sustained. In view of the facts that the bill of exceptions does not purport to set out all, or substantially all, of the evidence adduced on the trial (as it is certified to this court, it not even including all of the written instruments introduced in evidence and which purported to be made a part of it as exhibits), and that it expressly recites that there was evidence tending to prove that prior to the attornment to Davis the statute of limitations had run for the period required to give title by adverse possession, it is not made to appear that the plaintiff in error was entitled to such instructions on this phase of the case as its counsel now claims should have been given. The instruction which the court gave plainly required a verdict against the defendant in error if the jury should find from the evidence that the Davis lease was made before the adverse possession had continued for the period required to confer title, and that the lessor, in taking that lease, was representing the title under which the plaintiff in error claimed, and that the lessees, in attorning to him, recognized the superiority of that title; and these instructions were not excepted to. The court properly submitted to the jury the evidence tending to prove the acquisition of title by adverse possession as claimed by the defendant in error, and also that tending to prove an eviction before such possession became effective to confer title, and its instructions to the jury with reference to the evidence as to the attornment incident were as comprehensive and as favorable to the plaintiff in error as it is made to appear by the evidence as it is disclosed to us that the latter was entitled to require. Merryman v. Bourne, 9 Wall. 592, 19 L. Ed. 683; Tiffany on Landlord and Tenant, pp. 504 and 1298.

We find no prejudicial error in any ruling of the trial court of which complaint is made. It follows that the judgment should be affirmed; and it is so ordered.

In re R. & W. SKIRT CO. et al.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 193.

BANKRUPTCY ⟸288—COLLECTION OF ASSETS—SUMMARY PROCEEDINGS.

Where one of the members of a bankrupt partnership, about an hour after the filing of the petition in bankruptcy, paid a debt due from the partnership for money loaned with money belonging to the estate, the money so paid was recoverable in a summary proceeding, and a plenary suit was unnecessary, as, the debt and the payment out of the bankrupt's property after the filing of the petition being admitted, the question was purely one of law, and there was no question for determination by a jury.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⟸288.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

This matter comes here upon a petition to revise an order of the District Court for the Southern District of New York confirming the report of the referee in bankruptcy which denied the petition of the trustee praying that Freida Silberstein turn over to him the sum of $600 paid to her by one of the bankrupts after the filing of the petition in bankruptcy.

Dallas Flannagan, of Upper Montclair, N. Y., for petitioner.
Jacob Goldstein, of New York City, for respondent.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. This controversy involves a simple question of law. The facts are not disputed. After the filing of the petition in bankruptcy one of the bankrupts took $600 belonging to the bankrupts' estate and delivered it to Freida Silberstein, who refuses to return it to the trustee for the reason that it was received by her in payment of a debt of $600 for money loaned by her to Arthur J. Rosenthal, one of the bankrupts.

We have no doubt that a plenary suit will lie in such circumstances: The question is, Was such a suit absolutely necessary? The Bankruptcy Act is in itself a summary proceeding. Its principal aim and object is to divide the bankrupt's property among his honest creditors as speedily as possible. The purpose of the act will be largely defeated if each time a question of law arises over the title to property an action at law or a suit in equity must be commenced. In all these cases time will be lost and the assets depleted if the complicated machinery of a suit must be set in motion. After all is said and done, the question at issue must be determined by the court as matter of law. In the present case there are no facts in dispute. The bankrupt Rosenthal owed Freida Silberstein $600 for money which he borrowed of her. No one disputes this proposition. An hour after the petition was filed Rosenthal took $600 from the assets of the bankrupt firm and sent it to Freida Silberstein, which sum she still retains. No one disputes this proposition.

The trustee in bankruptcy petitioned the court alleging the facts as stated above. Freida Silberstein answered alleging that she received the money in payment of a debt due and owing her from one of the bankrupts. With the issue so joined what were the disputed questions of fact? If the case had been tried with a jury what question could have been sent them for determination? The question was purely one of law and was, in substance, whether after the petition in bankruptcy was filed the bankrupt could lawfully pay out of the funds belonging to the bankrupt company a debt owing by the bankrupt. The debt to Freida Silberstein is admitted, the payment out of the company's property after the petition was filed is admitted and the issue is whether upon these facts she can retain the money so paid. This upon admitted facts is a question of law. The court would, therefore, have been justified in dealing with it in a summary proceeding and, in order that the estate may be speedily and economically settled, it should have done so.

These views, we think, are supported by: Lazarus v. Prentice, 234 U. S. 263, 266, 34 Sup. Ct. 851, 58 L. Ed. 1305; Everett v. Judson, 228 U. S. 474–478, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; Mueller v. Nugent, 184 U. S. 17, 22 Sup. Ct. 269, 46 L. Ed. 405.

In the opinion of a majority of the court the order should be reversed and the petition granted.

BRADFORD v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1915.)

No. 2643.

PUBLIC LANDS ⇐130—CANCELLATION OF PATENTS—LIABILITY FOR IMPROVEMENTS.

On the cancellation as invalid of patents to public lands, the claimant under such patents cannot recover from the United States the cost of improvements made on the land, or taxes paid thereon under the laws of the state, in the absence of any contract by the United States, express or implied, to repay such sums.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 346; Dec. Dig. ⇐130.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Wm. I. Grubb, Judge.

Suit in equity by James L. Bradford against the United States. From a decree of dismissal, complainant appeals. Affirmed.

James L. Bradford and Donelson Caffery, both of New Orleans, La., for appellant.

Walter Guion, U. S. Atty., of New Orleans, La., for the United States.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. In our opinion the case is controlled by Bradford v. United States, 228 U. S. 446, 33 Sup. Ct. 576, 57 L. Ed. 912, so far as it is therein decided that the District Attorney of the United States was without authority to bind the United States by a contract express or implied to pay for improvements and taxes on public lands.

Accepting the appellant's contention that the adjustment made in settling the cases in court was in effect a compromise, we conclude that the same as a compromise did not extend to or in any wise cover, but expressly reserved, the right of Bradford to claim under the laws of Louisiana for any improvements that he may have made or taxes paid upon the lands in controversy.

To assert such claim the bill in the present case was brought, and under the averments thereof the motion to dismiss was properly grant-

ed, unless the claims of Bradford for taxes and improvements as a possessor in good faith under the laws of Louisiana can be maintained against the United States as resulting from an express or implied contract.

There was certainly no express contract, and the averment of such contract in the bill must be taken as a conclusion of law, not admitted by the motion to dismiss; and there can be no implied contract for the United States to pay for improvements made upon public lands, unless authority for the construction of such improvements can be found in some law of the United States (which is not contended in this case), or that the United States, after allowing improvements to be made on the public lands, have accepted or benefited by the same, of which there is no allegation in this case. See United States v. Doullut, 213 F. 729, 130 C. C. A. 243.

The decree of the court, entered in pursuance of the compromise, avoided, canceled, and annulled the patents that had been issued and the conveyances made thereunder, and restored to and declared the lands to be the property of the United States. This cancellation has the effect of wiping out as though never existing the patents and conveyances in question. Certainly Bradford under no law of Louisiana, no matter whether in good or bad faith, can recover against the United States for improvements made on public lands of the United States without the consent or authority of the United States, and where the United States have not in any wise accepted or benefited by the improvements for which compensation is claimed.

As the lands in question must, as an effect of the cancellation of the patents, be considered as continuously the public property of the United States, the United States cannot be held to repay taxes levied and paid under authority of the state of Louisiana.

The decree appealed from is affirmed.

DAIMLER IMPORT CO. v. DAIMLER MOTOREN GESELLSCHAFT.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 145.

CONTRACTS ⊂=305—CONSTRUCTION—MODIFICATION—WAIVER OF PERFORMANCE.

An agreement by an importing company to pay the expense of returning a fire engine to Germany unless it should be sold within six months *held* to have been waived by the manufacturer by demanding and receiving delivery of the engine in New York after bankruptcy proceedings had been commenced against the importer.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398, 1399, 1400, 1463, 1464, 1467-1475; Dec. Dig. ⊂=305.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

This cause comes here on petition to revise an order of the District Court, Southern District of New York, holding that the Motor Company was not entitled to recover or receive credit for expenses incurred by it in shipping a certain fire engine from New York to Germany.

Charles Oakes and G. B. De Luca, both of New York City, for petitioner.

Ernest W. Kelsey, of New York City, for respondent.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. The engine had been sent here for sale under a contract by the terms of which the Import Company undertook fully to insure it against fire and other risks and within six months either to return it in good condition to Germany free of any charge to the Motor Company or to pay for it by a remittance of 15,000 marks.

The only question in the case is whether this contract was modified. The six months would expire December 18, 1912. Petition in bankruptcy was filed and receiver appointed on October 21, 1912. As early as October 30th the Motor Company, through its attorneys here, requested that the engine be delivered forthwith to them in New York, and persisted in such request, hoping that they could sell it here. It was delivered to said attorneys herein December, 1912, and, not being able to sell it, they shipped it back to Germany, and now ask to be paid the expense of such shipment.

We concur with Judge Hand in the conclusion that by demanding and accepting delivery here, without reserving any right to compel the Import Company or its receiver to send it to Germany, delivery according to the terms was waived.

The order is affirmed.

WOODCOCK v. CITY OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1915.)

No. 2742.

DEDICATION ⟸19—SALES WITH REFERENCE TO MAP OR PLAT.

Where the owners of land made a plan of the property on which a vacant space was designated as "Samuel Place," and subsequently the owner of that part of the property including Samuel Place sold lots in accordance with the plan, the "place" was thereby dedicated to the public.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37–47; Dec. Dig. ⟸19.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action between Ernest E. Woodcock and the City of New Orleans. From a decree for the City, Woodcock appeals. Affirmed.

Lyle Saxon and Walter S. Lewis, both of New Orleans, La., for appellant.

I. D. Moore, City Atty., and John F. C. Waldo, Asst. City Atty., both of New Orleans, La., for appellee.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The owners of the lower half of Cottage Plantation, Laurent Millaudon and Samuel Kohn, in 1849 authorized Augustus S. Phelps to make a plan of the property for the purpose of selling their interest in the same at auction. The plan proposed by Phelps was approved and signed by Millaudon and Kohn. A vacant space was delineated on the plan under the designation of Samuel Place, the property in controversy. Samuel Kohn, the owner of that part of the estate which included Samuel Place, sold various lots in accordance with the Phelps plan.

We think there is no doubt that the acts of the parties operated as a dedication of Samuel Place to the public. If acceptance of the dedication was necessary, a question which it is not essential to decide, the enactments of the Legislature, together with ordinances of the city, and other acts of proprietorship exercised by the city as shown by the record, sufficiently evidence such acceptance in behalf of the public. In a carefully prepared and clearly expressed report the master so held. His report was confirmed, and rightly confirmed, by the court.

The decree of the District Court should be affirmed; and it is so ordered.

RAILROAD SUPPLY CO. v. HART STEEL CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 1886.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—RAILWAY TIE PLATE.
The Wolhaupter patent, No. 538,809, for a railway tie plate, claim 8, covers broadly a tie plate having tie engaging flanges on the under side and rail supporting flanges on the upper side, each being an independent and distinct feature of the invention which may be infringed although the other, as described in the more specific and limited claims, is not. As so construed, the claim is not too broad, but covers a true combination which was not anticipated, discloses invention, and is valid. Also, *held* infringed.

2. PATENTS ⊂=165—CONSTRUCTION OF CLAIMS.
In contemplation of law, each claim of a patent must be considered as setting forth a complete and independent invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. ⊂=165.]

3. PATENTS ⊂=177—COMBINATIONS—COMBINATION OR AGGREGATION OF PARTS.
To sustain a combination claim in a patent, it is not necessary that the natural action of each element must by the action of the other elements

upon it be converted into some sort of action other than its natural action, but it is sufficient if the elements are associated in a unitary structure and there co-operate to produce either a new mode of operation or a new result or the old result in a modified and improved way.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 253, 254; Dec. Dig. ⊂⊃177.

Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

4. PATENTS ⊂⊃45, 49—SUIT FOR INFRINGEMENT—EVIDENCE OF NOVELTY AND UTILITY.

In a suit for infringement, the fact of infringement, if shown, may be accepted as evidence of utility as against defendant and also of novelty if the invention is an important one in a commercial sense.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 51–53, 59–62; Dec. Dig. ⊂⊃45, 49.]

5. PATENTS ⊂⊃17—INVENTION—PRIOR ART.

In considering the question of invention, the disclosure of the patentee should as far as possible be excluded from view, and to negative invention a prior art device must disclose the idea of the patent so clearly that it would be apparent to a mechanic of ordinary intelligence who did not previously have such idea.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 16, 17; Dec. Dig. ⊂⊃17.]

6. PATENTS ⊂⊃312—VALIDITY—PRESUMPTION FROM GRANT.

The presumption of validity of a patent should be given more than formal recognition, and, before determining that the examiners of the Patent Office were in error and declaring its invalidity, the courts should consider the patentee's equities in his business developed under its presumptive validity and the place which the patented article has achieved in the field of practical art since the patent was granted.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. ⊂⊃312.]

7. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—RAILWAY TIE PLATE.

The Wolhaupter patents, No. 691,332, claims 1, 2, and 3, and No. 721,644, claims 7 and 9, each for a specific and limited improvement on the railway tie plate of patent No. 538,809 to the same patentee, *held* not anticipated, valid, and infringed.

8. WORDS AND PHRASES—"RAIL CHAIR."

A "rail chair" is a device used where the ends of rails come together; it holds the separate rails firmly together and in alignment and so gives them the effect of being one continuous rail.

9. PATENTS ⊂⊃1—WHAT CONSTITUTES.

A "patent" is a contract between the government on behalf of the people and the patentee.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 1; Dec. Dig. ⊂⊃1.

For other definitions, see Words and Phrases, First and Second Series, Patent.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Suit in equity by the Railroad Supply Company against the Hart Steel Company and Guilford S. Wood. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 193 Fed. 418.

Taylor E. Brown, Charles C. Linthicum, and Clarence E. Mehlhope, all of Chicago, Ill., for appellant.

Frank F. Reed and Edward S. Rogers, both of Chicago, Ill. (Frederick P. Fish, of New York City, of counsel), for appellees.

James Negley Cooke, of Pittsburgh, Pa., for defendant.

Before BAKER and SEAMAN, Circuit Judges, and GEIGER, District Judge.

BAKER, Circuit Judge. Appellant failed in its suit to hold appellees as infringers of claim 8 of patent No. 538,809, May 7, 1895, and claims 1, 2 and 3 of patent No. 691,332, January 14, 1902, and claims 7 and 9 of patent No. 721,644, February 24, 1903, all granted to B. Wolhaupter, appellant's assignor. A report of the decision in the trial court is found in 193 Fed. 418. On a record identical with that now before us, the Court of Appeals of the Sixth Circuit, in Railroad Supply Co. v. Elyria Iron & Steel Co., 213 Fed. 789, 130 C. C. A. 447, adjudged that the claims in suit were void for lack of invention. While these decisions are entitled to, and have been given, great weight in our consideration of the case, neither of them can be allowed to control our judgment or relieve us in any degree from giving to the record a complete and independent investigation. We proceed to set forth the findings of fact and conclusions of law which lead us to hold that the claims are valid and infringed.

[1] I. The inventions covered by the several claims in suit are susceptible of joint use in one article, a railroad tie plate, and therefore the three patents are properly brought forward in one suit. Of the three, we deem the first the most important, the others being improvements of the tie plate covered by claim 8 of the first patent. That claim reads as follows:

"8. A railway tie plate formed on the under side with devices more or less sharpened adapted to penetrate and engage the tie, and on its upper side with a series of flanges on which the rail rests, substantially as described."

1. At the root of the case lies the inquiry whether it is true that:

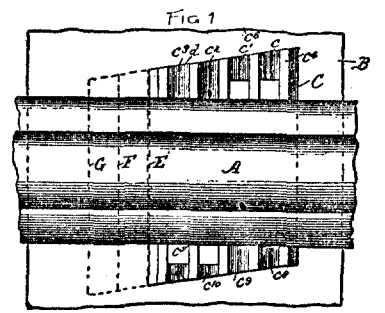
"Wolhaupter endeavored to cover a field of invention far wider than he was entitled to occupy, and the claim must be held void because it is broader than the real invention."

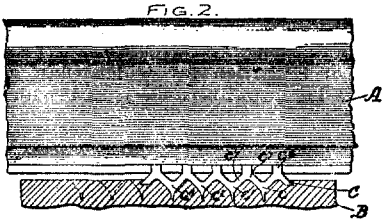
This conclusion is based on the finding that:

"The distinguishing feature of his device is not a series of relatively narrow, flat-topped, supporting surfaces suitably spaced apart, i. e., a corrugated top surface for the plate as distinguished from a flat or plain top surface; for, in alluding to the permissible variations in construction, none of which was to depart from the prime object of his invention, which is the stepped flanges or lower stepped projections, he states that the flanges may be divided; that instead of flanges stepped projections may be used; that a square, instead of a beveled, plate may be employed, and the under flanges alone be stepped; that but one end of the plate need be stepped; or that flanges having one or more of their ends stepped might be applied to a flat

plate or to the numerous other constructions of plates then on the market. His top surface construction may be entirely omitted. Disregarding his thirteenth claim, which relates wholly to spike holes, each of his remaining 13 claims covers his lower flanges, and but 4 of them mention his upper flanges. The body of his plate may be changed, or may assume the form shown in some prior invention, but his stepped form of lower flanges or projections must be used, else his purpose to prolong the life of the tie cannot be attained. The language employed in his patent precludes the substitution for them of any alternative form. To locate his flanges parallel with the rail necessitates an abandonment of the 'prime object' and 'essential idea' of his invention, which he declared to consist in providing a plate having on its under side a series of stepped flanges or projections arranged in a diagonal line with respect to the rail flange."

A reading of the specification discloses very clearly, we believe, that instead of the patent merely describing one invention in which the prime object or essential idea consisted in providing on the under side of the tie plate a series of stepped flanges or projections arranged in a diagonal line with respect to the rail flange, another invention was described, as distinct and separate an invention as if it had been contained in a separate patent, and it is in relation to this additional disclosure that claim 8 and some other claims of the patent were framed. We subjoin Fig. 1 and Fig. 2 of the patent and under headings A and B those parts of the description and also the statements of invention which point to the separateness of the two subject-matters:





A. "In carrying out the invention *A* represents the track rail, *B* the tie, and and *C* the tie plate. The plate is preferably, although not necessarily, formed into the shape shown more particularly in Fig. 2, that is to say, what may be termed a trussed shape so that flanges are provided on both the under side as at *c*, c^1, c^2, c^3 and top side as at c^4. On the top side a way c^5 for the rail or what may be termed the rail seat is provided. The flanges on the under side are preferably shaped with comparatively sharp edges c^6 so that they will readily enter and separate the grain of the tie. As will be seen when in position these under flanges extend parallel with the grain of the tie, the ends being substantially blunt or square and forming abutments to prevent so far as possible the plate from creeping along the tie. It will be observed that by this form of plate there is much less opportunity or chance of buckling than with the ordinary flat plate, since each point where the rail rests upon the plate is supported and trussed by metal which is more or less on edge instead of on its side, thereby forming for each resting point of the rail two girders c^7 joined at the apex by the top flanges c^4 where the rail rests. By the above construction also the wood between the flanges *c*, c^1, c^2, c^3 will, because of the sloping of the approaching sides of the flanges, be compressed between the flanges, thereby greatly aiding in sustaining the weight put upon the plate, and also in excluding moisture from the wood under the plate.

A form of plate such as I have just described is also of material advantage in that I am enabled to make it much lighter in weight. In this construction of plate with the same amount of material as is ordinarily used in tie plates a much stronger plate is obtained. Heretofore it has been a commercial necessity in order to get the price of plates where they could be sold for use on the cheaper grade of ties, to reduce and diminish as far as possible the material and consequently the weight of the plate. The result has been that with the plate flat and thin it has buckled when the rail pressure has been brought on it thereby damaging the tie as well as rendering the plate useless as a bearing for the rail; but in my construction since the points where the rail rests are supported by metal more or less in upright position the plate is greatly strengthened without addition of weight. So also, by a construction as above, the top of the plate where the rail is seated comprises a series of flat portions with a series of depressions between, so that while there is abundant wearing surface between the rail and plate, there is space for sand, cinders, etc., to work out. Again, these depressions permit the draining off of water and moisture so that in cold weather the top of the plate, particularly the space between the rail and plate, is not covered with ice and the friction between the rail and plate thereby either lessened or obviated entirely."

And it was with respect to the above-quoted particularized description that the patentee made the following general statement of invention:

A. "The invention further contemplates a form of plate provided with top and under flanges which shall be extremely strong in its construction and effective in its designed use, and yet easily rolled or formed into shape as well as very light weight."

And upon this general statement of invention and particularized description the patentee based not only claim 8, which by its terms is not limited to the preferred trussed shape shown in Fig. 2, but also other claims in which the trussed form and other details of construction are covered. Of these latter claims we quote 10 and 11 as illustrative:

"10. A railway tie plate the body of which is formed into a series of arches, the lower edges of said arches being provided with tie entering and engaging devices or flanges, substantially as described.

"11. A railway tie plate the body of which is formed into a series of arches the lower edges of which are provided with tie entering and engaging flanges, and the upper side of the plate having a series of depressions vertically above said engaging flanges, substantially as described."

B. "I will now describe the second feature of the invention, viz., the ability to adjust the plate to take up any widening of the gauge due to the lateral movement of the plate and rail. The ends of the engaging flanges on the under side of the plate are regularly stepped or cut on a diagonal line as compared with the rail flange. It is of course obvious that the ends of the flanges might be cut on this diagonal line or the entire end of the plate cut in this way. In my present drawings I have shown the latter construction, the entire end of the plate being sheared diagonally as at *D*." (Then follows a particular description of the stepped flanges on the under side of the plate, which for present purposes can be sufficiently understood from an examination of Fig. 1, after which the specification proceeds.)

"It is obvious that the construction just described is susceptible of many changes, and the prime object of the invention still be attained. For instance, the under flanges might be divided, or instead of flanges they might be merely projections and the plate instead of having its end beveled might be square, and the under flanges alone be stepped; or but a single end of the plate need be stepped; or the flanges having one or more of their ends stepped might be applied to a flat plate or to the numerous other construc-

tions of plates now on the market. In all of the above-named variations the principle employed is the same and each would embody the essential idea of my invention which consists in providing a plate on its under side with a series of stepped flanges or projections that is to say, flanges or projections arranged on a diagonal line with respect to the rail flange."

With respect to the subject-matter of stepped flanges on the under side of the plate the inventor made the following general statement of invention:

B. "My invention has for its object the production of a plate which, while being provided with the top flange to receive the thrust of the rail, is so constructed on its under side that, after it has been moved by the lateral pressure of the rail, it, together with the rail, can be easily moved back to the proper position to maintain the gauge, and be held in that position even more firmly than when originally laid."

And upon this general statement of invention and particularized description the patentee made several claims to features of the stepped flanges on the under side of the plate. We quote claim 1 as an example:

"1. The combination with the rail and tie of the tie plate provided with a series of stepped tie-engaging flanges or projections on the under side, each arranged to fit into the perforation made by the flange or projection next adjacent, whereby when the plate is shifted transversely of the tie it is also shifted longitudinally thereof, substantially as described."

It is thus made clear, we believe, that a serious error is committed in saying that the stepped flanges on the under side of the plate is the prime object and essential idea of the patent. Undoubtedly such a construction is the prime object and essential idea of one of the two separate inventive concepts disclosed and claimed in the patent. Both inventive concepts contemplate the production of a complete tie plate, and both concepts are embodied in combination claims; but it is only with respect to the concept of stepped flanges on the under side of the plate that the patentee makes the statement that many changes of construction might be made without departing from the prime object of the invention, as for instance applying the stepped flanges to a plate having a flat top.

Turning now to claim 8, we perceive that the subject-matter is a railway tie plate formed on the under side with devices more or less sharpened adapted to penetrate and engage the tie, and on its upper side with a series of flanges on which the rail rests. Advantages in having a series of flanges on the upper side of the plate for the rail to rest upon are clearly pointed out in the part of the specification which we have quoted under the heading A. These advantages are manifestly independent of the character of the tie-engaging flanges on the under side of the plate. Claim 8 very clearly, we think, undertakes to stake out a monopoly of having rail-supporting flanges on the upper side of any railway tie plate on the under surface of which are devices of any sort adapted to penetrate and engage the tie. The objects to be attained by the rail-supporting flanges were separate and distinct from those to be accomplished by the stepped arrangement of

the tie-engaging flanges. The mental concepts were different, and their coming into being was in no wise dependent upon each other. Therefore it is inadmissible, in our judgment, to read into claim 8 that part of the specification which is devoted to the stepped arrangement of the tie-engaging flanges and thus limit the right of the inventor to hold a monopoly of the rail-supporting flanges in a railway tie plate unless that tie plate also embodies the independent concept of the stepped arrangement of the tie-engaging flanges.

And inasmuch as it was confessedly old in the art to have on tie plates tie-engaging devices that ran parallel with the grain of the tie and also across the grain, there is nothing in the prior art or in the patent itself that requires the tie-engaging devices of claim 8 to be parallel with the grain of the tie or across the grain, and assuredly nothing that requires them to be the stepped tie-engaging flanges of claim 1.

[2] Nor is the tie plate of claim 8 to be limited to a construction in which the depressions between the rail-supporting flanges are vertically above the tie-engaging flanges, nor to a construction wherein the body of the plate is formed into a series of arches. This is so because the alignment of the depressions on the upper side with the flanges on the under side is covered by claim 11, and the formation of the body of the plate into a series of arches is covered by claim 10; and because in contemplation of law each claim of the patent must be considered as setting forth a complete and independent invention. Leeds & Catlin v. Victor Talking Machine Co., 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805; Celluloid Mfg. Co. v. Zylonite Brush & Comb Co. (C. C.) 27 Fed. 291; Chicago Woodenware Co. v. Miller Ladder Co., 133 Fed. 541, 66 C. C. A. 517; Twentieth Century Heating & Ventilating Co. v. Taplin, Rice-Clerkin Co., 181 Fed. 96, 104 C. C. A. 156. To construe claim 8 as being the same as either claim 10 or claim 11 would be to declare claim 8 void as a duplication. Such a course should not be pursued unless it cannot fairly be avoided. In the present instance not only can it fairly be avoided, but further the specification clearly requires a differentiation of claim 8 from the other claims of the patent. In quotation A the patentee shows that the form portrayed in Fig. 2 and particularly described by reference letters was only the preferred form—preferred because, while embodying the general characteristics and the law of the structure covered by claim 8 with respect to rail-supporting flanges on the upper side of a plate having on its under side any sort of tie-engaging devices, it also enabled the maker to embody at the same time the stepped arrangement of the lower flanges described and claimed in other parts of the patent.

We therefore conclude that the Patent Office was right in determining that there was a sufficient description and disclosure of invention to support claim 8 as presented; and, further, that claim 8 should be given its prima facie value unless matters outside the patent make such a construction impossible.

[3] 2. A contention is made that the association of elements in claim 8 does not constitute a true mechanical combination, but is merely an aggregation. In Pickering v. McCullough, 104 U. S. 310, 318, 26

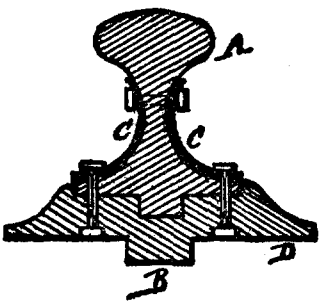
L. Ed. 749, the one statement of Mr. Justice Matthews that, "in a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other," if separated from the context and taken to mean that the natural action of each element must by the action of the other elements upon it be converted into some sort of action other than its natural action, seems to have gone too far. The Patent Office has continued to grant and the patent courts have continued to sustain combination claims on the theory that it is sufficient if the elements are associated in a unitary structure and there co-operate to produce either a new mode of operation or a new result or the old result in a modified and improved way. In Oshkosh Grass Matting Co. v. Waite Grass Carpet Co., 207 Fed. 937, 125 C. C. A. 385, we upheld, against the defense of aggregation, in a machine for making grass twine, claims for combinations of "means for forcing the material forwardly, a funnel into which the material is received, compression-rolls adapted to receive the material therebetween after said material leaves the funnel, and means, after the material is compressed, for wrapping a twine therearound," although it is apparent that the natural action of the feeding means could not be changed into some other sort of action by the subsequent action of the compression-rolls or by the still later action of the twine mechanism. In short, the action of no one of the elements could or did in any wise affect the inherent law of action of any of the other elements. But because the grass twine machine was a unitary structure and because all of the elements co-operated to produce an improved grass twine, the defense of aggregation was overruled. And in Krell Auto Grand Piano Co. v. Story & Clark Co., 207 Fed. 946, 125 C. C. A. 394, citing Burdett-Rowntree Mfg. Co. v. Standard Plunger Elevator Co., 196 Fed. 43, 197 Fed. 743, 117 C. C. A. 206, and other cases, we upheld, against the defense of aggregation, in an automatic player piano, claims for the combination of the controlling levers with the fall-board, although no coaction between those elements was possible except through the mediation of the operator. In the instant case there is a unitary structure in which all of the elements of claim 8 co-operate to produce a new tie plate with new and improved qualities. We are therefore of the opinion that, if claim 8 is to be overthrown, it must be on account of some other defense.

[4] 3. The utility of the invention is abundantly demonstrated by the instant and growing demand, amounting at the beginning of this suit to over 40,000,000 plates a year, and is further shown by appellees' move to share in this commercial success in the face of the certainty of vigorous and expensive litigation. This last-mentioned fact might also be taken as sufficient to evince the novelty of appellant's structure, since appellees probably would not venture on the possibility of being convicted of trespass if they could have found upon the public commons what would serve their commercial purposes. And an examination of the 70-odd patents in the record leaves no doubt that appellant produced something that in fact was new. The real question at this point in the case is whether the inventive faculty or no more than the skill of the mechanic was employed in producing the new

thing, for, as declared in Bates v. Coe, 98 U. S. 48, 25 L. Ed. 68, anticipation or denial of novelty of a combination claim cannot be based upon picking and choosing pieces here and there from prior patents and publications and thus showing that each of the elements was old. The real test is whether the mental concepts that are distinctly disclosed in and by the laws of the prior nonanticipatory patents and publications left no room for a new and independent mental conception in bringing into working form the new machine or product or process under investigation.

An analysis of all the prior patents we deem unnecessary. If the strongest references cannot prevail, it would be profitless to review the others. Two classes of references will be noticed, rail chairs and tie plates:

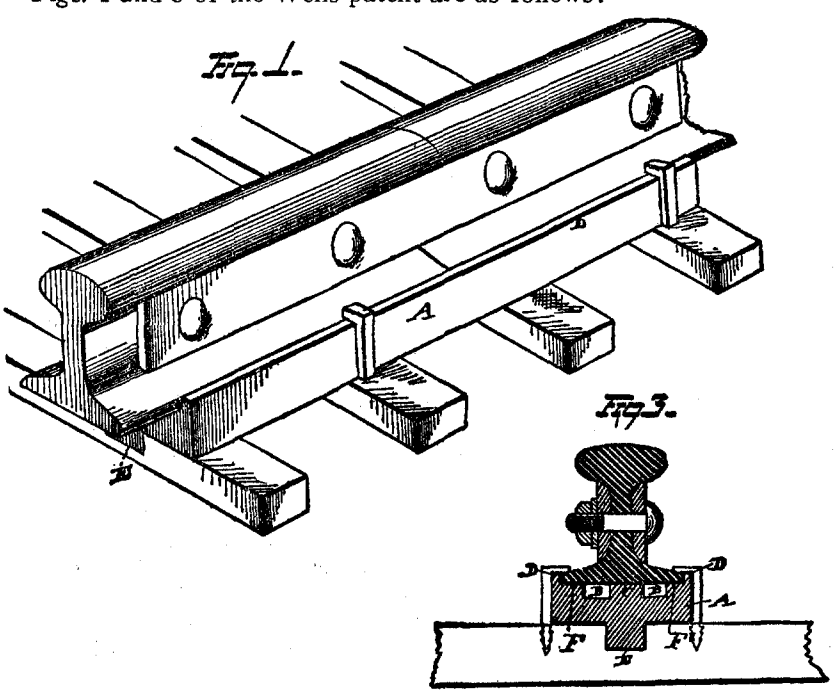
(a) Patent No. 142,020, August 19, 1873, to Hudson, and patent No. 203,570, May 14, 1878, to Wells are the strongest references of the rail chair class. Fig. 2 of the Hudson patent is as follows:



[8] The projection from the under side of the rail chair is not a device "more or less sharpened adapted to penetrate and engage the tie"; it is a heavy rectangular rib made to fit snugly into a corresponding depression cut into the tie in advance. And the upper side of this Hudson chair is not provided with "a series of flanges on which the rail rests," for the depression in the upper surface of the chair so corresponds with the snugly fitting rib depending from the rail that the rail throughout its breadth is seated in uniform contact with the chair. The Hudson patent, in our judgment, furnished no light to those concerned with the problem of producing an efficient tie plate. As wooden ties became more and more expensive and as rails and trains and traffic became heavier and heavier, the cutting of the ties by the action of the rail flange due to the wave motion of the track became a very serious matter. The shingles or flat plates of wood with which the practical tie plate art began were soon found to be insufficient. These were succeeded by flat plates of iron, and down to Wolhaupter's time the best that the practical art had was an iron tie plate having a flat upper surface and having tie engaging projections on the under side. Physical exhibits in this case show that these flat plates became warped or worn through in a comparatively short time. The wearing relation between the rail and tie plate is the same as between the rail and the tie; but with rail chairs the situation is different. "Rail chairs" are devices used where the ends of rails come together; they are intended to hold the separate rails firmly together and in alignment and so give them as far as possible the effect of being one continuous rail; they are bolted or otherwise permanently and securely affixed to the rail; and so, as far as cutting or grinding action between the rail and the tie caused by the wave motion of the track is concern-

ed, they belong with the rail. Tie plates are intended to protect the wooden ties from being worn and cut by the action of the flange of the T-rail due to the wave motion of the track; they are laid upon the surface of the ties and are attached thereto by means of tie-engaging projections; spike holes are provided in the plates through which are driven the spikes whose heads clamp over the flange of the T-rail; and so, as far as cutting or grinding action between the rail and the tie caused by the wave motion of the track is concerned, they belong with the tie. And thus, due to the wave motion of the track, water and sand or grit would get in between the rail and the surface of the flat tie plate and would grind and destroy the metal. This was a known condition of the practical tie plate art; but the record does not show that this same condition had to be met by workers in the rail chair art, and the law of the rail chair structure would seem to exclude it; and it was not until after Wolhaupter's disclosure that any mechanic, expert or otherwise, claims to have discovered in the 22 year older Hudson patent any instruction regarding the way in which to build an efficient tie plate.

Figs. 1 and 3 of the Wells patent are as follows:



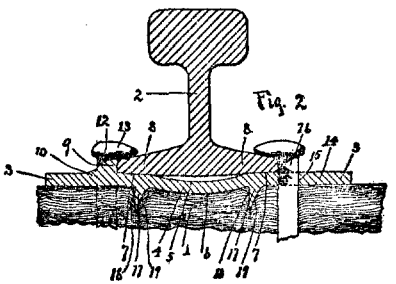
This chair, as Wells directed it to be made, extends over four ties. The depending rib *E* is not a device "more or less sharpened adapted to penetrate and engage the ties"; it is a rectangular projection, about one-half as broad as the head of the rail, and made to fit snugly into a prepared channel cut across the body of the tie; the channel in the

tie is of such a depth as manifestly to weaken it; the purpose of the depending rib is to prevent lateral displacement of the chair and to impart increased strength and stiffness to the central portion of the chair; this strengthening function is called into play where the depending rib acts as a girder from tie to tie; and it is therefore a clear departure from the law of the structure to cut from Wells's chair a piece the width of a tie and then call the rib or girder *E* a device in a tie plate adapted to penetrate and engage the tie. The rail is supported upon the ledges *F*, *F*[1], and *C*. These ledges result from the presence of the grooves *B* which, as the patentee says, enable the chair to be made much lighter than the ordinary chair and which also serve as receptacles for sand and grit which may enter between the chair and the rail. But inasmuch as Wells's device was a rail chair extending over four ties, a distance of about 5 feet, it seems fairly clear to us that Wells never had in mind, and the record does not show that the railway chair art was ever concerned with, overcoming the emery-like grinding and cutting action upon the tie or upon armor on the tie as that action is brought into play upon the ties successively by the wave motion of the track. For, though Wells's chair may not be as securely and inevitably made a part of the rail as is the case with Hudson's chair, yet it is clear that Wells intended the law of his structure to be that the chair should be part of the rail, just as a tie plate is a part of the tie. The sides *D* extend up flush with the upper surface of the flange of the rail; the spikes shown in Fig. 3 and described in the specification are not the ordinary rail spikes, but are specially made of such a width as to lock the rail into the chair; and, though this locking might not be as efficient as the permanent bolts in the Hudson chair which was of no greater length than the width of the tie, yet by reason of the greater length of the chair as specified by Wells, probably the locking was in fact just as effectual, and there is no doubt that Wells intended the rail to be locked securely in the chair. If this is so, then the upper surface of the tie plate of claim 8 was distinctly novel in itself. But this is not vital to the validity of the claim. The claim is for a combination, and it is very evident that the devices of both Hudson and Wells would have to be redesigned, reorganized, and rebuilt in order to bring into existence the combination of claim 8. That something more than the skill of a mechanic who was acting in the line of the teaching of these patents was required to produce the efficient tie plate of claim 8 might be inferred from the great lapse of time between Hudson and Wells and the disclosure of Wolhaupter, during which time the need of an efficient tie plate was recognized by many skillful persons engaged in improving the roadbeds of railroads; but the fact is really demonstrated by the practical development of the tie plate art.

(b) Prior to 1870 the tie protector was a wooden shingle or plate. From about 1870 to 1880 a simple metal plate with flat top and flat bottom was used. Between 1880 and 1895, when Wolhaupter made his disclosure, a channel plate of equal thickness throughout which fitted over the tie like a cap, a flat topped plate with tie-engaging devices on the bottom, a plate flat on the top and bottom with a shoulder on the top to resist lateral pressure of the rail, and the same sort of a

plate with tie-engaging devices on the bottom, were in actual use; but never prior to Wolhaupter had the tie plate of claim 8 been produced. And since then the entire development has been along the line of improving the tie plate of claim 8. If the redesigning and reorganization of the rail chairs of Hudson and Wells was so obvious, why did not some one of the many men who were interested in the improvement of the roadbeds of the 1,300 railroads of our country bring forward this combination which has proven to be so desirable?

In addition to the prior practical art, some prior patents need to be noted. Fig. 2 of the Goldie patent, No. 485,030, October 25, 1892, is as follows:



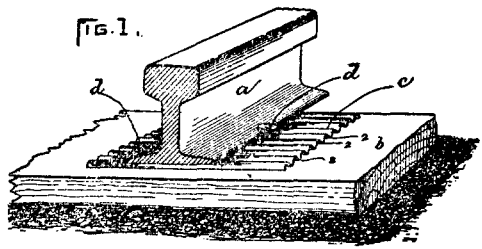
The draftsman has indicated a space between the bottom of the rail flange and the top of the central portion of the tie plate, but this is contrary to the intention that Goldie had in mind. He points out that the under surface of the rail flange is slightly raised in the middle and that the depression in the tie plate is made to accommodate the bottom of the rail so formed, and in this way a firm and solid bearing for the rail is afforded throughout the width of the rail flange. Physical exhibits showing the result of the actual use of this tie plate demonstrate that Goldie's idea accorded with the fact, and that the rail actually bears fully upon the tie plate throughout the width of the rail flange. The manufacture of this plate, as the patentee thereof himself testified, was abandoned, and its use was entirely superseded by the Wolhaupter plate.

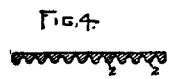
Patent No. 494,692, April 4, 1893, to Reece, is for a method of making railroad tie plates. At one step in the process of manufacture there are flanges at each edge which might be rail supports if they were left in the completed plate. But the next step in the manufacture cuts away these flanges at the part where the rail is seated, and the rail rests upon the flat surface of a plate of uniform thickness, except that there are two holes left in the plate by the process of cutting away the flanges. It is difficult to see how Reece, by cutting away what otherwise might be rail-supporting flanges, was instructing the ordinary mechanic how to make a tie plate having on its upper side a series of flanges on which the rail rests, much less instructing him in regard to the desirability of such flanges.

Wilson's tie plate, described in patent No. 522,867, July 10, 1894, is made in several pieces. One part of Wilson's tie plate, by reorganizing it in the light of Wolhaupter's disclosure, might be made into something similar; but, when the whole plate is put together as Wilson instructed it to be, the rail rests upon a flat plate of uniform thickness throughout.

So far there has been found in neither the practical nor the paper prior art any tie plate which approached the idea of having rail-sup-

porting projections upon the upper surface of a plate. Figs. 1 and 4 of the Dunham patent No. 469,386, are as follows:





This corrugated plate is of uniform thickness throughout. Two purposes were to be served by the corrugations: First, the patentee says that a corrugated plate three-sixteenths of an inch thick will be stiffer and better adapted to resist the bending or buckling strain to which it is subjected by the weight of the rolling stock than a flat plate which is five-eighths of an inch thick. This tie plate never made any appearance in the practical art. The testimony of practical men convinces us that Dunham's three-sixteenths of an inch material would either break or flatten out under the weight to which it would have been subjected in actual use at the date of the application, and since that time the strains have greatly increased. Second, the corrugations were to afford air spaces between the bottom of the plate and the tie to obviate the decay of the wood. Regarding the bottom formation of this tie plate of uniform thickness, it is to be noted that the corrugations could not be tie-penetrating and tie-engaging devices, else the air spaces would be lacking and the plate would fit tightly upon the wood as in Wolhaupter's plate. Regarding the upper surface, no suggestion with respect to the corrugations is made except that thus the plate may be made lighter and stronger. And that the character of the upper surface was not material is shown by the patentee's statement in connection with Fig. 4 that a plate with a flat upper surface corresponds fully to his invention. In our judgment nothing in this paper patent corresponds in letter or in spirit to the tie plate of claim 8.

[5] 4. The law which we believe is applicable to these facts has been frequently declared and may be briefly summarized. Invention of a combination does not lie in gathering up the elements that are employed, but consists in first conceiving that a new and desirable result may be attained by bringing about a relationship of elements which no one has before perceived and then going forth to find the things that may be utilized in the new required relationship. In an old and well-developed field the apparent simplicity of a new device is often the highest evidence of inventive genius. So far as human minds are able, judges should exclude from view the disclosure of the patentee, should regard the patentee's problem as of a time antedating the application, and should therefore not too readily accept the ex post facto wisdom of the bystander. Prior art structures are to be examined in view of the purposes and laws of such structures. It is not enough that a prior art device approach very near the idea of the patent in suit; it must so clearly disclose the idea that it would be ap-

parent to a mechanic of ordinary intelligence who was not examining the device for the purpose of discovering in it the idea of the patent. For, if he already had that idea, he would not be getting it from the prior art device, but from his own imagination or some other source. Clough v. Barker, 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527; Ryan v. Goodwin, 3 Sumn. 514, Fed. Cas. No. 12,186; Regent Mfg. Co. v. Penn. Elec. Co., 121 Fed. 80, 57 C. C. A. 334; Faries Mfg. Co. v. Brown & Co., 121 Fed. 547, 57 C. C. A. 609; Ideal Stopper Co. v. Crown Cork & Seal Co., 131 Fed. 244, 65 C. C. A. 436; Wm. B. Scaife & Sons Co. v. Falls City Woolen Mills, 209 Fed. 210, 126 C. C. A. 304.

[6, 9] Another consideration is the presumptive validity of a patent. From long and continued repetition of the phrase the members of the patent bar and of the patent bench sometimes may seem to get into the condition of the man who repeats a word over and over until it fails to convey any meaning to his mind. But this presumption should be given more than formal recognition. A "patent" is a contract between the government on behalf of the people and the patentee. The grant of a patent might have been made conclusive evidence of its validity except against suits by the government for fraud or mutual mistake in the issuance. But the fact that certain defenses are left open to the individual should not make us lose sight of the nature of the presumption that attaches to the grant. Not merely has the application been examined on behalf of all the people by experts who have access to all the prior patents and publications of the world; not only has the applicant spent his time and invested his money in procuring the patent; but in most of the important cases the patentee and those working under him have invested very large sums in buildings and machinery and have expended other large sums and put in great energy and effort to build up, by advertising and salesmanship, a profitable business. And this is done before any one challenges the presumptive validity of the patent. Courts therefore should not view the application as of the date of its filing and constitute themselves into a board of reviewing examiners and on nicely balanced considerations find that the Patent Office examiners were in error; but they should consider the patentee's equities in his business which has developed under the presumptive validity of the patent, should give heed to the place achieved by the patented article in the field of the practical art since the date of the patent, and should therefore decline to sustain the defense of noninvention and to strike down the patent and the business built upon it unless that defense has been established beyond a reasonable doubt. In this case we find that the appellees have not so maintained their defense.

[7] II. Claims 1, 2, and 3 of the second patent read as follows:

"1. A railway tie plate provided on its upper side with one or more flanges on which the rail may rest or by which it is directly sustained and on the under side with one or more tie-engaging flanges extending parallel with the upper flanges and directly beneath the latter, substantially as described

"2. A railway tie plate provided on its upper side with one or more flanges on which the rail may rest and by which it is directly sustained and on the under side with one or more tie-engaging flanges extending parallel with the upper flanges and directly beneath the latter and sharpened to permit them to readily enter the tie, substantially as described.

"3. A railway tie plate provided on its upper side with one or more flanges on which the rail may rest and by which it is directly sustained, on the underside with one or more sharpened tie-engaging flanges extending parallel with the upper flanges and directly beneath the latter, and on the upper side with an additional flange or flanges extending above the plane of the rail-sustaining flanges and adapted to receive the lateral thrust of the rail, substantially as described."

In the prior art the nearest reference is the first Wolhaupter patent, which shows a tie plate having rail-supporting and tie-engaging flanges. The claims now in question are for a specific and limited improvement of the first Wolhaupter tie plate. By limiting the construction to one wherein the tie-engaging flanges are parallel with and directly beneath the rail-supporting flanges greater strength was obtained. Nothing in the prior art anticipates this particular construction. Of course the idea may be the same as that which induces the placing of the columns on one floor of a building immediately beneath the columns on the upper floor. But the question here, as was the case with the first patent, is one of invention, whether it involved more than mechanical skill to perceive that such a general strengthening principle might be brought into the relationship between the elements of a tie plate, and then practically to organize the new structure. The prompt acceptance of this idea, the commercial success to which this idea has contributed, and the fact that seven years elapsed after Wolhaupter had disclosed the general combination before any of the numerous engineers interested in railroad construction perceived the possibilities of such a relationship, lead us to resolve any doubt that might be created by the apparent simplicity of the step, in favor of the validity of the patent.

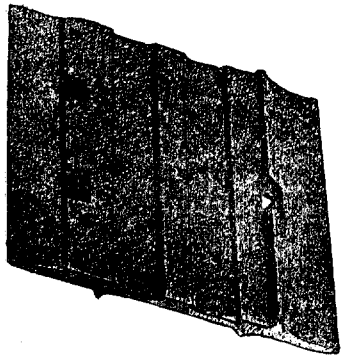
III. Claims 7 and 9 of the third patent are in these words:

"7. A tie plate provided in its rail-supporting surface with transverse grooves or channels, and at one margin of said supporting-surface with a transverse rail-abutting shoulder."

"9. A tie plate provided in its rail-supporting surface with transverse grooves or channels, reaching to the edge of the plate, and at one margin of said surface a transverse rail-abutting shoulder."

Here again is a specific and limited improvement upon the original Wolhaupter tie plate. The invention does not consist in putting a rail-abutting shoulder upon a tie plate. And the concession that rail-abutting shoulders were old in the tie plate art presents no obstruction to the validity of a claim in which the rail-abutting shoulder is one of several elements. In this instance, also, the question is whether invention was involved in producing this specific and limited combination. No prior structure of the practical or of the paper art either meets these limited claims or suggests, out of all possible relationships of the elements, the particular relationship that is here claimed. For the reasons stated in connection with the other patents we are unable to find that the defense of noninvention is properly sustained.

IV. In developing its commercial tie plate, appellant dropped from view many of the separate inventions embodied in other claims of these patents; but it brought into one structure the several inventions of the claims in suit. We have found that none of these claims is nullified by the prior art or limited by anything more than its own terms. So respecting infringement the question is whether these claims read upon the structure put forth by the appellees. A photographic reproduction of appellees' tie plate is as follows:



As this tie plate is substantially a copy of appellant's commercial structure, the real inquiry is whether appellant has abandoned its own inventions. To us it seems clear that this tie plate responds in letter and in spirit to the terms and meaning of the claims in suit. We have no difficulty in perceiving a railway tie plate formed on the under side with devices more or less sharpened adapted to penetrate and engage the tie and on its upper side with a series of flanges on which the rail rests. We also observe that the tie-engaging flanges extend parallel with and are directly beneath the rail-supporting flanges. It is likewise obvious that there is the specific and limited relationship of having the rail-abutting shoulder at one margin of and parallel with the rail-supporting flanges and of having both the rail-abutting flange and the rail-supporting flanges transverse to the tie.

The decree is reversed, with the direction to order an accounting on the claim of the first patent and to enter an injunction and order an accounting on the claims of the second and third patents.

AUTOPIANO CO. v. AMERICAN PLAYER ACTION CO.

(Circuit Court of Appeals, Second Circuit. February 9, 1915.)

No. 118.

1. PATENTS ⊂=328—VALIDITY—NOTE SHEET GUIDE FOR SELF-PLAYING PIANOS.
The O'Connor reissue patent, No. 13,398 (original No. 789,053), for a perforated note sheet guide for player pianos, covers a pioneer invention, and is entitled to a liberal construction and a broad range of equivalents.

2. PATENTS ⊂=134—REISSUES—CONSTRUCTION OF STATUTE.
Rev. St. § 4916 (Comp. St. 1913, § 9461), authorizing reissue of a patent when error has arisen "through inadvertence, accident or mistake, and without fraud or deceptive intention," is intended for relief of meritorious inventors who are likely to lose their invention through some accident or mistake, and when no intervening rights appear should be literally construed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 197; Dec. Dig. ⊂=134.]

3. PATENTS ⊂⊃146—REISSUE—REINSTATEMENT OF ORIGINAL CLAIMS IN SECOND REISSUE—INFRINGEMENT.

A claim of an original patent may be reinstated in a second reissue, although omitted from a first reissue; but in such case one who commenced the manufacture and sale of a device when the first reissue was in force cannot be held an infringer of such claims in the second reissue.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 218, 219; Dec. Dig. ⊂⊃146.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing the bill in a suit for infringement of patent. The patent is reissue No. 13,398, granted to complainant April 2, 1912, for an invention made by James O'Connor on a "perforated note sheet guide." The original patent, No. 789,053, dated May 2, 1905, was before this court in Autopiano Co. v. Amphion Piano Co., 186 Fed. 159, 108 C. C. A. 291. We sustained a decision of Judge Hand, which held the original patent valid, but not infringed by the device then before the court.

L. W. Southgate, of New York City, for appellant.
D. A. Usina, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] The opinions of Judge Hand and Judge Mayer [1] set forth in detail the device of the patent and may be referred to. The apparatus of the patent relates to self-playing pianos, in which the keys are put in action by drawing a perforated note sheet transversely over a tracker bar which contains a series of apertures, each communicating by a tube to the pneumatic device for operating the corresponding striker of the note. As the perforations uncover the apertures in sequence the proper actions are successively struck in order to render the musical composition. It is of supreme importance that the note sheet register always with the tracker bar, so that each perforation will come only over the particular aperture for which it is cut. There is a tendency in playing a long piece for the note sheet to shift sideways over the tracker bar; a tendency which must be at once overcome. This is a very delicate operation, involving the attainment of accuracy in order to be commercially successful. Restoration of register may be effected, either by shifting the note sheet back to its old position, or by shifting the tracker bar to a position in proper register with the note sheet. The patent discloses and describes both methods.

The invention of O'Connor was a highly meritorious one and broadly new. The prior art contains nothing which should require it to be narrowly construed. Judge Mayer says:

"It undoubtedly represents the first automatic adjusting device which will maintain automatically correct lateral register between the note sheet and

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1] See note at end of case.

the tracker bar." "Complainant and its licensee were the first to produce a successful piano player which would operate properly all the 88 actions of a piano."

The record abundantly sustains these findings. In the patent, original and reissue alike, what is shown is a device consisting of two bellows motors; each motor is operated by air rushing into it through a tube; each tube leads to an aperture in the tracker bar. When such aperture is covered by the note sheet, no air rushes in and nothing happens. When by a sidewise slip of the note sheet one of the apertures is uncovered, air enters and the bellows motor with which the aperture is connected is put in action, moving the tracker bar in one direction; such movement at once re-covering the aperture and putting that bellows motor out of commission. A shifting of the note sheet towards the other side produces similar action by the other bellows motor; one motor moving the tracker bar to the left, and the other moving it to the right. In this way a perfect register is maintained throughout the entire forward movement of the note sheet, and the note apertures always register with note perforations.

The claims here in controversy are these:

3. The combination with the marginal surface of a traveling sheet, or web, of means for guiding or restoring the web to its normal path when diverted therefrom, a tracker bar, and means contacting with the marginal surface of the web and held out of operation when the web is in its normal position, for inaugurating the operation of the guiding means.

5. The combination, with a traveling sheet or web, of a tracker bar and means, maintained in inoperative condition by the sheet when in its normal position, for restoring the normal relation of the sheet and the tracker bar when uncovered by the edge of the sheet.

8. In a web-driving apparatus, means for restoring the web and the apparatus into normal relations when deflected therefrom, consisting of rolls for guiding the web, and a tracker bar provided with an aperture adjacent to and within the normal position of the web so as to be covered thereby, and pneumatic devices, the operation of which is inaugurated by the uncovering of the aperture, for restoring the web or the tracker bar to normal position.

19. The combination, with a traveler sheet or web, of a tracker bar, and means, maintained in inoperative condition by the sheet when in its normal position, for restoring the normal relation of the sheet and the tracker bar when uncovered by the sheet.

21. The combination of a tracker bar having a series of music apertures, means for drawing a perforated note sheet forward over the tracker bar, a pneumatic control opening appurtenant to the tracker bar and arranged so that a lateral deviation of the note sheet will change its condition, a pneumatic motor connected to adjust the lateral relation between the note sheet and tracker bar, and connections between said control opening and said pneumatic motor arranged so that, when a lateral deviation of the note sheet changes the condition of the control opening, the pneumatic motor will operate to restore the normal lateral relation between the tracker bar and note sheet before the forward run of the note sheet in abnormal lateral position can produce discord.

22. The combination of the tracker bar having a series of music apertures, means for drawing a perforated note sheet forward over the tracker bar, a pneumatic guide opening appurtenant to the tracker bar and arranged so that a lateral deviation of the note sheet will uncover the same, a pneumatic motor connected to adjust the lateral relation between the note sheet and tracker bar, and connections between said guide opening the said pneumatic motor, arranged so that, when a lateral deviation of the note sheet uncovers the guide opening, the pneumatic motor will operate to restore the normal lateral rela-

tion between the tracker bar and note sheet before the forward run of the note sheet in abnormal lateral position can produce discord.

Claims 3, 5, 8, and 19 are identical with claims similarly numbered in the original patent.

The defendant uses one bellows motor, instead of two, as shown in O'Connor's description and drawings. This bellows motor is operated in one direction or the other by pneumatic action—in one direction by pneumatic pressure directly; in the other by the expansion of a spring, which has been contracted by pneumatic pressure. Defendant has one aperture only, because it has only one bellows to move, and contends that it has avoided infringement by dispensing with the second bellows and aperture.

We are satisfied that infringement is not avoided by this simple change, since the patent is a pioneer one, entitled to a liberal construction and a broad range of equivalents. If part of a combination is stated to be a square table on four legs, and neither the shape of the table nor the number of legs is a matter of any importance, so long as the table is large enough and is maintained in a horizontal position, a triangular table on three legs would be an equivalent of the element specified. The defendant's double bellows is in fact two bellows placed together and working by a combination of air pressure and spring alternately in opposite directions. The exact location of each of these bellows is not of the essence of the invention, so long as each performs its function of producing a correct register between the perforations in the note sheet and the note apertures in the tracker bar. None of the claims here relied on is limited to two bellows and two apertures, nor does anything in the prior art require that they should be so limited in order to save them. If other prior inventors had employed a double acting bellows operated through a single opening, of course O'Connor would be held strictly to his two bellows construction; but as he was a pioneer so far as this improvement is concerned—the first to restore register by moving tracker bar or note sheet by the action of bellows motors, set in motion by uncovering auxiliary apertures in the tracker bar—infringers cannot escape these claims by locating their bellows or one member of their bellows in a different place.

Defendant further seeks to avoid infringement because in its device the aperture in the tracker bar is never fully covered by the note sheet, some air is always passing in. But when the note sheet is in a normal position the small amount of air thus passing in is so neutralized by springs, etc., about the motors that its effect is nil. Whenever the aperture is by a displacement of the note sheet more widely uncovered, air which enters sets the bellows in motion to produce action in one direction. Whenever by a different displacement of the web the aperture is more fully covered, less air enters and there is a contrary action of the bellows. Defendant's device may evidence improvement, possibly even patentable improvement, in simplification of structure or saving of cost; but that will not negative infringement, when in substantially the same way substantially the same results are produced, and the prior art justifies a broad construction of the claims. Defendant's device is a plain equivalent of what is shown and claimed in the patent; its

double action bellows has substantially the same parts, acting in substantially the same way to accomplish the same results, viz., to move the tracker bar one way or the other, so as to maintain a proper register at all times between note sheet and tracker bar.

If the original patent had never been changed, or if this second reissue were the original patent, the state of the art being shown in the record before us, we are satisfied that defendant's device complained of (Exhibit 4) is an infringement of the claims above quoted. Does its reissue history call for any different conclusion?

In the suit against the Amphion Company, supra, the defendant's device was held not to infringe. The O'Connor patent, as we have seen, automatically sets the motors in operation by uncovering an aperture in the tracker bar. The note sheet, which runs smoothly, slides off or on the aperture; the surface of the sheet is either superimposed over the aperture or is withdrawn therefrom. This is spoken of as "surface control." In the Amphion device the automatic action was the engagement of the edge of the note sheet (whenever it slipped out of register) with the end of a lever. This is spoken of as "edge control." It was held in the Amphion Case that the language of the specifications and claims precluded a construction which would cover a device operating automatically under "edge control."

The owner of the patent—O'Connor had sold and assigned it to complainant—was dissatisfied with this result and consulted a lawyer who had not theretofore had anything to do with the case. He recommended applying for a reissue, modifying the language of the patent so as to cover "edge control," and prepared the papers and made the application. Apparently he formed the impression that the prior art was such that the claims of the original patent were too broad. In the proposed reissue patent he struck them all out, and substituted four claims, each of which was restricted to "two bellows motors" and "two guide openings." The proposed reissue also contained seven specific disclaimers, none of which affected the number of bellows motors or apertures. This reissue, as asked for, was granted August 15, 1911; it was applied for April 1, 1911, less than a month after final decision in the Amphion Case.

After this reissue was received by the owner of the patent, it realized that a very serious change had been made from the original patent. It took the matter up with counsel, other than the one who had obtained the first reissue and in December of the same year applied for a second reissue, pointing out that the error of the first reissue was:

"That the specification thereof is not sufficient, and that said insufficiency consists particularly in the omission to include in said reissue patent the claims appearing in applicant's original letters patent No. 789,053, dated May 2, 1905, and in the omission to claim a combination substantially the same as the claims of said first reissue, but covering only a single guide opening, as particularized in a large number of the claims of said original patent."

No change was sought to be made in the descriptive part of the specification of the first reissue, which set forth two bellows motors and two apertures, as indeed the original description did. The proposed second reissue contained the original claims, which had been

dropped in the first reissue. These include 3, 5, 8, and 19, supra. Some additional claims were added, among which are 21 and 22, supra. The application was made in the usual form, accompanied by oath that:

"The errors which render said prior reissue patent so inoperative arose from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention on the part of deponent."

[2] The second reissue was granted as prayed April 2, 1912. The statute (Rev. St. § 4916 [Comp. St. 1913, § 9461]), authorizing reissue when error has arisen "through inadvertence, accident, or mistake, and without fraud or deceptive intention," is undoubtedly intended for relief of meritorious inventors who are likely to lose their invention through some accident or mistake. When no intervening rights appear, it should be and has repeatedly been liberally construed. It may be noted that we have not here the situation presented in some of the authorities, where the reissue contains a claim which, after controversy with the Patent Office pending his earlier application, the inventor abandoned, acquiescing in its rejection.

[3] Every one of these claims 3, 5, 8, and 19 was allowed by the Patent Office, and the only "abandonment" of them relied upon is their omission from the first reissue. Defendant's position seems to be that there never can be a reissue of a claim once allowed in the original and omitted from a first reissue; but to this proposition we do not assent. Giant Powder Co. v. Safety Nitro Powder Co. (C. C.) 19 Fed. 510; Celluloid Manufacturing Co. v. Zylonite Brush & Comb Co. (C. C.) 27 Fed. 293; Sawyer Spindle Co. v. Eureka Co. (C. C.) 33 Fed. 836. It may be noted, also, that the claims here are not broader than the original claims, as they were in many of the cases cited on the argument. Inasmuch as the statute provides for "inadvertence, accident, or mistake," not, as defendant paraphrases it, "mistake inadvertently committed," there is no reason why the mistake should not be corrected even though it occurred in an attempt to amend.

The first reissue was certainly not obtained by "inadvertence." It was the result of the deliberate attempt of a patent solicitor to modify an existing patent; but it was, so far as we can see, none the less a mistake, and not merely a mistake of judgment, as when applicant's solicitor submits to rejections by the Patent Office. The mistake was as to what the prior art contained. It was believed to be much more extensive than the patentee supposed it to be when he applied for his original patent, so broad that his claims could not be sustained unless they were strictly confined to two bellows motors and two apertures. But, now that the prior art is displayed, it is apparent that it is not so broad as the owner of the patent and his solicitor supposed it was when application was made for the first reissue. When this misconception as to condition of the prior art was discovered, application was promptly made for a second reissue, and the affidavit on which such application was based truthfully stated—at least, there is nothing shown to negative its truthfulness—that the omission from the first reissue of the original claims was a "mistake." That there was "any fraudulent or deceptive intention" we find no evidence at all.

Before the second reissue was granted, however, and while the public was advised that the rights which complainant claimed were those only announced to the public in the first reissue, defendant began the manufacture of player piano actions with automatic regulation of the register between note sheet and tracker bar. It used the fundamental idea of O'Connor, viz., moving the tracker bar to one side or the other, so as to keep its apertures in register with the note sheet perforations, effecting this motion by the operation of a bellows motor, setting the motor in operation by the admission of air to it through an auxiliary aperture in the tracker bar, and automatically regulating the initiation of such motion by means of the note sheet moving over the auxiliary aperture. The defendant's device, however, consisted of a single bellows motor, moved one way or the other as it was exposed to pressure or suction. This device (Exhibit N), was not covered by the first reissue, the claims of which were confined to two motors and apertures. That defendant entered upon the manufacture and sale of these automatic trackers before the grant of the second reissue made public the fact that complainant was making claim to the broad invention covered by the claims here in issue is fully established. That only five of these player piano actions were actually sold is immaterial. Not only the five are free from this reissue, but the business of manufacturing and selling automatic trackers of the type shown in Exhibit N, which was entered into in the belief, warranted by complainant's conduct and mistakes, that defendant's tracker would not be challenged as an infringement under either the original patent, which had been given up, or the reissue, which did not cover it, cannot be interfered with under this second reissue.

The defendant is now making and selling a modification of this Exhibit N, which is known as Exhibit 4. In its original double acting bellows motor the air which came through the auxiliary aperture impinges upon a diaphragm which raised or lowered a stem carrying two valves, the movements of which brought to the bellows motor alternatively "pressure air" or "suction air." In the present type the diaphragm, stem, and valves are discarded, and the air from the aperture is brought directly to the inside of the bellows motor; connection between the bellows motor and the air chest being regulated by a small disk having a so-called bleed opening therethrough. The improvement simplifies structure, presumably costs less, and is said to be more efficient, operating more quickly. We do not see, however, that it has so changed the type shown in Exhibit N as to make it no longer free from the claims of the second reissue.

We therefore reach the conclusion that complainant is estopped from claiming infringement by this particular defendant in continuing the manufacture and sale which it entered upon while the first reissue was the only public announcement of complainant's alleged monopoly.

The decree is affirmed, with costs.

WARD, Circuit Judge (concurring). I think the decree dismissing the bill should be affirmed, on the ground that the complainant, by taking the first reissue with the four narrow claims, abandoned the

broad claims of the original patent, which should not have been restored to him by the second reissue. The cases cited in the opinion of the court upon this point involve reissues with broader claims than those of the original patent. When in such a reissue the narrow claims are repeated or where they are covered by the broader claims, it is reasonable to restore them to the patentee on his surrendering the reissue. There is in such case no evidence of an intent to abandon narrower by asking for broader claims. Where, however, the patentee withdraws broad and asks for narrow claims, there can be no other inference than that of an intention to abandon the broad claims. If this is done because of accident, inadvertence, or mistake, the statute no doubt permits relief. Here, however, no claim is made of accident or inadvertence, but only of mistake as to the prior art. The mistake was that of the attorney, who withdrew the broad and obtained the narrow claims of the first reissue. It was evidently the result of a misconstruction of the prior art, a mistake of law, which I think not remediable under the statute. If there were any mistake of fact, the complainant, upon whom the burden of proof lay, should have called the attorney who made the mistake to state exactly what it was and how it arose.

NOTE.—The following is the opinion of the District Court:

MAYER, District Judge. The patent in suit is a second reissue. The original patent contained 20 claims, the first reissue 4 claims, and the second reissue the 20 claims of the original patent restored thereto, and the 4 claims of the first reissue, and 3 new claims. The claims here in controversy, which were incorporated in the original patent, are Nos. 5, 8, 10, 16, 19, and 20. Claims 21 and 22 are new claims, and the 4 claims of the first reissue are not involved in this suit.

The defenses are (1) that the reissue patent is void "for fraud, deception, and failure to comply with statutory requirements"; and (2) that there is no infringement. Player pianos have gone into extensive use, and their sales in the United States now amount to millions of dollars per annum. The original patent was granted to O'Connor on May 2, 1905, he stating: "This invention relates to means for guiding a traveling sheet or web in suitable relation to or registration with the rolls, type, tracker bar, or other devices of machinery or apparatus employing such a sheet or web, the object being to maintain the sheet or web in suitable normal operative relation to its associated devices by means of the margins of the sheet or web itself without any perforation or cutting or other special preparation of the sheet and without in any way injuring the edges of the most delicate or fragile fabric."

What O'Connor sought to accomplish was the automatic regulation of the note sheet, so that the perforations therein should register correctly laterally or sidewise with the apertures in what is known as the tracker bar. In the self-playing pianos there is incorporated an automatic playing mechanism arranged so that the piano can be played automatically or manually from the ordinary keys. The pianos are operated by air, a pneumatically operated striker being provided for each action of the piano. To actuate these strikers a perforated note sheet is drawn over an apertured tracker bar. Most of us by this time are familiar with the way in which the note sheet is wound on a spool or music roll before being placed in the instrument and is drawn therefrom over the tracker bar by being wound up on a drawing roll which is rotated by suitable propelling means. The note sheet has a series of perforations corresponding in arrangement and spacing to the notes of the piece of music which is to be played. The tracker bar has a series of apertures corresponding in number to the actions to be operated, each aperture communicating by a tube to the pneumatic for actuating the corresponding striker of

the action. As the perforated note sheet is drawn over the tracker bar, the perforations in the note sheet uncover the apertures in the tracker bar in sequence, so that the proper actions are successively struck in order to render the musical composition for which the sheet is cut. The tempo is governed by the speed with which the note sheet is drawn over the tracker bar and means are provided whereby the operator may regulate such speed. The result is that the sheet may run over the tracker bar at anywhere from a very slow to a very rapid rate. The failure of the note sheet, at any time during its entire run, to register laterally with the tracker bar, so that the perforations in the sheet will correctly cover and uncover only the proper apertures in the tracker bar, obviously will result in discord.

The ordinary piano has 88 keys, and previous to the O'Connor invention there were not any commercially successful player pianos which would operate more than 65 out of 88 actions of the piano. The reason for this limitation was that, with 65 notes, the apertures in the tracker bar could be spaced six to the inch, leaving bridges between the apertures of about one-sixteenth of an inch in width, so that a slight deviation of the note sheet from its true path would not produce discord; but where 88 notes were employed, it was necessary to space the apertures nine to the inch, whereby the bridges between the apertures were only about one-fiftieth of an inch in width, and hence a very slight deviation of the note sheet would produce discord. It will be seen, therefore, that the subject-matter related to a very delicate operation involving the attainment of accuracy in order to be useful and thereby commercially successful.

The O'Connor patent undoubtedly represents the first automatic adjusting device which will maintain automatically correct lateral register between the note sheet and the tracker bar, and it is nowhere denied that complainant and the Amphion Piano Player Company (O'Connor's licensee) were the first to produce a successful player piano which would operate properly all the 88 actions of a piano. O'Connor, however, evidently had a hard task convincing manufacturers of the value of his invention, and it was not until he gave his license to the Amphion Piano Player Company that he seems to have made any impression. The Amphion Company placed the device of the O'Connor patent on the market on April 4, 1908, and on October, 7, 1908, O'Connor sold the patent to complainant. After this purchase complainant discovered to its surprise that the Amphion Company was manufacturing a player piano containing O'Connor's device, and was justifying its manufacture under the claim of a license obtained from O'Connor, prior to the assignment of the patent to complainant. Complainant brought suit against the Amphion Company, its bill having been verified on January 27, 1909. In that suit two forms of instrument, known in that case as "Complainant's Exhibit No. 3" and "Complainant's Exhibit No. 4," were involved. The cause came on before Judge Hand, and was decided by him on November 22, 1910, in a comprehensive opinion, and the decree entered thereon was affirmed, without opinion, by the Court of Appeals for the Second Circuit, on March 15, 1911.

Judge Hand held the patent valid and that Exhibit 3 was a precise copy of the patent and a clear infringement, but that this exhibit came under the license. He also held that Exhibit 4 was not infringed. While Judge Hand thought that the invention was not a pioneer, he expressed the view that it was "a meritorious and excellent invention." His judgment in this regard was not only affirmed by the appellate court, but has since been justified by the remarkable commercial success of the device.

In 1913 complainant manufactured and sold 8,643 player pianos, and two licensee companies made and sold 39,000 of these player actions for other piano manufacturers. Nearly one-half of the automatic mechanism of the player pianos manufactured in the United States in 1913 were produced by complainant, or its licensee company, and it is estimated that, on an average price, the manufacture of over $20,000,000 worth of player pianos was rendered possible by other piano manufacturers by reason of the O'Connor automatic tracker. Whatever the figures may be, it is enough to say that they run into some millions of dollars, and that complainant company, which in 1908 was a relatively small concern, is to-day the largest, or one of the largest, manu-

facturers of player pianos in the world, and that it, with its two licensee companies, employs over 1,400 employés, with a weekly pay roll of over $16,000. Such a result cannot be accomplished merely by able business methods, but, in substantial part, must be because of the production of an instrument which the public desires.

While the patent may not be a pioneer, I am satisfied that, in a sense, it has helped revolutionize the business of manufacturing and selling moderate priced self-players, on easy terms, and the men who developed the O'Connor patent, and had the good judgment and courage to exploit it, should not lightly be deprived of the just fruits of their labors. Up to the time of the suit before Judge Hand, there was nothing to suggest to the inventor, or his assignee, the necessity of making any changes in his claims; but the result of that suit manifestly created alarm, and thereupon, instead of continuing the employment of their then attorney, who was thoroughly competent and evidently had lived with the case, complainant retained another attorney. Application for a reissue was advised, and was filed on April 1, 1911—only 16 days after the decision of the Court of Appeals. An affidavit was prepared for and sworn to by O'Connor, wherein, among other things, he stated that the original letters patent were invalid by reason of his claiming as invention more than he had the right to claim, "and that the combinations thus excessively claimed, are the combinations which are claimed in claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 17, 18, and 19, and that the combinations claimed in claims 13, 15, 16, and 20, respectively, are therein claimed too broadly, in that they are not limited in certain respects, in which they *must be limited* in order to make them respectively conform to the new and useful inventions which they were intended to define." O'Connor's affidavit continued: "Neither the deponent nor his attorney was a professional patent lawyer (not referring to Mr. Southgate, but to a previous attorney), and their deficiencies of legal knowledge led them into the erroneous opinion that it was not necessary to limit any of the claims of said application to combinations including *two* guide openings and *two* bellows motors, and the examiner did not instruct them into the true view of the law relevant to that subject, which true view is that the law requires each claim of any proper patent upon the deponent's invention to be limited to a combination which includes a guide opening and a bellows motor to control the lateral tendency of the note sheet in each of the two directions toward which that tendency may be developed."

Seven supposed inventions were disclaimed, and in a letter dated March 29, 1911, from the attorney, accompanying the application, the following statement was made: "Sixth. The specification of the reissue application contains only 4 claims, whereas the original letters patent has 20 claims, many of which are broader than any or all of the 4 claims of the reissue application, in that each of many of the 20 claims of the patent are broad enough to cover one or more of the 7 inventions disclaimed in the reissue application, whereas none of those inventions fall within the terms of any of the 4 claims of the reissue application."

The specification of the first reissue No. 13,283 set forth: "The principle of this invention, in whatever mode it is embodied, is as follows: Correct registration between the perforations in the note sheet and the corresponding music apertures in the tracker bar is constantly maintained by two bellows motors, which work mechanically in opposite directions, but which are worked by atmospheric pressure, which pressure is constantly governed, but not produced, by the presence or absence, as the case may be, of tendency to lateral movement of the note sheet upon the tracker bar." Figures 2, 3, and 4 of the original patent were omitted, and Figure 1 was retained. That figure showed two bellows motors (*23* and *24*) and two guide openings (*29* and *30*), as did also Exhibit 3 in the Amphion suit, though arranged in a slightly different manner.

It is contended that the statement of invention in the first reissue omitted the clause of the original patent, "by means of the margins of the sheet or web itself without any perforations or cutting or other special preparation of the sheet and without in any way injuring the edges of the most delicate or fragile fabric" so as not to exclude apparatus controlled by perforations in the sheet or controlled by edges of the sheet and so as thereby to include the

construction in the Amphion case (known as Exhibit 4), which Judge Hand had held not infringed. Whatever the purpose of the change may have been, the fact is that the specification set forth in full detail two bellows motors and two guide openings and their operation, and the 4 claims were limited in unequivocal language to two bellows motors and two guide openings. On August 15, 1911, only five months after the affirmance of Judge Hand's decision, the first reissue was granted to O'Connor as assignee of complainant.

When the reissued letters patent came to the attention of the officers of complainant company, they were surprised, and they could not understand how it was that the Patent Office had allowed them but 4 claims, when they had 20 claims theretofore. Thereupon they returned to Mr. Southgate, their original counsel. He proceeded with diligence, filing the application for a second reissue on December 12, 1911 (long before complainant knew about defendant's alleged infringements), and succeeded in having the second reissue (the patent in suit) granted on April 2, 1912. The 4 claims of the first reissue are concededly narrowed claims. In the second reissue, all of the claims of the first patent, as above stated, were reinstated, together with the 4 claims of the first reissue (not here in controversy), and 3 additional claims, of which 2 are involved in this suit.

In the specification of the second reissue the principle of the invention is stated in precisely the same words as in the first reissue, and the language of the original patent, in that regard, is not readopted. Indeed, from the words "To all whom it may concern" (line 1) to "deflected therefrom" (line 129), the specifications of the first and second reissues are identical, word for word, and numeral for numeral. In the second reissue, as in the first, Figures 2, 3, and 4 of the original patent are omitted. Claims, of course, cannot be torn from their context, and whatever may have been the proper construction of the claims of the original patent, when read in connection with the context therein contained, the claims now under consideration must be read with the context of the reissued patent here in controversy.

I think I appreciate the difficulty with which Mr. Southgate was confronted, for the situation was between the upper and the nether millstone. There was danger in going back to the original specification, and to stand on the first reissue would result in a limitation which might impair, to some extent, at least, the value of the patent. But, although the application for the second reissue was made in the hope of claiming a combination "substantially the same as the claims of the first reissue, but covering only a single guide opening as particularized in a large number of the claims of the original patent," these claims, if valid, in view of the specification of the second reissue and the whole history of the proceedings, must be construed in the second reissue as limited to a construction with two bellows motors and two guide openings operating on the principle stated. As so construed, the defendant's device does not infringe claims 3, 5, 8, 10, 16, 19, and 20, as will appear later.

It will be serviceable to follow the history of the defendant, as introductory to a consideration of claims 21 and 22. Defendant company is the successor of the American Player Action Company, formerly of Davenport, Iowa, which went out of business in the spring of 1911. Defendant company started to make player piano actions with automatic trackers. One of these actions (like Defendant's Exhibit N) was shipped July 22, 1911, to Krell Piano Company, of Cincinnati—that is to say, at a date while the original patent was still in existence and before the first reissue. Another was shipped to Knabe Bros., of Norwood, Ohio (not the older house of the same name at Baltimore), on October 26, 1911, a date while the first reissue was alive; and three were shipped to the Krell Company on December 6, 1911, or about four months before the second reissue. The manufacture of these actions was abandoned in December, 1911, and there is no evidence that they were installed in pianos or sold to the public.

Devices like Complainant's Exhibit 4 (in this suit), the alleged infringing mechanism, were concededly not made until after the second reissue patent, although Turney, the inventor of Exhibit N, applied for a patent on September 22, 1911, which, however, was not granted until March 25, 1913, two months after the bill in this suit was filed. Turney frankly stated that, between the

time Exhibit N was abandoned and Exhibit 4 was placed on the market, he had read the second reissue and thoroughly understood its theory. He also stated that Exhibit N was abandoned, because Exhibit 4 cost less money to build and was more effective, although of the same principle as Exhibit N.

Between, however, 1905, the date of the original O'Connor, and December, 1911, the date of the application for the second reissue, the art had learned a good deal—notably Doman, No. 939,897, November 9, 1909, and Southgate, No. 995,492, June 20, 1911. In addition, Judge Hand's decision had pointed out the breadth and limitations, respectively, of the patent in certain respects. While Turney's patent (No. 1,056,858) was not granted until 1913, he was striving in 1911 to work out an invention along the lines of one opening or port, and had progressed far enough at least, to file his application for a patent at a time when the first reissue was alive and the application for the second reissue had not yet been filed.

One of the reasons why the courts are so strict as to reissues with broadened claims is because a loose or over-liberal construction will arrest progress, and men will have little incentive to further the art, if, after a long delay, the patentee acquires a broader invention than that which, in the first instance, he made known to the world. Claims 21 and 22 are unquestionably broadened. In claim 21 is the dragnet as to a lateral deviation changing "the condition" of the control opening. Further, all of the original patent claims positively define the relation of the guide opening to the normally positioned web. Thus, to be infringed, these guide opening means of these original claims must be either "held out of operation by the web, when the web is in its normal position," or its operation must be inaugurated "only after the web has departed from normal position, or the opening must be arranged, not merely adjacent to and within the normal position of the web," but so far within "as to be covered thereby," or "closed." In the second reissue claims 21 and 22 omit any such limitation positively defining the relationship of the guide opening to the normal web; and claim 21 especially is not limited to a normally "closed" or normally "held out of operation" guide opening.

On the question of delay, claims 21 and 22 must be considered in relation to the original patent, and, I think, are quite distinguishable in principle from the first 20 claims, in respect of which there was not unreasonable delay. Over six years had elapsed between the granting of the original patent and the application for the second reissue, and such a delay, under now settled authority, renders these two broadened claims void.

Finally, as to infringement. In view of what I have pointed out supra, the remaining claims cannot be sustained as subcombinations. So to do would really be to construe the claims as applying to one guide opening and one bellows motor, and that cannot be done if the patent is to be saved.

The only theory remaining is that of equivalency. What the range of equivalents might have been in respect of the original patent is no longer open to discussion, for we are here dealing with the second reissue. Defendant's original device is not now in issue. Defendant's improved machine has a single guide opening and a single bellows motor. There is no alternate covering and uncovering of the guide opening.

Another characteristic of defendant's machine is its continuity of operation. It never stops pressing the tracker bar in both directions until the playing is stopped. The spring is always pressing to the left and the pneumatic to the right. In defendant's device, a constant stream of atmospheric air is being sucked through the continuously open guide opening into the bellows motor to produce the pressure therein, which constantly varies with the extent, more or less, to which the traveling sheet opens the guide hole. I have not overlooked the experiment of a spring and one bellows motor, but in these particulars (and details of operation might be compared in extenso if necessary) the device of the second reissue works on a different principle, and therefore does not infringe.

I must say that I regret the result, in view of the merit of the invention; but courts must pass on what is, and not on what might or should have been.

The bill is dismissed, with costs. Settle decree before June 27, 1914.

McCORMICK WATERPROOF PORTLAND CEMENT CO. et al. v. MEDUSA CONCRETE WATERPROOFING CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2136.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—WATERPROOF CEMENT.
The Newberry patent, No. 851,247, for a waterproof Portland cement and process of making same, which process consists in mixing with the cement a small percentage of an insoluble lime salt of a fatty acid, preferably stearate of lime, substantially free from glycerine or other soluble substance, was not anticipated, and covers an invention of a very high order. Nor is the patent limited by the proceedings in the Patent Office to a product absolutely free from any soluble substance. Also *held* infringed.

2. PATENTS ⊂=168—CONSTRUCTION—LIMITATION BY PROCEEDINGS IN PATENT OFFICE.
Arguments and explanations in support of an application for a patent, to make clear the true nature and merits of the invention, and amendments to emphasize them, are not to be construed as limitations on the claims of the patent as allowed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. ⊂=168.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in equity by the Medusa Concrete Waterproofing Company against the McCormick Waterproof Portland Cement Company and Sidney T. Sjoberg. Decree for complainant, and defendants appeal. Affirmed.

Appellants ask to be freed from the decree that adjudged them to be infringers of patent No. 851,247, April 23, 1907, to Newberry, appellee's assignor, for waterproof Portland cement and process of making same.

The specification and claims read as follows:

A. "The invention is in part a process of rendering cement waterproof, which consists in mixing therewith a small percentage of an insoluble lime salt of a fatty acid, preferably stearate of lime, substantially free from glycerine or other soluble substance.

"It also consists in the product of that process, namely, a cement rendered waterproof by the mixture therewith of a small percentage of an insoluble lime salt of one of the fatty acids, preferably stearate of lime.

"The stearate of lime to be employed may be made in any suitable manner. It may be made by a dry process, to wit, by heating one part of stearic acid with two parts (more or less) of dried slaked lime; or it may be made by a wet process, to wit, by adding the stearic acid to hot milk of lime. Specifically fifty pounds, more or less, of quicklime may be slaked in a hundred pounds, more or less, of water, and to this mixture, while it is still hot, may be added about thirty pounds of stearic acid. The resultant stearate of lime is to be dried so that it is in the form of a dry powder. The resultant of either method of operation, above described, is an insoluble stearate of lime, mixed with a greater or less excess of hydrate of lime, according to the quantity of lime employed.

"The stearate of lime may be added to the cement clinker and ground therewith. I prefer, however, to add it to the finished dry cement. In fact it is preferable to keep the cement and the stearate of lime separated until a waterproof cement is required for use. I have found that 1 or 2 per cent. of stearate of lime, added to the dry cement, is all that is required to render the mortar

or concrete made therefrom absolutely and permanently impervious to water; and this is true even when cement is mixed with so large a proportion of sand as five parts of sand to one of cement.

B. "I am aware that various materials have been proposed, and to some extent used, as additions to cement and plaster to prevent the absorption of water. These various materials have been produced by saponifying, in various ways, various kinds of fats, oils, and waxes. But all of said materials heretofore proposed or used for this purpose have retained the glycerine which is set free by the saponification, and have, in fact, been soft soaps. They are, therefore, in part, soluble in water; that is to say, the glycerine therein is soluble. For this reason cement or plaster, with which these materials are mixed, is not impervious to water, and becomes less so as the glycerine is dissolved by the water. The waterproofing material hereinbefore described is, however, free from glycerine or any other material soluble in water, being a lime salt of a fatty acid, which acids are, as is known to all chemists, formed from fats by breaking up the chemical combination of the glycerine with said fatty acids, and segregating them from the glycerine. The lime salt of a fatty acid is absolutely insoluble in water; and the addition of this substance to cement or plaster in the manner and substantially the proportions heretofore described renders the resultant compound, when set, substantially and permanently waterproof.

"I claim:

"1. The process of rendering cement waterproof, which consists in mixing therewith a small percentage of the insoluble lime salt of a fatty acid, substantially free from glycerine or other soluble substance.

"2. The process of rendering cement waterproof, which consists in mixing therewith a small percentage of insoluble stearate of lime, substantially free from glycerine or other soluble substance.

"3. A composition of matter resulting from the described process, which consists of cement mixed with a small percentage of the insoluble lime salt of a fatty acid, substantially free from glycerine or other soluble substance.

"4. A composition of matter, which consists of cement mixed with a small percentage of insoluble stearate of lime, substantially free from glycerine or other soluble substance."

Forest P. Tralles, of St. Louis, Mo., for appellants.

Francis W. Parker, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). [1] A block of artificial stone, made from a mixture of Portland cement and sand or other calcareous matter, appears to be solid; but in it there are many microscopic pores or capillary tubes; and these constitute from 20 per cent. to 40 per cent. of the cubic contents. This characteristic of concrete was known for 40 years before Newberry filed his application in March, 1905. As concrete had long and increasingly been used in constructions that contact with water, as in reservoirs, aqueducts, tunnels, and the like, the desirability of having concrete impervious to water had been constantly appreciated.

Men of high class—civil and mechanical engineers—had given much thought and devoted great effort to a solution of the problem. Numerous prior patents and publications, from 1863 to 1904, were introduced by appellants; but it will not be necessary to review more than two or three of them to illustrate the fact that none reached the goal, that none made any impress upon the practical art. This is so because a large volume of clear testimony establishes that, until the Newberry product was on the market and in successful use (starting

in 1905 with a few thousand pounds and rising in 1911 to a million pounds a year), manufacturers and dealers in cement, contractors and builders of concrete structures, chemists, civil and mechanical engineers, had known of nothing that would produce impervious concrete. In 1903 the question for discussion before the American Society of Civil Engineers was: "Is it possible to make concrete which will be impervious to water? If so, what is the best method?" A paper was read, and a general discussion was participated in by a large number of civil engineers. And in 1904 "Some Notes of Cost of Waterproofing the Concrete Lining of Reservoirs" was published. Five engineers contributed to this publication. The sum of the proceedings in those two years was to show that the competent men who were familiar with the literature of the subject and were also concerned with the practical art knew of no means that were more than halfway efficient.

Workers in the prior art for 40 years had been going along very natural lines. Holes in the concrete? Well, use finer particles of calcareous matter, put into the mixture a larger proportion of pure cement, and tamp or compress the mixture more firmly before it sets. But this, while substantially increasing the material and labor costs, only partially reduced the total space taken up by the "voids." Why not stop up the pores by covering the surface of the concrete with a cement paint or mineral paint? But those surface applications were liable to scale or be broken off, and what was wanted was a concrete which in itself should be impervious to water. Why not impregnate the concrete as far as possible from the outside by applying a solution that will enter and stop up the pores? Or put into the mixture a substance that will fill the pores in the concrete as it is being worked into form? But these methods, only halfway efficient at best, furnished no practical answer to the problem. For, if you cannot have a concrete that is completely impervious, what ultimate good is accomplished by simply delaying for a time the ultimate water-soaking of the structure?

Specifically we need notice only the Sylvester process and the Liebold and Nieske patents. The Sylvester process "consists in applying a wash of a solution of soap, which is allowed to soak into the surface of the concrete, and is then followed by a wash of a solution of alum. The soap enters the voids of the concrete and is followed by the alum. Where these two unite the chemical action precipitates an insoluble compound, which fills the voids in the concrete and renders it impermeable." That was the theory; but, because soluble as well as insoluble compounds were precipitated, and because the soluble compounds were leached out of the pores, the process never made the slightest impression upon the practical art. Liebold proposed applying to the cement before it is ground a mixture of Japanese vegetable wax, caustic alkali, and boiling water. This compound would contain glycerine, and other products soluble in water, and would therefore permit the proposed filler to be substantially leached out of the pores. Nieske's patent in 1892, which is the only portion of the prior art relied on by appellants in this court, proposed to add to cement about one-tenth in bulk of either aluminum acetate or aluminum palmitate. Aluminum acetate

is soluble in water. Aluminum palmitate is insoluble; but no way is shown of producing it without having associated with it water-soluble substances; and there is no evidence that it has been or can be practically used. And when Nieske declared that aluminum acetate and aluminum palmitate might be used as equivalents in his compound, he certainly failed to show that the Newberry conception had ever entered his mind.

Now, what was Newberry's solution of the problem? He said: It is unnecessary to attempt to pack the voids with a filler, or to stop up the pores with a paint, if you will consider the physical law that causes the water to enter them. That law is capillary attraction. The walls of the capillary tubes are water-attractile, and so the water climbs up them. These capillary tubes may be disregarded, if their walls, instead of being water-attractile, are made water-repellant. The insoluble lime salt of a fatty acid is a water-repellant. One per cent. of that insoluble salt, of course, cannot serve as a filler for the 20 per cent. to 40 per cent. of voids in the concrete; but it can so change the character of the walls of the capillary tubes that water will be repelled and the concrete will be permanently waterproof. Preferably the insoluble lime salt of a fatty acid should be pure, for so it is most thoroughly water-repellant. If it were adulterated with glycerine or other water-attractile substances, the water-repellant power of the insoluble lime salt might be so far overcome that the primary water-attractile quality of the walls of the capillary tubes would remain in action; and therefore you must use an insoluble lime salt that is substantially free from water-attractile substances—that is, so far free that the water-repellant power of the insoluble lime salt will not be overcome.

This solution of the problem was not a haphazard achievement. Newberry, the patentee, was graduated in science at Columbia in 1878. In 1880 he received from the same University the degree of Doctor of Philosophy. He was a student of chemistry at the Universities of Berlin and Paris in 1880 and 1881. He was Professor of Chemistry at Cornell from 1882 to 1892. From that time on he occupied himself with the chemistry of cements and other industrial products. With an accurate knowledge of what had gone before, his own large vision and his independent investigation along an untried line led him to success. His patent is clear. Inexpert workers in concrete are plainly told how to achieve the new result in the best way. And in the light of this record we believe he is to be credited with an invention of a very high order.

Against the finding of infringement the strongest insistence is that the patent affords no ground for relief unless the alleged infringer uses an insoluble lime salt of a fatty acid that is absolutely free from glycerine or other soluble substance. The specification and claims are not thus limited; but it is contended that the history of the application requires this restriction. When the application was originally filed, the specification did not include the phrase "substantially free from glycerine or other soluble substance" in the paragraph we have marked A, nor did the paragraph marked B appear therein; and

the claims called for mixing with cement a small percentage of stearate of lime. The examiner, failing to comprehend the invention, rejected the claims on reference to the Liebold process, stating that the amount of glycerine which would be produced thereby could not materially affect the result. Applicant then amended by adding to the claims the phrase "free from glycerine or other soluble substance"; and the examiner, still failing to appreciate Newberry's achievement, maintained the same position, and stated that the denial of the presence of a useless substance was not sufficient to carry the claims over the references. Thereupon applicant amended the specification by putting in the paragraphs marked A and B, and redrafted the claims in their present form. The amendments were accompanied by an argument which enabled the examiner to understand the true nature of the invention, and to realize the significance of the expressions "a small percentage" and "substantially free from glycerine or other soluble substance"; and thereupon the application was promptly allowed. The significance of these quoted expressions, in the light of the disclosures of the specifications, was perfectly clear to those versed in the cement art.

[2] We perceive no limitation or disclaimer in the file wrapper. Arguments and explanations, and amendments to emphasize them, are not to be so construed. Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. Ed. 149; Daylight Prism Co. v. Marcus Prism Co. (C. C.) 110 Fed. 980; Dodge Needle Co. v. Jones (C. C.) 153 Fed. 186.

On behalf of appellants a competent and reputable chemist testified that he had analyzed appellants' product and found glycerine therein. Three competent and reputable chemists testified for appellee that they had analyzed appellants' product and that it was free from glycerine or other substance soluble in water. So the finding of infringement might well be affirmed, even if the Newberry patent required absolute freedom from soluble substances. But on appellants' own showing we think it is clear that the patent, giving it its true scope and meaning, has been infringed. While Liebold and others of the prior art showed an insoluble lime salt of a fatty acid, they showed at the same time the presence of glycerine and other soluble substances. Their compounds contained from 85 per cent. to 90 per cent. of stearate of lime and 10 per cent. to 15 per cent. of glycerine. These compounds were inefficient, because the percentage of water-attractile substance was so high that it counteracted the water-repellant substance. "Substantially free from glycerine or other soluble substance," therefore, means that the insoluble lime salt of the fatty acid must have a purity of more than 90 per cent.; and the higher the degree of purity, the more efficient the compound. According to the analysis of appellants' chemist their compound contained about 4 per cent. of glycerine. Appellants put into the record what they claim is the formula of their process of manufacture. One side asserts that the use of the stated ingredients would necessarily result in the presence of glycerine; the other contends that whatever glycerine might otherwise be produced is vaporized and disappears during the heating and dry-

ing processes of the manufacture. But it is unnecessary to enter into the contentions and differences of the chemists, for one fact alone is sufficient, in our judgment, to demonstrate infringement, and that fact is that appellants are putting forth a waterproofing compound that does the work, and does it confessedly on the water-repellant principle disclosed by Newberry, for appellants rely on the water-repellant power of "a small percentage" (less than 1 per cent.) of "stearate of lime." Consequently it is manifest that appellants' compound is "substantially free from glycerine or other soluble substance"; that is, if soluble substances are present at all, they are present in such relatively small quantities that they do not materially detract from the water-repellant power of the insoluble stearate of lime which both parties use and rely on to attain the desired result.

The decree is affirmed.

PEELLE CO. v. RASHKIN et al.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 191.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—HATCHWAY DOORS—PRIOR USE.

Evidence of prior use of the device of the Rashkin patent, No. 871,735, for hatchway doors, considered, and *held* insufficient to defeat the patent, within the rule requiring such evidence to be clear and convincing. The patent also *held* infringed.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from so much of the decree as dismisses the bill as to Tillie Rashkin, one of the defendants in a suit brought to restrain infringement of United States Patent No. 871,735, granted November 19, 1907, to Joseph Rashkin, the other defendant, with respect to whom the bill was sustained.

See, also, 194 Fed. 440.

The invention consists of an improvement in hatchway doors, which are divided in the middle and open up and down. Each pair of doors is connected by chains over pulleys, so that the movement of the upper door controls the movement of the lower door. In the prior art the wide-open position of such doors was determined by having the upper door abut against some sort of stop. Hence the lower door was, at that time, supported by the chains. If it were subjected to any shock or strain, when in its wide-open position, the strain was directly imposed on the supporting chains and, as they could not yield (the upper door then resting solidly against its stop), the tendency was to break them. For this reason, with such doors, it was always the practice to adjust the length of the chains so that, when the doors were wide open, the upper edge of the lower door would be far enough below the floor level to prevent it being struck by the wheels of the trucks used in carting loads into and out of the elevator. This arrangement had two well-known disadvantages: In the first place, it made a depression over which the wheels of the trucks must bump; and, in the second place, the depression would retain whatever dropped off the tracks, and this would interfere with the closing of the doors. Rashkin removed the stops from the top half of the door and put on the lower half of the door very strong stops, so positioned that, when the doors were

wide open, the upper edge of the lower door was flush with the floor, thus forming a truckable sill or bridge, and thus avoiding a slot to collect rubbish, while at the same time the chains were wholly relieved of all shocks and strains imposed on the top of the lower door.

J. Edgar Bull and Fred H. Bowersock, both of New York City, for appellant.

Charles F. Dane and C. S. Champion, both of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. There is no question as to infringement. Nor is there any as to the proposition that Joseph Rashkin, the patentee, cannot defend on the ground of invalidity of the patent which he himself assigned to complainant's predecessor in title.

No prior art disclosed in patents or publication negatives invention. The decision below was based entirely upon an alleged public use two years prior to the date of application. The contention is that in 1899 or 1900, five years prior to the date of application (June 14, 1905), Joseph Rashkin, as an employé of Caleb M. Peelle (who was president of complainant company when this suit was brought), made and installed in an elevator shaft in the plant of the Manhattan Refrigerating Company in this city five sets of elevator doors which embodied the patented apparatus. Five witnesses testified as to these doors. Rashkin, the patentee and defendant, Starr, Lane, Scanlon, and Ludemann. Referring to this testimony, the District Judge finds that Rashkin's testimony is clear and circumstantial that he produced a model which he verified by a personal inspection of the doors shortly before testifying; that Starr was in a position to know, and was perfectly clear in his recollection; that his veracity and impartiality were conceded; that his testimony, which was not in the least impaired by cross-examination, "seems to be superior in weight to the testimony of complainant's witnesses." Of the complainant's witnesses, he finds that Lane and Scanlon "were indefinite and uncertain," and that, while Ludemann displayed considerable knowledge of the complainant's door construction, his testimony "is not of the convincing quality that characterizes Starr's statements." He concludes with the statement that, in view of the direct and convincing testimony of the defendants, he is impressed by the "failure of the complainant to produce any direct evidence to the contrary," and adds that "if the doors, or any of them, are still in use, it would have been easy to show what the construction was."

None of these witnesses were examined in court. The judge had no opportunity to observe their demeanor on the stand. All that he had was the printed record which is before us. The appellant is therefore entitled to our independent judgment as to the relative weight of their testimony.

Rashkin testified that he went to work for C. M. Peelle, doing business as the Standard Supply Company, in 1896, and stayed with him six years; that in 1899, at Peelle's request he put in five pairs of doors in the Manhattan building; that they had the crossbar and stops of

the patent; that about 1907 he had a man repair the doors with some new chains and pulleys, and saw them after the job was done; that he saw the doors three weeks before testifying, and they were the same doors he had put in. However clear and circumstantial his testimony may have been, his statement that he installed these doors "with stops" on them in 1899 is his recollection merely of what took place 13 years before, without reference to any record to fix the date. Moreover, he is one of the defendants, pecuniarily interested in the result of the suit. He is also the patentee, who, when making his application in 1905, swore that such doors had not been in use for more than 2 years before that date. He explained this last statement by saying that in 1905 he had an imperfect knowledge of the English language, and did not understand what he was swearing to. It seems to us that his testimony is entitled to little weight.

The witness Starr, a mechanical engineer, was president of the Starr Engineering Company. He was consulting engineer for the Manhattan Company, and drew the plans for their warehouse and equipment, and supervised the installation of the same. The warehouse was erected in 1896 or 1898 (it is given 1906 or 1908 in the record, which is manifestly a printer's error). This witness also testified wholly from memory, except that he says that he has refreshed his recollection as to the date he removed his office from the Manhattan Building (May 1, 1890), by reference to his books of account. He says he saw the doors for some time before and some time after that date. No one disputes the proposition that the doors are the same, nor that they are now provided with crossbar and stops; the question is, Were they so equipped prior to 1903? This witness testified that the lower door had a strengthening bar across its top, extending on each side over the guide rail in such a manner that when the door was open, and therefore the lower half of the door was down, so that the top would be flush with the floor, this bar engaged on each side with a stop placed on the rail, so as to hold the lower half of the door from going below the floor level and the top of the door filled the space between the platform of the elevator and the floor in such a manner as to form with the platform and the floor a practically continuous surface, so that trucks could be conveniently wheeled from the floor to the platform or vice versa.

Being merely consulting engineer, he did not have occasion to see them regularly after he left the building, but says the doors were in use up to about 1902.

The complainant's witness Lane has been since 1903 engineer to the Stock Exchange. He testified that he was in the employ of the Manhattan Company from 1899 to 1903, for three years as roustabout and one year as engineer; that there were gates when he came, which were soon changed to these fireproof doors. He says the doors were like defendant's model, except that there were no stops to prevent the door from dropping in case the chains broke. When opened, the top edge of the lower half of the door dropped below the floor a couple of inches; that the only stop that he ever saw was the chain that came through the pulley; that four or five times he helped the carpenter re-

pair the chains that "were broken on one side, which would let the door drop on one side"; that when he repaired them he had to get a pry underneath and hold it up in place while repairing; that the lower door sections had a piece of iron on the top and side; that whenever he saw them lowered their tops were below the floor level.

Complainant's witness Scanlon, who is now engineer of the Presbyterian Hospital, testified that he was chief engineer at the Manhattan Building from 1896 to 1902; that he remembered that while he was there they substituted for the light gates sliding doors—when the upper half was lifted the lower half would go down; that there was no positive means provided for arresting the lower door in its descent at a point where its top edge would be supported substantially flush or level with the floor; that sometimes it would stop flush, then again from an inch to an inch and a half below the floor level; that he knew of nothing which limited the drop; that it never stopped twice in the same place; that the engineering department was called upon repeatedly to "dig out the dirt." This phrase he explained by saying that, when the top of the door dropped below the floor level, the ice from the barrels of frozen poultry, pieces of barrel hoop, and rubbish would "pack in over the door in the slot in the floor"; that there was never any trouble when the doors stayed at the same level, but that they had trouble with them right up until he left in December, 1902.

Complainant's witness Ludermann, now in business for himself, testified that he worked for the Standard Supply Company (with which Rashkin was employed), from August, 1903, to 1911; that on two occasions during such employment he was sent to the Manhattan to make repairs to these doors; that on one of these occasions a door had broken loose from the chains and was jammed between the tiller sheave and the pit of the hatch; that the doors when he saw them were not of the "truckable sill" type; that is, they were not held by stops flush with the floor, but the top of the lower door was set so far below the floor level that a wheel or rolling object would not touch it. The prior use date relied on by defendant must be anterior to June 14, 1903. This witness, it may be noted, did not begin his employment until August, 1903.

We fail to see why the evidence for complainant is not as "direct" as that for the defendant. When A. says he saw a door and it had a certain device on it, and B. says he saw the same door and it had no such device on it, the testimony of each is equally direct. As to the suggestion that there should have been produced a photograph or description by a competent witness of the doors still in use, we fail to see what bearing that would have on the question. No one disputes that the doors are the same, nor that they are now equipped with the "stop" devices. The only question is when those devices were applied. Leaving out Ludemann, who only visited the place twice, surely both Lane and Scanlon were in as good a position to know what was there as Starr was. There is nothing to indicate that they were not as veracious and impartial as Starr; nor is their testimony, any more than his, impaired by cross-examination. Nor is it "indefinite and uncertain"; quite the contrary.

All that we have touching this alleged prior use is the not infrequent case of fairly balanced testimony of disinterested and impartial witnesses, not the clear, convincing proof which is required when it is sought to establish a prior use of a date more than 10 years back by oral testimony. We are not satisfied that such prior use has been proved. The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; Deering v. Winona H. Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153; Parker v. Stebler, 177 Fed. 210, 101 C. C. A. 380; National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693, 45 C. C. A. 544.

The conclusion above reached makes it unnecessary further to discuss the case, but we may add that, in our opinion the estoppel of Joseph Rashkin to attack the validity of his own patent disposes of this case. His wife Tillie has invested money in the business, and he contends that she alone is interested; he being merely her general manager. We do not find the testimony of the defendants persuasive, but think it is really his business; the wife being brought in with the expectation thereby of avoiding estoppel.

Decree reversed, with costs, and cause remanded, with instructions to decree for complainant against both defendants.

TERRY STEAM TURBINE CO. v. B. F. STURTEVANT CO.

(District Court, D. Massachusetts. March 13, 1915.)

No. 319.

PATENTS ⊂328—VALIDITY AND INFRINGEMENT—STEAM TURBINE.

The Terry patent, No. 741,385, for a steam turbine, of the type known as a single impulse helical flow turbine, was not anticipated and discloses patentable invention. Claims 1 and 5 also *held* infringed by the devices of the Bentley patents, No. 944,839 and No. 1,042,871, and claim 3 not infringed.

In Equity. Suit by the Terry Steam Turbine Company against the B. F. Sturtevant Company. On final hearing. Decree for complainant. See, also, 204 Fed. 103.

John P. Bartlett and Bartlett, Brownell & Mitchell, all of New York City, and W. K. Richardson, of Boston, Mass., for plaintiff.

Benjamin Phillips, Horace Van Everen, and George E. Stebbins, all of Boston, Mass., for defendant.

BINGHAM, Circuit Judge. The complainant is the owner of United States patents Nos. 741,385 and 793,857, granted to Edward C. Terry on October 13, 1903, and July 4, 1905, respectively; the applications being filed in the Patent Office December 10, 1902, and June 25, 1904. The complainant became the owner of the patents April 10, 1906, by a writing duly executed and recorded in the Patent Office.

This is the ordinary suit in equity, and the defenses are invalidity and noninfringement. Claims 1, 3, and 5 of patent No. 741,385, and claims 8 and 9 of patent No. 793,857, are in issue. Claims 1, 3, and 5 read as follows:

"1. A wheel with substantially U-shaped buckets and reversing chambers arranged mouth to mouth to receive both primary and secondary steam in one and the same bucket, acting at the same time."

"3. A wheel with buckets and reversing chambers of a substantially semicircular form and with the discharge for the steam therefrom at their central portion, instead of at a circumferential portion."

"5. A wheel having the series of substantially U-shaped buckets and confronting reversing chambers, with the jets in a part of the said reversing chambers and within the mouth thereof, substantially as described."

In the specification of the patent to which these claims relate the patentee declares that he has "invented certain new and useful improvements in steam turbines," and that the objects of his improvements are "simplicity and economy in construction and efficiency in use." The type of turbine here in question is known as a single impulse helical flow turbine. It has a wheel rotating on a shaft *B* (Figs. 1, 4, and 8 of the patent), and on its periphery a series of overlapping U-shaped buckets, the mouths of which face outwardly around the wheel. They "are arranged in step form, and the axis of their curved walls is neither parallel to the axis of the wheel nor cuts into the said axis." The surrounding casing has a series of reversing chambers of a similar U-shape, with open mouths facing the mouths of the wheel buckets. In the words of the patent:

"These chambers are arranged in a circular series, lapping one upon the other in the form of a series of steps, the plates extending from the inner edge of the rim *23* and plate *15* in direction shown in Figs. 2 and 8, and with the top of the U or broadest part of the semicircular interior of the chambers facing inwardly."

Referring to the feature whereby the receiving ends of each of the reversing chambers is located in a plane at the rear of its discharging end, and, when annexed to or containing a nozzle, to the rear thereof, the patent states:

"Instead of arranging the terminal edge *33* of the plate [of the reversing chamber] that confronts inwardly in a line parallel to the axis of the wheel, I slant the said edge *33*, Fig. 6 (also shown by broken lines in Fig. 2), so that the said edge at one of the supporting plates—the plates *15* as shown—is in advance of the same edge where that edge meets the other one, *22*, of the plates upon which the said chambers are mounted. This results in giving the broad sides of these chambers a slightly-warped surface. This terminal edge of each chamber at the side from which the jet discharges is in advance of the same edge on that side of the said chamber which receives the steam from the buckets in the wheel by a distance about equal to one-half the space between the two bucket plates measured at the periphery of the wheel."

In the drawings of the patent, the mouths of the wheel buckets are indicated as extending straight across the periphery of the wheel.

"The wheel has a circular series of buckets of a similar construction and form to that of the reversing chambers and also placed with the top of the U or greatest dimension of the semicircle at the edge of the wheel to face the corresponding portion of the reversing chambers, so that when a bucket stops directly in front of one of the reversing chambers they open mouth to mouth

and the two form substantially a circular figure, with a short straight portion on two sides, as best illustrated in Fig. 5."

The steam is discharged into the buckets of the wheel through a divergent nozzle, spoken of in the patent as a jet, inserted through the wall of one of the chambers of a series of four or five.

"The jets *27* are arranged to discharge into the wheel from one of the curved side edges of the reversing chambers."

"The arrangements and number of the jets may vary as circumstances may require. I have shown them as arranged with one jet for every four reversing chambers."

"The jets *27* are in the form of elbow tubes, the small portion of which constitutes the jet proper, while the cylindrical larger body portion connects the jets proper with the steam chamber and gives room for the ordinary pins *28* or other ordinary means for opening and closing the said jets. The delivery end of these jets merges into the adjacent wall of the reversing chambers on what may be termed one leg of the U, considering the chambers U-shaped, as shown in Figs. 2, 5 and 6. In the direction of the width of the reversing chambers—that is, from plate *15* to plate *22*—the walls are parallel to make them narrow in this direction, as shown in the said Figs. 2, 5, and 6, while the desired expansion or progressive enlargement toward their effluent end is made by flaring the walls" in the opposite direction.

Another feature of the device relates to crescent-shaped openings for the discharge of dead steam from the reversing chambers and the buckets.

"I have shown the discharge primary into the exhaust-chamber as through the middle or central portion of the broad sides of the reversing chambers in the form of crescent-shaped openings *34*; but whether the discharge be through the reversing chambers or through the buckets of the wheel, it will be in the central or middle portion of one of the broad sides."

In speaking of the functions of the reversing chambers, the buckets, and the helical course of the steam, the patentee says:

"I have called the chambers of the case 'reversing chambers,' because that is their primary function, and I may here note that the buckets serve a like function in addition to their bucket function in a wheel. The curve, however, of the buckets and of the reversing chambers and their relations to each other is such that the steam, in passing from one to the other, follows a circular path in one continuous curve without making any reverse curve. In Fig. 5 I have illustrated one of the buckets, *37*, *39*, as stopped directly in front of one of the reversing chambers, *30*, *31*, with broken lines and darts to indicate the flow of the steam. If the buckets were held in this position, the steam flowing in at the jet *27* has to travel around, following the curve of the inner wall *39* of the bucket and then the curved wall *31* of the reversing chamber, forming what I may call 'primary' steam. The second time around the steam would gradually widen by expansion and follow around inside of the current of primary steam, forming what I may call 'secondary' steam, and so on until it reaches the outlet *34* in the middle or central portion of chamber, *30*, *31*, all as indicated in Fig. 5. In practice, however, the buckets are moving; but the steam in flowing from jet to bucket and bucket to chamber, and so on, follows the path shown in Fig. 5, as well as can be illustrated, only, of course, one particular bucket is not all the while in front of any one particular chamber. By means of this form of bucket and chamber placed mouth to mouth for the repeated action of the steam within the same buckets I obtain from a wheel with one series of buckets substantially the repeated use of the steam that is attained by the much more expensive compound wheels."

The art of propelling a wheel by steam is old, but the first two men to produce steam turbines of a practical nature were Parsons and De

Laval. In 1884 Parsons took out a British patent for a reaction pressur-stage turbine. Prior to his invention the principle of reaction due to pressure drop and expansion had been applied to a single stage and a single wheel. This produced unworkable speed. To overcome this, Parsons devised means for applying the principle to a number of wheels or sets of moving vanes mounted on a shaft. As the steam passed from the high pressure end of the chamber inclosing the movable vanes through the successive sets of vanes to the exhaust, it expanded, decreased in pressure, and imported motion to the vanes. It is this drop in pressure that is the underlying principle of the reaction turbine. By adopting this principle and pressure staging, Parsons reduced the speed of the reaction turbine to practical, workable limits. Its difficulties were its complexity, the necessity of steam-tight casings, the question of clearance of the numerous vanes, and the axial thrust of the shaft, which restricted the application of the principle to turbines of large size. The principle of the reaction turbine is entirely distinct from that employed in the De Laval or Terry turbines, which is that of impulse.

In impulse turbines, the steam is blown against the vanes or buckets of the wheel in the form of a jet, in a manner resembling the impulse given a projectile by the explosion in the barrel of a gun. After the projectile leaves the gun it possesses velocity energy. This is similar to the velocity energy of the steam as it leaves the nozzle of an impulse turbine. The nozzle gives the steam a large velocity at the expense of its pressure energy. In other words, the steam in passing through the nozzle drops in pressure from initial to exhaust pressure and in expanding to the exhaust pressure produces a high velocity. In these turbines the potential energy of the steam is transformed into kinetic energy in the nozzle prior to its entering into the bucket of the wheel, while in reaction turbines the potential energy is transformed into kinetic energy within the wheel. As the motion of the wheel is caused by the impulse of the jet, it follows that the jet speed must be greater than the bucket speed; otherwise, no power will be drawn from the jet by the bucket.

In 1888, De Laval took out a patent in Belgium for an impulse steam turbine, which is conceded to be the first practical commercial turbine of that type. His contribution to the art which insured the success of his machine was in the construction of the steam nozzle, which was divergent beyond the throat and converted all the pressure inherent in the steam into velocity. Prior to his invention converging nozzles were used, and as they developed only a small percentage of the kinetic energy of the steam the impulse turbine was then impractical.

In the De Laval turbine, all the energy of the steam is abstracted by a single jet and is consumed by one passage of the steam through a single series of vanes. In order that the entire energy of the steam be employed, it is necessary that the velocity of the vanes should be equal to about one-half the velocity of the steam jet; and, as the steam velocity obtainable where the steam is discharged into the atmosphere from its ordinary boiler pressure with the divergent nozzle is

about 2,000 feet per second, the vanes must travel at a rate of about 1,000 feet per second, which is faster than the speed of the ordinary bullet. It is apparent from this and other disclosures in the case that when the kinetic energy thus developed is converted into mechanical work, the speed of the wheel is too great for practical purposes, unless a considerable portion of the available energy is wasted. In large wheels the impulse principle, as applied by De Laval, was found to be entirely impracticable, and its use in small ones was prevented, except when accompanied by means for reducing the speed.

In applying this principle to small wheels and to lessen their speed, De Laval resorted to such expedients as speed-reducing gearing and a flexible central shaft. And to further eliminate this difficulty he reduced the velocity of the jet itself before it entered the wheel vanes by mass compounding it with some passive liquid, such as superheated water or other desired fluids, to reduce its acceleration in the nozzle. This last expedient resulted in such a loss of kinetic energy as to amount to a substantial diminution of the power, and the speed-reducing gearing likewise resulted in a loss of the available energy of the steam.

In 1896 Curtis obtained a patent for a multiple pressure-stage compounding-velocity impulse turbine. The object he had in view was the production of an impulse turbine which would work efficiently at a shaft speed so slow as not to require speed reducing gearing and would hold and reserve the potential power of the passing steam until its use was required at a subsequent stage. To do this he devised a scheme of subdividing in the impulse turbine the available energy of the steam, while in transit, into a number of steps or stages. This was brought about by a series of separate wheels on a shaft through the vanes of which the steam was made to pass by employing several successive chambers connected by divergent or parallel nozzles. Instead of developing the full kinetic energy of the steam at one stage upon a single wheel by the use of a single nozzle, he so treated the steam by means of interchamber nozzles that it could be reused in successive nozzles and chambers, with the result that he utilized in stages the full kinetic energy of the steam; and as a result of these subdivision stages of pressure he reduced the steam velocity to a practical bucket speed.

It is thus seen that, while the Curtis turbine was of the impulse type, it did not involve the idea of utilizing the full kinetic energy of a jet of steam on a single wheel by directing it in a helical flow through buckets and reversing chambers, and no contention is made that this invention has any bearing on the patent granted to Terry. Moreover, the defendant's expert admits that on December 10, 1902, when the application for Terry's first patent was filed, "the desirability for some further improvement which would make it practicable to use a simple type of impulse turbine with good economy, yet with a low rim speed, and without pressure staging, was well recognized," and that "these requirements would have been met by turbines like the present Terry turbine or the Sturtevant turbine—that is to say, by a turbine with proper expanding nozzles and with suitably arranged U-shaped reversing chambers placed mouth to mouth with the wheel buckets. But in 1902 no successful turbine of this kind existed."

Prior to Terry's invention, several inventors had undertaken to gradually abstract the velocity of steam through devices calculated to employ it several times, such as surrounding a wheel having a series of buckets or vanes on its periphery with a stationary frame having series or sets of stationary buckets or reversing chambers. The theory upon which the steam was supposed to act when such means were employed was that when driven from the jet or nozzle it would strike a wheel bucket, be carried around the bucket, impelling the wheel in a forward direction, then leave the bucket with a half or three-fourths of its velocity or energy abstracted, pass around a reversing chamber and enter another wheel bucket, and so on, until its energy had been fully abstracted and it had become dead steam. The theory was that if a suitable construction of this kind could be devised, the turbine could be run at a comparatively low speed, and still develop large power by utilizing all the available energy of the steam, and, as above stated, it is admitted by the defendant's expert that the Terry turbine presented means for working out such a result.

Attention has been called to a British patent granted to Imray in 1881, a German patent to Lilienthal in 1890, and a United States patent to Wolke, applied for in April, 1901. All of those patents involved the helical flow idea, but at the time the first two patents were granted the divergent nozzle of De Laval was not known. No reliance is placed upon them as anticipating the Terry patent, and none reasonably could be. The nozzles employed were convergent, and the evidence discloses that in the absence of a divergent nozzle a single stage turbine of the impulse type is wholly impractical. It is the patent granted to Wolke upon which the defendant relies to show anticipation. This patent is now owned by the defendant, it having been procured since the institution of this proceeding.

The Wolke patent discloses a slightly divergent nozzle, the wheel buckets and reversing chambers are U-shaped, and their arrangement with reference to the periphery of the wheel does not differ materially from that in the Terry patent. The drawings of the patent, Fig. 2, indicate that three series or sets of reversing chambers were used, with a nozzle to each set, and that thirteen chambers constitute a series or set. The nozzle which discharges steam into the wheel buckets is located behind each series of chambers. There is no reversing chamber beside the nozzle or to the rear of it; the space at the rear being left open. The main exhaust, according to the specification, seems to be between the clearance of the wheel buckets and the reversing chambers, the edge rings of the rotary being beveled off "to diminish friction and back pressure and facilitate the escape," and the exhaust is "still further facilitated" by the omission of one or more buckets immediately back of each nozzle. The jet discharge from the nozzle is directed towards one side of the rotating wheel buckets, while the discharge ends of both the wheel buckets and the reversing chambers are in advance of their receiving ends, but to what extent is not disclosed.

No turbines were ever constructed under this patent. A model was built by Mr. Wolke in February, 1901, in which one nozzle was used in connection with forty-six reversing chambers. Soon after the com-

pletion of the model it was given a test with compressed air, but what efficiency it disclosed I am unable to gather from the evidence. The plates separating the reversing chambers were afterwards recessed at the center to assist the flow of dead steam to the exhaust, and a deflector was put in behind the nozzle because Wolke thought it might give the steam "on its departure from the guide and wheel buckets" a better chance to escape. In the model (which was a small affair, the diameter being only five inches) the delivery end of the reversing chambers is in advance of the receiving end, but the receiving end is not in the rear of the discharging end of the nozzle, being, if anything, slightly in advance of it. There being no reversing chamber beside the nozzle with its receiving end at the rear of it, a substantial portion of the primary steam, when the nozzle is coincident with the mouth of a wheel bucket, is not returned as secondary steam into the wheel buckets, but is lost. In this respect it differs from Terry's construction in a very important particular. Then, again, the fact that the central portion of the plates in the reversing chambers of the model were recessed to permit the exhaust of the dead steam—a matter not thus provided for in the specification of Wolke's patent—would indicate that the exhaust passages *34* in the central portion of the plates of the reversing chambers in the Terry device were of special importance, as would also the crescent-shaped recesses in the edges and near the center of the plates of the reversing chambers of defendant's alleged infringing devices, hereafter considered.

Although Wolke's device contemplates the use of a slightly divergent nozzle and the helical flow of the steam, by means of reversing chambers arranged mouth to mouth with the buckets of the wheel, it was without means for properly conserving the steam so that its energy might be fully availed of; and it would seem that no adequate means were provided for eliminating the dead steam from the chambers and buckets—a matter which would materially affect its efficiency. I am therefore unable to find that the Terry patent was anticipated by that of Wolke.

In the construction of turbines under the Terry patent for commercial use the complainant, instead of completely encircling the wheel, has arranged its reversing chambers in a series of four or five chambers to a nozzle, leaving spaces between each series, which operate as an additional exhaust. On this account the defendant contends that the commercial machine constructed by the complainant is not built in accordance with the specification and claims of the patent, and that if the reversing chambers completely encircled the wheel, the apertures *34* provided for the escape of dead steam from the central portions of the reversing chambers (*34* in Figs. 2, 5 and 8) would be inadequate and render the turbine impractical.

The primary question, therefore, seems to be whether the specification and claims of the patent should be so limited as to confine complainant to expanding nozzles and suitably arranged reversing chambers entirely surrounding the periphery of the wheel. In the specification, in speaking of the reversing chambers, it is said that "these chambers are arranged in circular series, lapping one upon the other in the

form of a series of steps"; but nowhere does it state that the reversing chambers shall entirely surround and enclose the periphery of the wheel. Such an arrangement might be necessary if all the buckets of the wheel were to be employed at a single instant, and the maximum power of the wheel developed. But it is quite possible that for many purposes the amount of power which would be developed under such an arrangement would not be required. The evidence discloses that a wheel two feet in diameter, in the periphery of which are located some seventy buckets confronted by three sets of reversing chambers, each set containing five chambers and a single jet, will develop 30 horse power, a very substantial power for ordinary purposes; and that when so arranged the greater proportion of the wheel buckets will not be confronted with reversing chambers at any one instant and will be nonactive. Now in view of this and the further facts that the patentee states that his preferred form of arrangement is one jet to four reversing chambers and that the spacing of reversing chambers by omitting one or more at intervals about the periphery of the wheel is an obvious thing and was old in the art, is it not more reasonable to infer that the patentee intended to disclose in his specification a construction which would permit of being used in the above-stated way and as the special requirements for power might demand than that he intended to limit his construction to a series of reversing chambers entirely surrounding the periphery of the wheel? A set or series of four or more reversing chambers, constructed in accordance with the specification, is circular in form and the words employed in the specification—"a circular series of reversing chambers"—do not necessarily confine the construction to a set or series of chambers entirely surrounding the wheel. Furthermore, the patentee expressly states that he does "not wish to be understood as limiting himself to the precise form of construction shown and described" and reserves the right to make some changes therein. And taking the specification as a whole, it seems to me that the patentee is entitled to be protected in the use of the construction employed in his commercial turbine to the extent that the claims of the patent, reasonably construed, may cover such construction and do not call for chambers entirely surrounding the wheel.

It should also be noted that the complainant's expert states that a wheel with reversing chambers constructed in accordance with the specifications of Terry's patent and entirely surrounding the periphery of the wheel, would be practical and efficient. The fact that the commercial wheel has not been so constructed does not necessarily militate against this view, for wheels of this type are small and the amount of power liable to be desired in a majority of cases is readily developed with the means provided by the Terry patent when no more than three to ten sets of reversing chambers are used. Consequently it is as reasonable to believe that turbines have not been constructed with reversing chambers entirely surrounding the periphery of the wheel for commercial purposes because there is no adequate demand for machines developing that amount of power as that when so constructed they would be impractical. I find, therefore, that the contention of the complainant as to this matter is the more reasonable.

Are the claims here in issue, when fairly construed, limited to a construction involving reversing chambers entirely surrounding the wheel? No contention is made that claims 1 and 5 are so limited. The contention of the defendant with reference to claim 1 is that its language does not include a function of complainant's device which differentiates it from the prior art. It is an undeniable fact that in the Terry construction, whenever a wheel bucket is receiving primary steam it also receives secondary steam, while in the Wolke patent this would be true only when the nozzle is straddling the partition between two wheel buckets and discharging primary steam into both of them; and this is so for the reason that in the Terry device there is a chamber with its receiving end back of and contiguous to the discharging end of the nozzle, while in the Wolke patent there is none. As stated by complainant's expert and admitted by the defendant, under the Terry device "each wheel bucket receives both primary and secondary steam acting at the same time, at all times it is receiving primary steam at all." While the language of the claim may be broad enough to include a construction under which secondary steam may at some time be found acting in a bucket with primary steam and does not clearly limit the claim to a construction under which secondary steam is always found acting in a bucket with primary steam, it is evident that when the claim is read with reference to the means specified by Terry to accomplish this result, it was not intended that it should be given the enlarged scope contended for by the defendant, but should be restricted to cover the special function of the patent; and such, I find, is the reasonable construction of the claim.

It may be further stated with reference to this claim, that the term "primary steam," as used therein and explained in the specification, means steam as it is discharged from the nozzle to the bucket, on its first passage through the bucket, and "secondary steam" means steam as it is discharged from reversing chamber to bucket on its second passage through a bucket. If the patentee was mistaken in thinking that the flow of the steam through the bucket was in a layered whirlpool, as the defendant seems to think the specification discloses, that does not alter its character as primary and secondary steam.

As to claim 5, the defendant says that it refers to the location of the jet within the mouths of a part of the reversing chambers, and that the words "in a part of the said reversing chambers" mean in a part of the total number of the reversing chambers, and not in a part of a particular chamber. As to this matter, the complainant is in full accord, for, in the brief of its counsel it is said:

"Our view is that the words 'in a part of the said reversing chambers' mean that the jets are in some, but not all, of those chambers."

And as to the words of the claim, "and in the mouth thereof," the defendant's contention is that the language—

"requires such jet to be actually within the mouth of the reversing chamber, * * * so that the steam passes from the nozzle into and from the mouth of said reversing chamber into the mouth of the wheel bucket, instead of passing directly from the nozzle into the wheel bucket."

This is manifestly a refinement which the language does not call for. The mouth of a reversing chamber, if no nozzle is inserted, extends from side to side and top to bottom of the chamber, and the nozzle is within the mouth thereof, within the terms of the claim, when it is inserted through the walls of the chamber, and this without regard to whether that portion of the nozzle opposite the side that merges into the wall of the reversing chamber extends all the way or only part of the way to the edge of the advanced plate of the chamber; and the steam is discharged from the jet or nozzle into the wheel bucket, under any reasonable construction of the language, whether that side of the nozzle opposite the one that merges into the side of the reversing chamber extends to the outer edge of the plate as above stated or not. Figs. 7 and 8 of the patent would indicate that the side of the nozzle opposite the side that merges in the side wall of the chamber extends to the edge of the advanced plate. This, however, is entirely immaterial so far as the operation or functioning of the device is concerned, and, so construed, the claim covers the construction described in the specification in the particulars to which it relates.

Claim 3 calls for a "wheel with buckets and reversing chambers of a substantially semicircular form and with the discharge for the steam therefrom at their central portion instead of at a circumferential portion." In construing this claim a dispute has arisen as to what is meant by the words "with the discharge for the steam therefrom at their central portion instead of at a circumferential portion." The defendant regards this language as limiting the claim to a construction where the discharge of the steam from the reversing chambers or buckets is all or substantially all through the crescent-shaped openings *34* located in the central portions of the broad sides of the chambers or buckets, and as excluding a construction which would permit of the discharge of any appreciable amount of steam, as an auxiliary, through the clearance between the wheel buckets and reversing chambers, or from the mouth of a bucket when it is not confronted with a chamber. While in the specification the patentee provides that the primary discharge into the exhaust chamber should be through the crescent-shaped openings *34*, and by the use of the term "primary" indicated that in some forms of his construction he did not mean to preclude himself from making use of an auxiliary discharge, it is evident that a construction affording an auxiliary discharge from the clearance between the buckets and reversing chambers, or from a bucket when not confronted by a reversing chamber, would not give full expression to the language used in claim 3, where it says that the discharge of the steam shall be "at their central portion instead of at a circumferential portion," for steam discharged into the exhaust from the clearance between the buckets and the reversing chambers, or from a bucket when not confronted by a reversing chamber, would be discharged at a circumferential portion rather than at the central portion of the chambers or buckets. In view of this and the fact that the specification also provides for a form of construction in which the wheel would be entirely surrounded by reversing chambers and have a steam-tight chamber to prevent the escape of the steam from the

clearance between the buckets and reversing chambers to the exhaust, it seems to me that the latter is the form of construction contemplated by the claim and that it does not cover a construction which permits the escape of steam from the circumferential portion of the buckets or chambers.

The object in an impulse steam turbine, as in any other steam engine, is the transformation of the steam into mechanical power without loss of energy. This was accomplished in such a marked degree by Terry in a field where prior inventors, in endeavoring to accomplish the same purpose, had failed, that I find there was sufficient invention, in the means employed to bring about the result, to sustain the patent. I am also aided in reaching this conclusion from the position in the commercial world which the Terry turbine took immediately upon its being put upon the market, creating, as it did, a monopoly in the field to which it belonged, and maintaining the same for a period of about six years and down to the time the defendant's alleged infringing device was introduced.

At the time of the institution of this proceeding the defendant was manufacturing and putting upon the market a single wheel helical flow impulse turbine. In its catalogue advertising this turbine, the division plates of the wheel buckets appear to be arranged straight across the periphery of the wheel as in the Terry device. The reversing chambers consist of four chambers to a series. The division plates of the chambers are not arranged diagonally, but the receiving end of each chamber is so constructed as to be slightly in the rear of the discharging end. The nozzle or jet is inserted through the wall of the second chamber and is within the mouth thereof, although the side of the nozzle opposite the side which merges in the wall of the chamber extends to the edge of the advanced plate. In the edge, near the central portion of the plates separating the chambers, there are crescent-shaped recesses, and in the advance plate of the fourth or last chamber there is a deep U-shaped cut. This device is of substantially the same construction as that indicated in Fig. 2, United States patent 944,839, granted to Bentley, December 28, 1909, and which the defendant now owns; the material difference being that in the Bentley device the crescent-shaped recesses in the plates between the chambers and the deep U-shaped cut opening into the exhaust are not present and are not disclosed in the specification of that patent. It is not disputed but that the device performs the same function as that set forth in the first claim of the Terry patent and that whenever the jet discharges steam into the wheel bucket, there will be present in the bucket both primary and secondary steam acting at the same time. I find that this device infringes claim 1 of the Terry patent.

As to the crescent-shaped recesses in the plates between the reversing chambers of this device, the defendant's position is that they are not there for any useful purpose, but were cut by the hub of the milling tool used in recessing the chambers; the chambers being made from a single piece of metal. No reason, however, is advanced by the defendant for the presence of the long U-shaped cut opening to the exhaust through the plate of the fourth chamber. The contention of the com-

plainant is that the crescent-shaped recesses in the central portion of the plates, together with the deep U-shaped cut, furnish means for the escape of the dead steam to the exhaust and perform the same function that openings *34* in the plates of the Terry reversing chambers perform. Complainant's expert says this is their function and that they unquestionably so act as to permit the passage of the dead steam from the chambers to the exhaust. While these recesses were undoubtedly caused by the hub of the tool used in milling the chambers, nevertheless, it appears in defendant's power article of February 20, 1912, that the milling of the chambers can be accomplished by cutters which would not cause the recesses. This fact, taken in connection with the unexplained deep U-shaped cut in the plate of the fourth chamber, leads me to believe that their presence in the defendant's device is for a purpose and that they perform an essential function in the operation of the chambers. But, having construed claim 3 as contemplating a combination or arrangement of means whereby all or substantially all of the steam from the buckets or reversing chambers is discharged into the exhaust through openings in the central portion of the broad sides of the buckets and chambers, and as not permitting the discharge of any substantial part of the steam through their circumferential portion, I am unable to find that the use made by the defendant of the recesses and U-shaped cut in the reversing chambers infringes claim 3, as under its construction and arrangement a substantial part of the steam is discharged from the circumferential portion of the buckets or chambers.

As above stated, the defendant's first infringing device is of the same construction as that indicated in Fig. 2 of the Bentley patent, No. 944,839, except as to the crescent-shaped recesses and U-shaped openings, In considering the question whether this device infringes claim 5, I shall refer to Fig. 2 of Bentley's patent. The presence of the first chamber *k*, in the device is necessitated by the fact that the receiving end of the chamber beside the nozzle is not at the rear of the discharging end of the nozzle, and chamber *k* performs the function which a chamber beside the nozzle would perform if its receiving end was at the rear of the discharging end of the nozzle, as in the complainant's device. The insertion of the plate between the chamber containing the nozzle and the chamber back of it produces a mere change in form and, if the plate were omitted, the device would perform the same function. That this is so appears from what Bentley (who is the engineer in charge of the defendant's turbine department) says in his patent No. 944,839, page 2, lines 100 to 109:

> "My invention may be somewhat modified without departing from its essential features. For example, the supplemental chamber *k*, instead of being separated from the more advanced chambers by the partition *j*, may be merged therewith as indicated in Fig. 4."

I therefore find that this device also infringes claim 5 of the Terry patent.

Three months after this suit was begun, the defendant ceased making use of the infringing device heretofore considered and adopted a

modified construction such as is shown in Fig. 2 of United States patent 1,042,871, granted to Bentley October 29, 1912, which patent is now owned by the defendant. This device was introduced into the case by the defendant, and full proofs were offered with reference to it. It has a series of five U-shaped chambers. The first chamber is at the rear and (for all practical purposes) at the side of the nozzle or jet. Its receiving end is also at the rear of the jet and the chamber performs the same function as the one beside the jet in the Terry patent, which has its receiving end similarly situated. This chamber, in connection with the jet, causes the wheel to receive both primary and secondary steam in the same bucket acting at one and the same time, whenever the bucket is receiving primary steam at all. The difference in the construction of the chamber with reference to the nozzle is simply one of form and is brought about by making the plate separating the first chamber from the one immediately in front of it thicker at the discharging side than at the receiving side; the thickness at the discharging side being sufficient to inclose the nozzle. If the thickness of this plate was reduced between the space occupied by the nozzle and the receiving end, the arrangement of the nozzle and chamber would duplicate that of the Terry device. I find that it infringes both claims 1 and 5.

In this device the plates of the chambers in advance of the first chamber slant diagonally, their receiving ends being at the rear of the discharging ends by the width of a bucket. At the center of each of these plates are crescent shaped recesses and a deep U-shaped cut in the last plate, the same as in the previous infringing device, only somewhat larger. I find, however, that it does not infringe claim 3 and for the same reason that the previous device did not infringe.

In view of the conclusions here reached, it does not seem necessary to consider the validity of claims 8 and 9 of United States patent No. 793,857, granted to Terry July 4, 1905, or whether they are infringed by either of the defendant's devices.

There may be a decree for the complainant in accordance with the prayer of the bill.

SAFETY CAR HEATING & LIGHTING CO. v. UNITED STATES LIGHT & HEATING CO.

(District Court, W. D. New York. December 11, 1914.)

No. A–2.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—CAR LIGHTING SYSTEM.

The Creveling patent, No. 747,686, for a system of electrical regulation adapted for use in supplying current to the lamps of railroad cars, consisting essentially of an axle driven generator in connection with a storage battery, which takes any surplus current and supplies the same to the lamps when the car slows down or is at rest, was not anticipated, covers a practical and operative device, and discloses invention. Claims 1–8 also *held* infringed.

In Equity. Suit by the Safety Car Heating & Lighting Company against the United States Light & Heating Company. On final hearing. Decree for complainant.

Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, H. S. Duell, R. S. Blair, and D. G. Haynes, all of New York City, of counsel), for complainant.

Jones, Addington, Ames & Seibold, of Chicago, Ill., and Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y. (W. Clyde Jones, Arthur B. Seibold, and Edwin B. H. Tower, Jr., all of Chicago, Ill., of counsel), for defendant.

HAZEL, District Judge. The bill in this case alleges infringement of letters patent No. 747,686, granted to John L. Creveling, December 22, 1903, for a system of electrical regulation adapted for use in supplying current to the lamps of railroad cars. There are 11 claims in the patent, but 8 only are alleged to be infringed by the lighting system of the defendant company. This court recently had before it for determination in another case between the complainant and defendant herein, argued and submitted just before this case was submitted for decision, the asserted infringement of the Thomson patent which it was claimed was an improvement on the Creveling patent in suit, and the opinion in that case is filed simultaneously with this. 222 Fed. 318.

We are herein principally concerned, first, with the combination of means whereby the current output of the generator, which is belted to the car axle and which runs at rates varying with the speed of the train, is maintained at substantially constant voltage, thus producing steady and continuous car lighting; and, second, with the combination for protecting the storage battery from overflow or exhaustion—the means affording such protection being an automatic device which opposes the generator voltage and modifies or alters the flow of the generator current by increasing or decreasing it at variable stages or periods.

The specification of the patent under discussion, supported by the explanations of the expert witnesses, clearly indicates that in the described system of electrical regulation the total current output of the

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

generator is steady and continuous while the train runs at a rate of 15 miles or more an hour; that the lamps are in parallel and the current controlled by a main field coil *8* in the main circuit, forming part of the field winding of pilot motor *7*, while the other part of the field winding of the motor is coil *9*, thinner than the main field coil, which opposes the latter and causes the fields to operate so as to neutralize one onother. The pilot motor is not in the magnetic field and therefore does not operate, and any slight armature current there may be is without operative effect; but the function of coil *9* is to receive the excess current flowing through coil *8*, the field of which then preponderates, causing the armature to rotate in such direction that the worm *36* and wheel *37* swing the rheostat arm *20* to provide the additional resistance in the field circuit of the dynamo. By this arrangement of the parts there is produced a weakening of the field circuits of the dynamo which then operate to restore the current to a normal flow. When there is a decreased current in the generator field there is a stronger flow in coil *9* which causes the actuating means of the rheostat arm—that is, the worm and wheel—to rotate in an opposite direction, decreasing the resistance of the field circuit of the dynamo and securing a normal current. The changes of the voltage are frequent, and, owing to the worm and wheel connection, the movements of the rheostat arm are also frequent, corresponding thereto to maintain a practically constant generator output until the battery is sufficiently charged, and this, regardless of the varying speed of the generator or variations in resistance of the main circuit. It will be understood, I take it, from what has been said, that variance in the current flow due to variation in the speed of the train or to the turning on or off of the lights is equalized by the adaptation of the means hereinbefore described, and that when the lamps are lighted the total current from the dynamo is divided between the lamps and the storage battery; the former taking only the amount required by them for lighting, and the latter the balance for subsequent utilization.

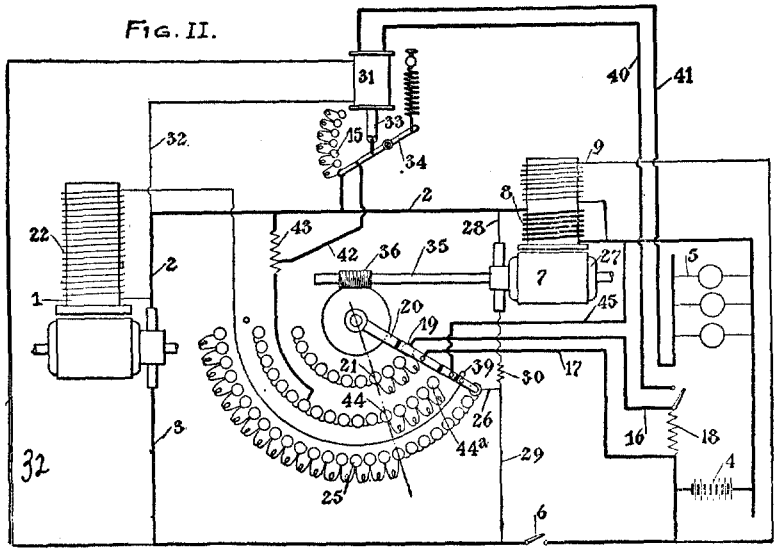
The mechanism by which the storage battery or accumulator is protected comprises a solenoid device (*31*) connected across the principal wires of the generator and on the side of the line switch (*6*). When the battery is charged to nearly its full capacity the voltage increases, so as to enable the solenoid to influence the contact arm (*34*) and bring into operation a resistance (*15*) and hence a lowering of the electromotive force in the field coil (*9*) below the force of the current which flows through the main coil and causes the pilot motor to rotate in a direction to effect another resistance in the main circuit which reduces the generator output, again neutralizing the current of the field coils. The function of the automatic switch is manifestly to break the main circuit whenever the generator voltage is low, although there may be a discontinuance of the current to the battery while the switch is closed, this occurring whenever the flow is greatly diminished, as, for instance, by the stopping of the train or by its slowing down below 15 miles an hour. In further explanation of the function of the protection device when the train starts up after coming to a full stop, the complainant's brief accurately says:

"As coil *31* is on the side of the automatic switch away from the battery, it can get current from the battery only when this switch is closed. As the train again speeds up or starts up, the automatic switch *6* is closed, and the original cycle of operations completed, except only in the case in which the battery is still fully charged; that is, at about its full-charged voltage. If such is the case, the coil *31* immediately performs its functions to cut down or cut off the charging current. If, however, the battery is not at or near this full-charged voltage, the practically constant generator output, at its normal value, is maintained as usual."

The principal advantages claimed to attach to the patent in suit are that the normal relation of battery and generator is at all times maintained and that any depletion of current in the battery by reason of lamp load or from stoppage of the train is instantly made good, thus securing continuous and steady lighting for the cars.

A diagrammatic sketch (Fig. II) attached to the specification is herewith reproduced.

Fig. II.



Claim 5, which is typical of the other claims, reads as follows:

"5. In a system of electrical distribution, the combination of a generator, and accumulator charged thereby, means for maintaining the current output of the generator practically constant throughout changes in speed, and automatic means, controlled by voltage of the accumulator, for altering the current upon changes in voltage of said accumulator."

The claims do not in terms refer to a railroad car lighting system; but the specification describing the generator and its purposes, and the adaptation for charging the battery to maintain the current output constant, leaves no doubt in the mind that the claims are in fact limited to an electric car lighting system. The prior art, thus limited, is subject to scrutiny.

The defendant insists that, long before the invention in suit was conceived, generator regulators were used commercially, first separately, and later in connection with a protection device to prevent overcharging the battery by shutting off the current or reducing its flow. It is no doubt true that the operation of an electric magnet in series with a generator or with the main circuit to control a variable resistance rheostat located in the field winding to vary the current from the dynamo was an old expedient in the electric art at the date of the Creveling patent. The patents to Brush, No. 224,511, and to Weston, No. 292,715, for example, describe means for maintaining a constant current output. Brush used a series wound generator, while Weston used one that was shunt wound; both preferably used a step by step wire rheostat for their variable resistance device; but they used them in different fields, Brush in shunt, and Weston in series. Both systems related to arc lighting, and in my estimation have no material bearing upon the combination in suit, for they contain no means for charging a storage battery to supply current to the lamps when the generator fails to do so.

The patent to Faure of 1888 is a more important citation, and on inspection plainly reveals a storage battery in connection with an axle driven generator for car lighting, the battery being used to supply current to the lamps when the car slowed down or was at rest. Faure, who was a skilled inventor of storage batteries and electrical appliances generally, was the first person to invent a storage battery for supplying current to the lamps when the generator was at rest. He adapted an automatic switch to connect and disconnect the battery from the main lead, and he preferably combined the same with a current regulator; but he appears to have failed absolutely to markedly advance the car lighting art, or to make it as efficient as Creveling designed to do. Faure used a shunt wound type of generator, and his variable resistance was of the step by step rheostat type in series with the shunt field winding; but concededly his patent went no further and is devoid of means for protecting the battery from overcharging. To provide against failure of the current to flow to the lamps while the car was stationary or slowing down, he connected a secondary battery or accumulator in a separate circuit, and utilized it at such periods to furnish the required current. Complainant's expert witness swears that the arrangement of the parts in the Faure patent allows the current from the battery to reach the dynamo when the latter is motionless, and that at times the dynamo supplies current to the storage battery and to the lamps, but that at other times the storage battery supplies current to the generator resulting in much waste of electricity, an objection which Creveling designed to remove. I am convinced that the two patents are essentially different and operate on principles at variance with one another.

In the Brush patent, No. 281,175, which was for a stationary lighting system, there is a combination of a constant current regulator, a storage battery, and a device for preventing overcharging of the battery; but when the battery is completely charged it is disconnected

from the line by an automatic switch device. It is clear enough that said switch does not operate to regulate the current output as does the said automatic stop charge regulator of the patent in suit. Nor do I find anything in the Badt patent suggestive of complainant's combination, save that it makes clear that storage batteries were used in combination with generators, receiving current from them, and that overcharging was prevented by disconnecting them from the circuit by a suitable stop charge device. Badt did not have in mind an adaptation for maintaining a constant current output from the generator for the purpose of supplying current to the lamps from both the generator and battery, but simply means for keeping the charging current constant—an adaptation quite different from that of Creveling.

I now come to the Emil Dick prior car lighting systems, the United States patent No. 682,978, dated September 17, 1901, and the Dick foreign publications, to which great importance is attached by the defendant to establish the invalidity of the patent in suit. It is urged that Dick disclosed the precise combination in suit, namely, a constant current regulator for keeping the generator current practically constant during the time the battery is being charged, together with means for protecting the storage battery from the current, and that the latter means consisted of a relay which operated automatically, by reason of the increased voltage when the battery was sufficiently charged, to modify the current so as to prevent overcharging. There was much testimony in relation to such Dick apparatuses and prior publications, and although they are by far the best references and bear definitely on car-lighting systems, I am nevertheless of the opinion, after carefully considering everything that has been argued by counsel for defendant, that neither the Dick patent nor his car-lighting systems are anticipations of the patent in suit.

The lighting system of Creveling was essentially different from those of Dick, for one of the objects of the former was, I repeat, to provide means for keeping the generator current constant, or as nearly so as possible, by using the main circuit through which the generator current flowed, while the object of the latter was to provide means for changing the circuits, resistances, and regulating coils whenever the lamps were turned on or off, without, however, having in mind keeping the generator output constant or protecting the battery. The automatic means in Clevering's lighting system were controlled by the voltage of the battery. This is shown by the fact that the relay coil modifying the current is on the generator side of the automatic switch or across the main terminals, while the relay in the Dick lighting systems was connected across the line on the battery side of the main switch *E* and was not responsive to the generator voltage with the switch open. The disadvantage arising from such location of the switch was that the modifying device at all times remained energized, even when the train stopped and the switch closed, which decreased the generator current and interfered with suitably lighting the cars.

In Vienna Street Poelten Lighting System, cited to anticipate or limit the claims of the Creveling invention there were, it is true, means

for keeping the charging current constant while the lights were turned out; but there is nothing therein to suggest means for maintaining practically constant the generator output. It is rightly claimed, I think, that the controlling coil in the Dick apparatuses is cut out when the lights are turned on, and that then both the generator and the battery supply the current required by the lamps; the battery voltage meanwhile being continually decreased so that the generator, to continue the light, is required to supply an increased current output which obviously would be varied by adding to or taking from the lamp load. Certainly there is no such constancy of current during the period of illumination or while the battery is being charged as in Creveling's adaptation. The operation of charging the battery without interfering with the luminosity of the lamps was of the essence of his invention. In order to charge the battery in the cars and trains in which the Dick lighting systems were installed, so that lighting would be uninterrupted when lighting was required, it was necessary to run the cars or trains at times when lighting was not required. How, therefore, can it be doubted that Creveling, assuming the operativeness of his invention which secured uniform lighting of the car at all times and under all conditions without extra runs, made a meritorious advance in the art?

There was also evidence indicating that the stop charge relay of the Dick apparatuses operated only intermittently. The Elektrotechnische Zeitschrift, under date of April 28, 1898, from which I quote, would seem to bear out this view:

"The relay only enters into operation when the charging is finished, while the same is disconnected when the dynamo supplies current to the lamps. * * * The circuit, however, has undergone a modification, viz., in the conductor leading from the dynamo to the main line the entire resistance *B* and an additional winding of the regulator is interposed, while the previous connection with the relay is interrupted."

From this it would seem to be true that the batteries or accumulators of the Dick devices were not kept fully supplied with current by a battery controlled by its voltage, and evidently had a tendency to become depleted while the lights were out.

The "Danish court train system" for lighting trains, as distinguished from separate car lighting, is also in my judgment essentially different from the apparatus in suit. It was necessary in such lighting system to keep two storage batteries in each car; one being used to supply the lamps with current after exhaustion of the other and while the latter was being recharged. No means are shown therein for constantly controlling the generator output. The feature of connecting the relay on the battery side of its automatic switch, and not on the generator side, was retained, with the result that such device failed to open at the proper time, and the automatic switch was ineffective upon its voltage. Nor are means shown for controlling the battery by the changes of the voltage, or of protecting it when a certain voltage is reached, and for these reasons the system was objectionable and faulty and incapable of furnishing continuous and steady illumination to trains running at variable rates of speed.

In the Aussig-Teplitzer lighting system there is also a variation in the generator output, owing to the utilization of changing resistance shunts around the current coil of the regulator, and to the coaction of the voltage coil with the current coil. No means are shown therein for opening the automatic switch device when the train stops or decreases its speed. While there is much testimony to show that such apparatuses embodied both the constant current regulator and battery protection device of the patent in suit, I am nevertheless persuaded by the evidence in its entirety that the Creveling lighting system operated on a different principle, and that in the Dick systems the generator output was not maintained practically constant, as in the patent in suit, and that there were no similar automatic means for controlling the battery voltage for altering the current upon the battery changes.

Was the patent in suit impracticable and inoperative? Impracticability and inoperativeness are asserted upon various grounds, but principally upon the ground that there was too much friction in the triple sliding contacts or in the wire rheostat in series with the shunt field winding of the generator. Considerable time was devoted to this subject, but in view of the broad scope to which I think the claims are entitled it would serve no useful purpose to extend this opinion by a narrative of all the asserted defects in the Creveling system. While it was not free from crudity and minor imperfections, I feel certain that it was operative.

The complainant did not rely entirely upon the presumption of operativeness and practicability which goes with the grant of a patent, but supported the presumption by the testimony of Hammer, Thomson, and Hulse. Professor Hammer substantially testified that the step by step rheostat with wire resistance units in series with the shunt field winding of the generator was a practical and operative device. It was not, he said, the precise form of rheostat employed at present, important improvements having been made—the wire rheostat having given place to the carbon disk rheostat; but in his opinion Creveling's adaptation was practicable. Thomson testified that he was present when an apparatus constructed in accordance with the patent in suit was successfully operated; that such sytsem with a regulator arm over a step by step rheostat was operated in the plant of the Safety Company for a period of nine months, and that during such period of time he tested the regulator, using a spur gear in place of the worm and wheel arrangement of the specification in suit, and an arm sliding up and down, instead of in a semicircle; but these differences were nonessentials. Hulse testified that in 1902 he was in the laboratory of the Safety Company, and saw there the Creveling lighting apparatus in operation, that the illumination of a bank of lights was satisfactory, and that there was no apparent trouble from the use of the triple rheostat.

It is, however, conceded, as heretofore stated, that in the early stages the apparatus did not operate with the same facility as later, when a carbon disk resistance was substituted for the wire step by step resistance; but, as said by Judge Coxe, in Electric Smelting & A. Co. v. Pittsburg Reduction Co., 125 Fed. 933, 60 C. C. A. 636, 643:

"It is rarely that an invention develops ultimate perfection in the hands of the inventor. The test of actual use discovers defects to be remedied and suggests improvements to be made. If the inventor produces a new and useful result, he does not lose his reward because he, or some one else, subsequently renders it more useful."

And the learned court then stated in the opinion an analogous case from a kindred art which bears instructively on the present case.

Although the elements of the combination in suit separately were old, they nevertheless were substantially new in combination and in their mode of co-operation, and the defense of noninfringement, in view of the liberal scope to which the patent is entitled, requires but brief attention. Both the so-called stop charge and taper charge systems of the defendant company are operated in substantially the same way as the Creveling system in suit, and they accomplish the same result. There are indeed differences of construction, as, for instance, the strengthening of coil (*9*) in the defendant's system instead of weakening an opposing coil as in Creveling's system; the use of a weight for retraction instead of a spring; and the use of a carbon pile resistance instead of a wire resistance. But I think these differences or improvements are nonessential. It is immaterial that Creveling's generic invention was later improved by the defendant, or by Moskowitz, or by Thomson, by the substitution of one element for another. The employment by the defendant of the means relating to governing or controlling the output of the generator for charging the accumulator and for lighting, and also the means relating to the automatic altering of the current by changes of the voltage of the battery so as to protect it from overcharging, constitutes infringement.

A decree may be entered in favor of the complainant, with costs, holding claims 1 to 8, inclusive, valid, and infringed.

SAFETY CAR HEATING & LIGHTING CO. v. UNITED STATES LIGHT & HEATING CO.

(District Court, W. D. New York. December 11, 1914.)

No. A-3.

PATENTS ⊂328—INVENTION—DYNAMO SUSPENSION.

The Thomson patent, No. 881,743, for dynamo suspension for car lighting systems, *held* void for prior use and lack of invention.

In Equity. Suit by the Safety Car Heating & Lighting Company against the United States Light & Heating Company. On final hearing. Decree for defendant.

Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, H. S. Duell, R. S. Blair, and D. G. Haynes, all of New York City, of counsel), for complainant.

Jones, Addington, Ames & Seibold, of Chicago, Ill., and Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y. (W. Clyde Jones, Robert Lewis Ames, and Edwin B. H. Tower, Jr., all of Chicago, Ill., of counsel), for defendant.

HAZEL, District Judge. Infringement is alleged of patent No. 881,743, for dynamo suspension, issued March 10, 1908, to William I. Thomson, assignor of complainant. The dynamo is used in connection with the electric lighting of railway cars, and the specification is descriptive of a pulley or pulleys mounted fast upon the car axle and connected by belts to a corresponding pulley or pulleys upon the armature shaft of a generator which supplies the current to the lamp circuits, as is more particularly explained in two other actions between the same parties for infringements of Creveling patent, No. 747,686, and Thomson patent, No. 926,518, in which cases opinions of this court are this day filed. 222 Fed. 310, 320.

The object of the patentee herein was to provide means for mounting the dynamo and securely adjusting the same in position. The claims in issue are the sixth, seventh, and eighth, of which the sixth claim, for dynamo adjustment parallel to the axle, is the broadest. It reads as follows:

"6. In apparatus of the class described, in combination, an axle, a dynamo, power transmitting means interposed between said dynamo and said axle, means adapted to permit adjustment of the position of said dynamo in a direction substantially parallel to said axle, and means adapted to hold said dynamo in any one of various positions in the direction of said adjustment."

Claim 7 is for the suspension of the dynamo in a longitudinal direction, while claim 8 specifies that the dynamo is positioned beneath its point of suspension and that the adjustment is lateral and longitudinal.

The defenses are anticipation, limitation of claims, prior use, and noninfringement. There was evidence that prior to the patent in suit there had been in public use dynamo suspension for car lighting sys-

tems provided with means for longitudinal and lateral adjustment, and that there were also several prior patents embodying disclosures of dynamo suspension, axle driven, for car lighting systems, with means for adjustment parallel to the axle or for longitudinal or lateral adjustment. It will be necessary to refer to only two of the prior patents—patent No. 746,610, granted to Waddell & Brooks December 8, 1903; and patent No. 768,392, granted to Moskowitz August 23, 1904—to show the state of the art at the date of the invention in suit. These patents disclose means for dynamo suspension which, I think, embody the essential features of the patent in suit.

The Waddell & Brooks patent is for a dynamo suspended on a crossbar or shaft, and is attached laterally to the beams of the truck, with adjustment parallel to the axle. The construction is such that on passing bolts through elongated openings in the base of the bracket *H*, shown in the drawing attached to the patent, the feature of longitudinal adjustment becomes evident, while, by clamping arrangement on the shaft, lateral adjustment is made possible. The elongated slots are thought to serve the same purpose, and are readily caused to operate in substantially the same way as the slots at opposite ends of the shaft shown in the patent in suit. Hence the granting of a broad scope to claim 6 to include additional means of adjustment would scarcely be warranted. The so-called single bolt double slot arrangement of the patent in suit with one pair of slots at the end of the shaft is not, it is true, found in any of the prior patents or structures. Their adaptation, however, in the device in question, is thought devoid of invention. The evidence also shows that the Waddell & Brooks method of suspending the dynamo had been in public use prior to the invention in suit, on New York Central railway car No. 952, and that it included lateral and longitudinal adjustment.

The Moskowitz patent, to which reference has already herein been made, was for a modified form of the Waddell & Brooks structure, and contains means for adjusting the dynamo laterally and longitudinally on the car axle. I am satisfied by the proofs that such structure was also in public use prior to the invention in suit, on New York Central railway car No. 948. On comparing it with the Thomson structure, models of both being before the court, no essential difference in construction is found to exist. There are merely minor differences in the methods of assembling some of the parts. It was testified that said Moskowitz structure was provided with means for longitudinal adjustment and means for holding the dynamo in position after adjustment, and that there was nothing to interfere with readily altering the fastening means to permit lengthwise adjustment on the shaft.

The dynamo suspension installed on car No. 952 embodied the essential elements of claims 6, 7, and 8 in suit, although it had no adjusting slots at opposite ends of the crossbar, nor the single bolt double slot feature of complainant's patent. The addition of adjusting features of that type is not deemed a patentable improvement, but is regarded as the obvious expedient of the mechanic. Peters v. Hanson, 129 U. S. 541, 9 Sup. Ct. 393, 32 L. Ed. 742; Buck v. Timony (C. C.) 78 Fed.

487; Doig v. Morgan Mach. Co., 122 Fed. 460, 59 C. C. A. 616; National Harrow Co. v. Westcott (C. C.) 84 Fed. 671.

Importance is attached by the expert witness for complainant to the vertical suspension of the dynamo, which allows it to swing more freely when jarred by the motion of the train; but the patent in suit makes no claim to any particular alignment of the dynamo, and I do not think it involved invention to suspend it vertically rather than in the inclined position which was the common method of suspension.

Without considering it necessary to go into detail, I conclude that the evidence in its entirety was sufficient to establish prior installation by the defendant and public use on railroad cars in August, 1903, more than two years before the application in suit was filed, of a dynamo suspension apparatus embodying the essential elements of the patent in suit. And even though such patent in suit were not actually anticipated, it nevertheless was void for want of invention.

The bill is dismissed, with costs.

SAFETY CAR HEATING & LIGHTING CO. v. UNITED STATES LIGHT & HEATING CO.

(District Court, W D. New York. December 10, 1914.)

No. A–4.

PATENTS ⇐328—INVENTION—CAR LIGHTING SYSTEM.

The Thomson patent, No. 926,518, for an electric car lighting system, *held* void for lack of invention in view of the prior art.

In Equity. Suit by the Safety Car Heating & Lighting Company against the United States Light & Heating Company. On final hearing. Decree for defendant.

Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, H. S. Duell, R. S. Blair, and D. G. Haynes, all of New York City, of counsel), for complainant.

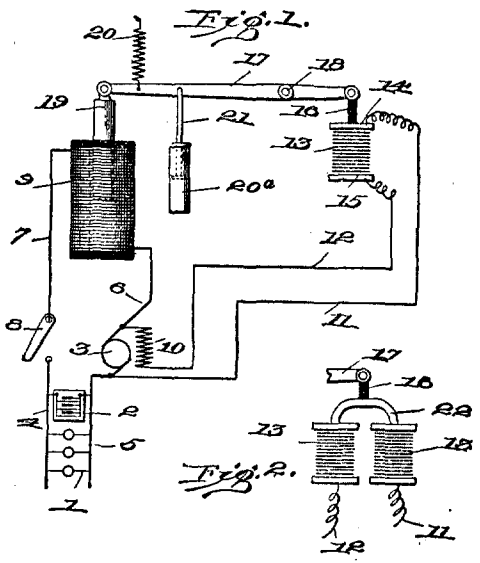
Jones, Addington, Ames & Seibold, of Chicago, Ill., and Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y. (W. Clyde Jones, Arthur B. Seibold, and Edwin B. H. Tower, Jr., all of Chicago, Ill., of counsel), for defendant.

Wm. Houston Keynon, Richard Eyre, and Gorham Crosby, all of New York City, for Gould Coupler Co., as amicis curiæ, on the question of patentable novelty of patent in suit.

HAZEL, District Judge. This is an equity action for the infringement of letters patent No. 926,518, granted to William I. Thomson June 29, 1909, on application therefor dated April 15, 1903, for an improvement in railroad car lighting, and particularly in the automatic regulation of the output of the generator which supplies the lamps with electric current. In systems of car lighting of this character, of which

there are several, the current is generated by a dynamo attached by a belt to an axle of the car and rotated thereby at variable speed.

The specification in suit, with the drawing attached thereto, describes a dynamo and a shunt field winding in the main circuit having serially included in its field a pile of carbon disks, or contacting electrodes, pressure on which decreases the aggregate resistance or opposition to the field current, while release of the pressure on it increases the resistance or opposition. In the main current there are also a storage battery, an automatic switch, a lamp circuit extending across the leads, a series coil controlling through a movable core, and a lever apparatus pivoted to control the pressure upon the carbon pile resistance; and reference is made to a dash-pot connected in such a way as to steady the movements of the lever by absorbing sudden shocks and jars, and to a spring arrangement which operates to oppose the attraction of the solenoid. The appended simplified sketch illustrates these features:



But to insure an accurate understanding of the patent in controversy a portion of the specification, referring to the figures in the sketch, is here quoted:

"The function of switch 8 is, as will be obvious from the drawings, to open the circuit through the dynamo 3 and prevent any wasteful discharge of battery 2. The coils of the field magnet or magnets of the dynamo are represented at 10 as shunt-wound, the leads of the shunt circuit being indicated at 11 and 12. Embodied in this shunt field circuit is a variable resistance, which is illustrated as comprising a pile or series of carbon disks or other contacting electrodes 13 located between the plates 14 and 15 to which the leads 11 and 12 are connected. The lower of these plates is stationary, and the upper one is carried by an insulated arm 16 pivotally connected to the end of the lever 17 pivotally mounted at 18. To the other end of this lever is pivotally connected the plunger 19 of the solenoid 9. A retractile spring 20 tends to rock the lever 17 on its pivot, so as to increase the pressure of the plate 14 on the pile of carbon disks, thereby lessening the resistance of such pile and the resistance of the field circuit of the dynamo. There is also preferably provided a means for absorbing any sudden movements or jerks of the lever 17, as a dash-pot 20a having its piston 21 connected to one of the arms of the lever."

According to the evidence, the assembled parts operate in such a way that, when an increased current passes either to the storage battery or to the lamps, there is created an opposition or interference in the flow of the current because of the pull upon the plunger of the solenoid, resulting in relieving the pressure on the carbon pile, and consequently lessening the current in the field circuit bringing the

same to the normal output, while on the other hand when an increase of current supply is required, the strength of the solenoid is diminished by automatic reverse action. The function of the storage battery is, of course, to supply current to the lamps when the car is at rest or when it has decreased its speed to such an extent that the current from the dynamo is insufficient to keep the lamps lighted or to keep them from flickering.

The patent has four claims, all of which are alleged to be infringed by the defendant company. It will suffice to set out claim 1, which broadly describes an automatic regulation of a shunt wound generator. It reads as follows:

"1. In combination, a shunt wound generator having serially included in its field circuit a plurality of contacting electrodes and positively acting electro-magnetic means controlled by the current output of the generator for varying the pressure with which said electrodes contact."

Claim 1 emphasizes three important features: (1) The circuit connection of the variable resistance; (2) the character of the resistance varying apparatus to be employed; and (3) the means for controlling the apparatus. Claims 2, 3, and 4 are limited to a dynamo in a lighting system driven from the car axle.

The defenses interposed are anticipation, prior use, want of novelty, and noninfringement. It is therefore important to ascertain at the outset whether said features were old and commonly known in the art at the date of the invention in suit, and, if so, whether the patentee was the first to combine them in a car lighting system, thereby achieving success which was denied to prior inventors in the same field. It is not doubted that other systems of car lighting in which the generator was driven by the axle of the car were in use before the origin of the Thomson system, nor that the elements of the claims separately considered were old and common expedients for performing their separate functions. Indeed, the defendant claims that the essential elements of the combination had been substantially adapted for use in a car lighting system successfully employed by various railroads. Complainant, however, insists that the assembling of the parts—the generator with the shunt field winding in the main circuit serially connected with the carbon pile—is new and novel, notwithstanding prior devices, in that the said elements or parts were so arranged and interrelated in their action that they achieved a new and useful result which prior systems failed in achieving.

The specific claim of the patentee is that he remedied the defects and inefficiencies in car lighting systems of the type under consideration by the automatic regulation and control of the entire current generated, as distinguished from merely supplying current to the lamps from a storage battery which, quoting from complainant's brief, "required charging on each run, with attendant delay and loss." If the proofs substantiate this claim, and the patentee did solve the problem of overcoming difficulties in the way of efficient car lighting, then beyond doubt his improvement is of great merit and value, and the protection of the patent laws should not be withheld from him or his assignor, the complainant. There is presented by the record, however, a serious ques-

tion as to whether the antecedent patents and prior car lighting systems, wherein the dynamo is driven by the car axle, do not indicate the dominant elements of the combination in suit. The patentability of such combination I conceive is not determinable merely by the existing differences or similarities between it and prior combinations claimed to achieve the identical result, but resort must be had to the functions which are performed by the adapted means and to the principle of operation by which the result is attained. It is well settled that a device which comes into existence by the adaptation of substantially the same means or instrumentalities, operating on the same principle, and achieving practically the same result, is the same device; and as said in Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935:

"A claim in a patent of one such device claims and secures the other."

Keeping this rule in mind, we may continue in our analysis of the claims in dispute.

Throughout the record complainant urges upon the consideration of the court the adaptation of the variable resistance feature positioned serially in the field, instead of in shunt about the field circuit with reversible control—a prior adaptation; the selection by the patentee of a carbon pile resistance, instead of a step by step rheostat, and of a current constant, instead of a voltage constant; the use of a shunt wound generator, instead of one that is series wound; and the selection of a solenoid and plunge device for current control, instead of an ordinary magnet with a fixed core. There is satisfactory evidence in this record to show that a carbon pile rheostat in a car lighting apparatus was not first adapted by Thomson, but that such element is shown in the Moskowitz car lighting system, and is described in the patent issued to him on application dated January 21, 1903, and numbered 746,558. A comparison of the Moskowitz device with claim 1 of the patent in suit discloses the substantial use and adaptation by the former of the various elements of the latter prior to the date of the patent in suit, with the single difference that the carbon pile rheostat or contacting electrodes of the Thomson patent are connected in series and not in shunt about the field winding as in the Moskowitz patent. Reference will again be made herein to the Moskowitz patents, which concededly were reduced to practice before the patent in suit was conceived.

It appears that long before car lighting sytsems were invented the patent to Brush, No. 224,511, of 1880, pointed out the feasibility of substituting a carbon pile resistance for a wire resistance. From similar disclosures in the later patent to Brush, No. 239,313, the patent to Sellon & Mordey, No. 392,370, the earlier patent to Moskowitz, No 626,713, and the English patent to Sellon & Mordey, it would seem to be clearly shown that before complainant's application for patent the connections of variable resistances, carbon pile or wire, in shunt or in series, controlled by a magnet with current output coil, were old features, recognized by the skilled electricians as equivalents; the operation and co-operation of the various parts also being familiar to skilled electricians. That one kind of resistance possessed advantages not inherent in the other in the way of greater or less consumption of energy

was understood, and hence the manner of the connection, whether in series or in shunt, was regarded as one largely of individual preference. Indeed, in the Sellon & Mordey patent of 1888 the specification substantially states that the variable resistance for varying the field of the generator may be placed around in shunt or in series with the field.

Brush, it is true, used the generator to supply current to an arc light; but the drawings (Figs. 2 and 3) clearly show variable resistances of the wire rheostat and carbon disk types, operating precisely as does the carbon pile resistance of the Thomson patent under consideration, to maintain constant the flow of the current. In Brush patent, No. 239,313, are shown two carbon pile resistances and a constant current regulator which operate automatically. A duplication therefore of carbon piles by Thomson (Fig. 2 of the drawing) is obviously not a new idea or use, unless their adaptation to a car lighting system as distinguished from stationary lighting be so considered.

Afterwards came Edison, with the incandescent lamps placed in parallel and connected in shunt across the main lead. As a preventive of fluctuation of pressure he adapted the magnet in shunt across the mains, obtaining thereby a variation of voltage and division of the current. A comparison of the Brush and Edison lighting patents discloses that Brush, to avoid fluctuation of the current, put the magnet in series in the main lead, while Edison to avoid fluctuation in pressure or voltage placed the magnet in shunt in the field with the result that as only a part of the current passed through it he was enabled to maintain the current constant. To be sure, the patents to Brush and Edison are not anticipatory; but, as hereinbefore indicated, they are pertinent as showing the knowledge that electricians possessed at the date of the patent in suit regarding the various methods of connecting variable resistances—i. e., a wire resistance or carbon disk rheostat, either in shunt or in series.

The patent to Weston, No. 292,715, of 1884, is claimed by defendant to anticipate the patent in suit. Therein are shown a generator and a magnet in series with the main circuit to respond to the variable flow of the current, with a wire rheostat in the field series controlled by a magnet to vary the strength of the field and maintain constant current to the lamps. That the Weston structure, wherein the generator is in shunt as in the patent in suit, was a practical device, is not questioned; and while it was not for a car lighting system, but was used for stationary lighting, still there is such marked similarity of operation between it and complainant's lighting system that it is difficult to overlook its importance as an anticipatory structure. It was used in an analogous art, and had but one essential differentiating feature from complainant's patent, namely, a wire rheostat resistance in place of the carbon pile; and although complainant's patent is for a combination of old elements achieving a new and useful result, it is nevertheless very questionable, I think, whether, in view of the Weston patent, considered in connection with the Moskowitz structure, it involved invention to substitute the carbon pile disk, made known to the art by Brush, for the wire rheostat first placed in the shunt field circuit by Weston.

There is evidence to show that Weston's adaptation was substantially used by Faure in a train lighting system in which a shunt wound generator was driven from the car axle. Faure adapted the shunt wound generator and constant current regulator to supply current to the storage battery and lamps, and used a wire step by step resistance to secure a constant potential; but, as he did not employ a carbon rheostat in the shunt field circuit of the generator controlled by a solenoid in the main lead to secure constant current, he cannot be considered as anticipating the combination in suit.

I now come to what is regarded by both sides as the most important reference in support of defendant's contention that the changes and modifications made by Thomson, after the practicability of the Moskowitz structure was demonstrated, were merely of form and not of substance. It is shown that prior to the date of the application in suit the defendant had installed the Moskowitz structure, in which there was used a shunt wound generator connected to the car axle by a belt arrangement as in the patent in suit. In such structure the dynamo supplied electricity to a circuit in which were placed a storage battery and incandescent lamp in parallel, while the current was maintained practically constant by the adaptation of an automatic regulator, which comprised a magnet included in series in the main circuit, operating upon a carbon pile rheostat in the shunt field circuit of the generator. The single difference between such system of car lighting and that of Thomson was that in the former the carbon pile resistance was not in series about the shunt field winding as in the latter. The question is therefore sharply presented whether, in view of the prior art, there was invention in connecting the carbon pile in series about the shunt field winding.

Complainant argues at length that both Moskowitz and Thomson, at substantially the same time, aimed to solve the same problem which confronted the art in perfecting axle driven car lighting systems, and that Moskowitz by his arrangement, as shown in the patent subsequently granted him, numbered 746,558, and dated December 8, 1903, failed because he adhered strictly to what Brush and the prior art taught regarding variable resistances in shunt with the field of a shunt generator, while Thomson, as counsel states, "devised the radically novel arrangement of a carbon rheostat in serial relation to the shunt field winding of a dynamo," thus controlling the current output of the generator.

In the Ferrand French publication, however, prior to the invention in suit, was described a rheostat of the carbon disk type connected in series in the shunt field circuit with the generator, and it was substantially stated therein that a carbon disk resistance might be connected in series about the shunt field circuit of the dynamo to the operating coil of the magnet, or connected in series in the main circuit, if constant current was to be secured; or it might be connected in shunt with the field if constant voltage was desired. In view of what is shown by Weston, Moskowitz, and Ferrand, it is difficult to conclude that the Thomson adaptation in controversy involved anything more than a change of form. I quite agree, however, that if it were proven

that he succeeded where Moskowitz failed, and made railroad car lighting systems more efficient by removing objectionable features, such as fluctuation of the current and consequent flickering of the lights, then his patent was not devoid of merit, but was of superior value and entitled to corresponding praise, and protection from appropriation by others, notwithstanding Ferrand's suggestions.

There is considerable evidence in the record showing that the Thomson adaptation was not new. Prior thereto, in the year 1900, there was in operation by Faure a system, called the Consolidated Commercial System, which employed a shunt wound generator driven by a belt from the car axle; the generator regulator being of the constant current type, with the belt winding in series and having a step by step resistance controlled by a solenoid in series in the main circuit. About 500 installations of this type had been made at the time of the invention in suit, and, according to the evidence, many more have since been installed. Complainant's criticism is that such system was crude and unsatisfactory, and that the Thomson patent was designed as an improvement thereon; but, if we assume such to have been the fact, we are confronted by other credible witnesses engaged in the railway lighting business who claim that the later Moskowitz system was also commercially successful and was used on the Santa Fé and Lehigh Valley Railroads.

It appears that in 1903 the defendant company installed the Moskowitz system on the Empire State Express and particularly in passenger car 952, where it was used for a period of approximately nine months; the purpose being to demonstrate its efficiency. Such installation was quickly followed by others on said railroad, and there remains no doubt in my mind that the said lighting system with its carbon pile resistance in shunt, and not in series, was successfully operated, and was not objectionable because of any defect in the arrangement of its parts or because of any flickering of the lamps. It is quite possible that complainant's arrangement of parts was simpler and more convenient, and perhaps required less current and less wiring; but any such alterations, improvements, or advantages were not due to invention, but were a change of form only, no new or different result being achieved than had previously been achieved by Moskowitz.

In the Patent Office the Thomson patent was beset by many obstacles, and was allowed only on an appeal to the Court of Appeals. The primary examiner rejected it principally on the patent to Weston, his opinion being that there was no invention in the substitution of the carbon pile for the wire resistance; the board of examiners, and afterwards the Commissioner of Patents, reaching a similar conclusion, but only after thorough examination and analysis of many patents pertaining to the electric lighting art. The Court of Appeals in its opinion expressed doubt on the question of patentability, but was constrained to grant the patent on the ground, as stated therein, that it appeared by affidavits that the use of the wire rheostat in prior car lighting systems was faulty, troublesome, and impracticable, that serious difficulty had been overcome by Thomson, and that no other car lighting system had gone into use. The showing before the Court

of Appeals as to the prior state of the art was incomplete, the particular Moskowitz patent or construction here considered not being before it for consideration, while in the present case it is shown by preponderating evidence that the patent in suit was not of a pioneer character, prior patents being in evidence which bear upon the state of the art, including the Hering and Creveling patents, which, in view of the foregoing, do not require particularization.

My conclusion is that, at the date of the filing of the application for the patent in suit, it did not involve invention to place the carbon pile in series with the field winding, which was an essential feature of complainant's car lighting system. The Moskowitz patent, No. 746,588, was not granted until after the Thomson conception; but prior use as early as 1903 of the structure therein described is satisfactorily shown, and therefore it did not involve invention to use a carbon disk resistance in series with a variable speed shunt generator to maintain constant current, and Thomson's particular arrangement of such parts and circuits was merely a matter of adaptation.

The bill is dismissed, with costs.

AMERICAN BRAKE SHOE & FOUNDRY CO. v. HOADLEY BRAKE SHOE CO.

(District Court, D. Massachusetts. March 1, 1915.)

No. 268.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—RAILWAY BRAKE SHOE.
   The Chipley patent, No. 651,435, for a railway brake shoe, which may be completely worn out by removing it from the brake head when partially worn, substituting a fresh shoe on the brake head, and attaching the partially worn shoe to the face of the fresh shoe, was not anticipated and discloses a useful, operative, and practical invention, made by the patentee, which is of a fairly broad character and covers shoes which are integral and continuous from end to end, as well as those made in two parts. Claims 4, 5, and 6 also *held* infringed.

2. PATENTS ⇐131 — RIGHT TO PROTECTION — DISCONTINUANCE OF MANUFACTURE.
   A patentee or his successor does not lose his right to protection under the patent, even if he does not continue manufacturing thereunder, unless an intention is shown to abandon the invention.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 188; Dec. Dig. ⇐131.]

3. PATENTS ⇐157—CONSTRUCTION—SCOPE.
   A patent should be construed, when it can be so construed, to cover the entire inventive thought of the patentee.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229–232; Dec. Dig. ⇐157.]

4. PATENTS ⇐91 — PERSONS ENTITLED TO PATENTS — ORIGINAL INVENTOR — PRESUMPTION FROM GRANT.
   The issuance of a patent is prima facie evidence that the patentee was the original inventor of the thing patented, and the burden rests on a defendant to overcome such evidence by proof which at least is satisfactory to the court.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 121–123; Dec. Dig. ⇐91.]

In Equity. Suit by the American Brake Shoe & Foundry Company against the Hoadly Brake Shoe Company. On final hearing. Decree for complainant.

Fish, Richardson, Herrick & Neave, of Boston, Mass., for plaintiff.
Briesen & Knauth, of New York City, for defendant.

HALE, District Judge. This bill in equity alleges infringement, by the defendant, of United States letters patent No. 651,435, issued June 12, 1900, for a railway brake shoe, to Gardiner W. Chipley, as patentee, and to Charles W. Armbrust, assignee of a one-half interest. The application of Chipley was filed January 18, 1900.

Claims 4, 5, and 6 are in issue, the charge of infringement relating only to those claims. They are as follows:

"4. A brake shoe provided in its wearing face with recesses adapted to receive the attaching and guide lugs upon the back of another shoe, substantially as described.

"5. A brake shoe provided in its wearing face with recesses adapted to receive the guide and attaching lugs on the back of another shoe, and with means for securing the two shoes together, substantially as described.

"6. A brake shoe having its wearing face and its back formed in parallel planes, so that the back of one shoe will fit the face of another shoe, and provided in its wearing face with recesses adapted to receive the attaching and guide lugs upon the back of another shoe, substantially as described."

Chipley describes two features of his invention. The first feature relates to the provision of a divided or two-part brake shoe, by which, he claims, certain advantages are attained. The second feature, concerning which this contention arises, relates to the provision of a brake shoe adapted to receive the back portion of a partially worn shoe, whereby brake shoes, partly worn out, may be used completely up, by attaching them to, and using them with, new shoes. In stating the advantages of the interlocking, interchangeable brake shoe, Chipley points out that all previous brake shoes, when worn down to a certain point, could be worn down no further without injury to the brake head; and so such brake shoe had to go to the scrap heap. Chipley testifies that he had frequently visited the scrap pile of the Rock Island road, and had there seen worn-out brake shoes. He had his attention called to the lack of economy in throwing away partially worn shoes, and tried to find a way to save this scrap by providing a brake-shoe construction which would enable a partially worn-out brake shoe to be attached to the face of a fresh shoe, and be completely worn out. To do this he brings together two counterpart shoes, an inner shoe attached to a brake head, and an outer shoe attached to the face of the inner shoe. To put the two shoes together, he provided lugs on the back for attaching the inner shoe to the brake head, and recesses on its face into which the lugs on the back of an exactly identical brake shoe fitted, by which the latter shoe could be attached to the face of the former shoe. The friction of braking the car wheel wore away the outer shoe entirely, and the inner shoe partially; then the inner worn shoe was removed from the brake head, a fresh shoe was attached to the brake head, the worn shoe was attached to the face of the fresh shoe, and the device was again put into use.

In his specification, Chipley points out substantially this method of using interlocking and interchangeable brake shoes. In a part of his specification he points out the advantages of the first feature of his invention relating to a divided or two-part brake shoe. In another part of his specification he describes the advantages of the second feature of his invention, with which feature we are now concerned. He alleges that this feature may be used with either the continuous or the divided shoe. He says:

"While I have illustrated and described in detail a simple and efficient method of attaching the worn shoes to the new ones by interlocking them together, my invention is not restricted in its broader scope to this particular method and means of attaching the old shoe to the new one, since, so far as I am aware, it has not heretofore been proposed to use up worn brake shoes by attaching them to new shoes in any manner whatsoever, and my invention therefore contemplates the employment of any suitable means for securing the old shoes to the new ones in the practical utilization of this idea.

"It will be understood that my invention has nothing to do with the particular construction of the body of the shoe—i. e., whether of solid cast metal or otherwise—or with the employment or nonemployment of 'inserts' in the wearing face of the shoe. Any of the various methods of constructing the body of the shoe and any of the usual inserts may be employed in connection with my invention without affecting the latter. It will also be understood that the second feature of my invention may be utilized in solid or continuous shoes, it being simply necessary for such purpose to provide suitable means for securing the old and new shoes together when assembled."

He makes it clear that his invention consists in the assembling of two interlocking shoes. He briefly points out the method of assembling:

"In assembling the parts, each half of the worn shoe is applied to and interlocked with the corresponding half of the new shoe independently of the opposite halves of the shoes, and when each half of the combined shoe has been thus assembled the two halves of the combined shoe are brought together end to end, and then secured to the brake head."

It will be seen that this description of assembling the two shoes necessarily involves interlocking half of a worn shoe with the corresponding half of a new shoe. The claims bring to the mind the picture of two shoes, the recesses of one shoe being adapted to receive the attaching and guide lugs upon the back of another shoe. Claim 6 distinctly expresses this feature; so that it is made clear that, if the patentee invented anything, it was the interlocking of two shoes identical in construction, and for the purpose described; and that he sought to do this either with divided shoes, or with continuous shoes. In his drawings he illustrates the two-part brake shoe, the first feature of his patent; in illustrating the second feature, he uses also the two-part brake shoe. He points out, however, that he intends his invention to be utilized either in the continuous shoe or in the divided shoe.

These defenses are relied upon by defendant: That Chipley's alleged invention was not new, in view of the prior art; that it was not useful, in that it was not operative, or capable of being put into use; that it has not been infringed by the defendant, for the reason that the patent should be so limited in its scope as to give the complainant the right to use only the divided brake shoe, whereas defendant's shoe is a continuous shoe; that, in any event, the patent is void, for the

reason that the alleged patentee, Chipley, was not the original and sole inventor, but that one Armbrust was the inventor.

[1] 1. Chipley's alleged invention, described in his patent, is a brake shoe which can be completely worn out, by removing it from the brake head, when partially worn, substituting a fresh shoe on the brake head, and attaching the partially worn shoe to the face of the fresh shoe. The defendant has cited several patents, claimed to be anticipatory of this invention. A certain British patent to Rendall issued in 1898 discloses a brake shoe with a face made up of removable and replaceable dovetailed sections. I do not think it necessary to consider the Rendall patent in detail. In some of its suggestions, I think, it comes nearer to being an anticipation of Chipley than any other patent cited in the prior art. It does not, however, disclose counterpart, interlocking shoes, nor anything which, I think, can be held to be anticipatory of the thought which seems to have been clearly in the mind of Chipley.

The Brownley patent of July, 1888, discloses recesses, or grooves, in the face of the brake head; but these grooves are for an entirely different purpose from those expressed in the Chipley claims. Interlocking brake shoes are not involved. The invention of Chipley is not suggested by the Brownley patent or by any other patent brought to my attention. So far as anything in the prior art is concerned, I think the three claims at issue in the Chipley patent must be held valid, and not anticipated.

[2] 2. On examination of the proofs, I cannot sustain the defendant's contention that the claims at issue do not disclose a useful, operative, and practical invention. The proofs convince me that Chipley's invention was useful and operative, that it was actually reduced to practice, and that it had a somewhat extended use. The specified form of brake shoe shown in the Chipley patent was manufactured, from 1900 to 1902, by the Lappin Brake Shoe Company, under a license. There was at that time a large sale of these shoes among railroads and car companies. The proofs show that since 1906 the complainant has not pushed business under this patent. But a patentee, or his successor, does not lose his right to protection under a patent, even if he does not continue manufacturing under the patent, unless an intention is shown to abandon his invention. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 430, 28 Sup. Ct. 748, 52 L. Ed. 1122.

The proofs are clear that the invention described in the claims at issue was capable of operation, and was actually put into operation. In practice, Chipley and his successors made use of a four-piece construction; they put upon the brake head two shoes, each shoe divided into two parts. It is urged that they never made a two-piece, interlocking shoe; that they never made a construction composed of two continuous or solid shoes. There is no doubt that Chipley and his successors thought the four-piece construction was better fitted for commercial use. The specific form of brake shoe which they did use and sell, however, was clearly useful and practical. I find that the claims at issue show an operative invention.

3. The question of infringement presents an important and interest-

ing issue. Upon this issue there is a sharp contention. The substance of the whole controversy is centered here. The defendant contends: That the patent law makes it incumbent upon every inventor to make such a description as to enable any person skilled in the art to construct the thing he undertakes to describe; that Chipley did not show anybody how to construct and use a double brake shoe, one undivided half of which is the carrying shoe and the other undivided half of which is the operating shoe, to be applied to the car wheel. The defendant insists that Chipley did not know how, and did not in his patent show anybody how, this could be done with a continuous brake shoe, and that, if his patent had any operative force, such force related only to the divided or two-part brake shoe. And the defendant says that where an inventor has produced two inventions so allied that they may properly be secured to him in one patent, and has described these inventions in the descriptive part of his specification, but has covered only one of them by his claims, then his patent is valid only as to one of these inventions and invalid as to the other. The defendant insists that the complainant must be limited to a structure which attaches a carrying shoe, made in two pieces, to a brake head, and an actuating or operating shoe, also made in two pieces, attached to the face of the first mentioned shoe; that this is the only device which is described in his patent; and that, if his patent is limited to this device, the defendant does not infringe.

The defendant's brake shoe, brought before the court for illustration, is composed of three parts: A brake head, a brake shoe fitted to the brake head, and a "starter" brake shoe on the face of the inner shoe. This outer shoe is used merely as a "starter"; it is grooved on its face to receive the flange of the car wheel. In practice, this "starter" shoe is worn away; and the inner shoe on the brake head is then partially worn away. The flange of the car wheel wears a groove on the face of the partially worn shoe, which is then removed; a fresh shoe, exactly like it before it was worn, is attached to the brake head; and the worn shoe is attached to the face of the fresh shoe, and the device is put into use. The "starter" shoe is used because the flange of the wheel bears against the shoe; therefore an ungrooved shoe could not be used at first against the wheel. After the flange wears a groove in the inner shoe, it is in condition to be used on the face of the fresh shoe. The shoe of the defendant is provided on its rear surface with attaching and guide lugs, by which it is to be attached to the brake head, and with corresponding recesses on its front face into which the lugs on the other shoe, to be secured to its face, fit; the two shoes are thereby fastened together. The learned counsel for the defendant thus describes its device:

"The defendant's carrying shoe is a one-piece shoe, having both faces inclined, and is connected with the brake head by dropping the inclined and tapered ribs on its back into corresponding inclined and tapered recesses in the face of the head. The actuating shoe is by similar ribs united to the grooved face of the carrying shoe. The parts thus assembled are firmly united by the action of the car wheel, and the corresponding jar on the parts. * * * The defendant's structure is covered by United States letters patent No. 937,069, issued to the defendant on October 17, 1909. * * * The in-

clination of the concave face of each of the defendant's shoes, and of the brake head, and of the corresponding convex faces of the shoes, is particularly described and claimed in defendant's patent No. 937,068, also dated October 19, 1909."

The defendant's patent, No. 937,069, relates to the special form of the attaching guide lugs, and the corresponding recesses. In the specification, the patentee states the purpose of the patent as follows:

"This invention relates to improvements in a construction of railway car brake shoes and brake shoe supporting back or carrying head therefor; and one of the objects is to provide an improved construction of brake shoe back and complemental brake shoes which are susceptible after use of being interchanged, so that the one which was initially a rear brake shoe may, after a front brake shoe has been worn away and the rear brake shoe more or less worn, be for the moment removed from the brake shoe back while the fresh rear brake shoe is being mounted on the back, and then such partially worn shoe (formerly a rear shoe) interlocked on and carried by the newly provided rear shoe, to the end that practically, if not absolutely, all of every shoe is subjected to wear in its utilization of braking purposes, no portions or remnants being necessarily thrown away as scrap iron."

It will be seen that the specification in defendant's patent discloses substantially the same purposes disclosed in the Chipley patent, so far as relates to interlocking shoes, and to a structure intended to wear out completely the operating shoe, in order to save scrap. The defendant contends that the complainant's patent should be limited to a divided shoe; that the defendant has a perfect right to its invention within the scope of its claims, and does not infringe the complainant's patent; that Chipley and his successors never showed to the public how it could put two solid brake shoes together; that its two continuous shoes, exhibited to the court for illustration, do not fit each other; that defendant has pointed out a practical, operative way of combining the brake head with two solid brake shoes, by means of ribs and grooves; that, by its perfect model and by its working devices, it has disclosed to the court an operative and practical method of doing what the claims of its patent call for; that the complainant should have the benefit of the structure it has distinctly described, involving the use of only a divided brake shoe, and the putting together of two divided brake shoes; and that it should be so limited, even though the patentee has said in his specification that his invention may be utilized in solid or continuous shoes.

[3] Upon a careful examination of the record, I cannot limit the Chipley patent as contended for by the defendant. The proofs persuade me that Chipley made an invention of a fairly broad character, and therefore is entitled to a fair use of equivalents; that such invention discloses a brake shoe which can be completely worn out by removing it, when partly worn out, from the brake head, by substituting a fresh shoe on the brake head, and then attaching the partially worn shoe to the fresh shoe; that nothing like this is disclosed in the prior art; that the invention contemplates the employment of any suitable means for securing the old brake shoe to the new brake shoe. I think the court must give some force to the patentee's expressed intention that his invention may be utilized in solid or continuous shoes. Giving complainant's patent this somewhat broad scope, it is clearly infringed

by the defendant. It may be that, in specific elements, the defendant has made improvements on Chipley; but it has clearly infringed, before it has improved. The same may be said of certain other patents referred to by counsel, and now, as shown by the record, held by the complainant. All these patents are clear attempts to improve in specific features upon Chipley's invention. The inventive thought of the patentee should not be defeated by the fact that the patentee sought to avail himself of two features in his patent. The patent was his contract with the public. It should be so interpreted as to express his whole intention. A patent should be construed, when it can be so construed, to cover the entire inventive thought of the patentee. Los Angeles Co. v. Æolian Co., 143 Fed. 880, 885, 75 C. C. A. 88; Anderson, etc., Works v. Potts, 108 Fed. 379, 383, 47 C. C. A. 409; National Tube Co. v. Mark, 216 Fed. 507, 521, 133 C. C. A. 13; Boyer v. Keller Tool Co., 127 Fed. 130, 134, 62 C. C. A. 244; Converse v. Cannon, 2 Woods, 7, Fed. Cas. No. 3,144; Curtis on Patents, § 320; Walker on Patents, § 376.

I am constrained to find that the defendant infringes claims 4, 5, and 6 of the patent in suit.

[4] 4. The defendant contends that Chipley was not the original and sole inventor of the invention described in the claims at issue; but that one Armbrust was the inventor, and that hence the patent is invalid, it having been issued to a party who was not the inventor. The proofs present much contradictory evidence upon this point. The issue of the patent to Chipley is prima facie correct and valid. The burden is upon the defendant to overthrow it by clear proof; or, as Judge Putnam says, "to put it in the mildest way, by proofs which are satisfactory to the court." Eastern Paper Bag Co. v. Continental Paper Bag Co. (C. C.) 142 Fed. 479, 500; American Bell Telephone Co. v. United States, 68 Fed. 542, 15 C. C. A. 569; Id., 167 U. S. 224, 251, 17 Sup. Ct. 809, 42 L. Ed. 144. Upon a careful study of the record, I do not find the proofs satisfactory. They are not sufficient to sustain the burden upon the defendant. On the other hand, the proofs are persuasive that the prima facie issue of the patent to Chipley was correct and valid.

I am of the opinion that Chipley was the original and sole inventor of the patent in suit; that claims 4, 5, and 6 of the patent are valid; that they present a new and useful invention of a somewhat broad character; that they have not been anticipated; and that they have been infringed by the defendant.

Let a decree be presented, consistent with this opinion.

Plaintiff's draft decree to be filed on or before March 4, 1915.

Defendant to file corrections on or before March 10, 1915.

Decree to be settled March 16, 1915.

SUNDH ELECTRIC CO. v. INTERBOROUGH RAPID TRANSIT CO.

(Circuit Court, S. D. New York. June 27, 1911.)

No. 3-64.

1. PATENTS ⊂⊃61—ANTICIPATION BY OTHER PATENTS.
A later patent is not of the prior art, and cannot anticipate a prior patent, although application therefor was first filed.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 77; Dec. Dig. ⊂⊃61.]

2. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—ELECTRIC CONTROLLER.
The Sundh patent, No. 733,564, for an electric controller or self-starter, while for a new combination of old elements, was not anticipated and discloses invention. Claims 1, 2, 3, 17, and 18 also *held* infringed.

In Equity. Suit by the Sundh Electric Company against the Interborough Rapid Transit Company. On final hearing. Decree for complainant.

Decree reversed, 198 Fed. 94, 117 C. C. A. 280.

William B. Whitney, of New York City, for complainant.

Jones, Addington, Ames & Seibold, of Chicago, Ill., and Leslie R. Palmer, of New York City (W. Clyde Jones and Arthur B. Seibold, both of Chicago, Ill., and Wylie C. Margeson, of New York City, of counsel), for defendant.

HAZEL, District Judge. This is a bill in equity for alleged infringement of patent No. 733,564, dated July 14, 1903, for an electric controller, and granted to August Sundh, complainant's assignor. The apparatus is described as an automatic switch device for a motor starter, or what is known as a "self-starter," by which a plurality of resistance currents are successively automatically cut out and into the circuit of the motor for the purpose of starting or stopping its movement or varying its speed. The invention consists of the combination of elements which are particularized in the claims. The questions presented for decision are whether the involved claims are valid, and, if valid, whether their scope includes the electric controller devices used for operating signals of the New York subway, installed by the J. L. Schureman Company for the defendant Interborough Rapid Transit Company.

To establish infringement, the complainant, out of a total of 19 claims, relies on claims 1, 2, 3, 17, and 18, which read as follows:

"1. An electromagnet, an armature therefor, a shaft, means for rotating said shaft controlled by said armature, a circuit-closing lever, a contact-terminal in the path of said lever, and a cam on said shaft constructed to move said lever to close circuit at said terminal.

"2. An electromagnet, an armature therefor, a shaft, means for rotating said shaft controlled by said armature, a circuit-closing lever, a contact-terminal in the path of said lever, and a cam on said shaft constructed to move said lever to close circuit at said terminal and to retain said lever in said closed position when the rotation of said shaft is arrested.

"3. An electromagnet, an armature therefor, a shaft, means for rotating said shaft controlled by said armature, a plurality of circuit-closing levers, a plurality of contact-terminals in the path of said levers, and cams on said

shaft constructed to move said levers to close circuit at said terminals; the aforesaid parts being timed and constructed to operate said levers to close said circuits successively."

"17. The combination with the solenoid *13*, and its movable core, of the rotary shaft *30*, gearing between said core and shaft for causing rotation of said shaft by said core, pivoted circuit-closing levers *48*, *49*, *50*, and cams *54*, *55*, *56* on said shaft; the said cams being constructed successively to operate said circuit-closing levers *48*, *49*, *50*.

"18. The combination with the solenoid *13* and its movable core, of the rotary shaft *30*, gearing between said core and shaft for causing rotation of said shaft by said core, pivoted levers *48*, *49*, *50*, and *62*, circuit-terminals in the path of said levers and cams *54*, *55*, *56*, and *74* on said shaft; the said levers and cams being constructed and timed so that said levers *54*, *55*, and *56* are successively actuated by said cams to close circuit and the lever *62* to open circuit."

Claims 1, 2, and 3 are broadly for a switching mechanism, which may be applied to various uses, and which includes: (1) an electromagnet (of the solenoid type); (2) an armature therefor (a core or plunger); (3) a shaft; (4) means for rotating the shaft controlled by the armature; (5) a lever for closing the circuit; (6) a contact terminal; (7) a cam on the shaft adapted to move the lever to close the circuit at the terminal.

Claim 2 is not materially different from claim 1, but specifies the function of the cam. Claim 3 includes a plurality of circuit-closing levers with corresponding terminals and arms on the shaft positioned to operate the levers in such a way as to close the circuit successively. Claims 17 and 18 particularize the elements of the combination and refer to them by the drawing numbers. The specification in detail and at length describes the manner in which the motor is started, with the resistance in the circuit, and such description, omitting immaterial portions, is well stated by counsel for complainant as follows:

"Briefly stated, the throw of a hand switch closes the circuit through the upper winding of a double solenoid, which, when energized, draws up its core and closes the main switch in the motor circuit and thereby starts the motor, with all the resistance in the circuit. At the same time the lower winding of the solenoid is energized, and, drawing up its core against the retarding action of a dash-pot, by means of a rack cut along the back of the core and meshing with a pinion on a cam-shaft, causes the rotation of the shaft, whose cams act successively on the arms of a series of pivoted lever switches, making 'butt' contact with a series of fixed contact terminals, to close these switches one after another, and thereby short-circuits and cuts out step by step the sections of resistance (and with the last section the series field winding of the motor), and gradually brings the motor from rest up to a condition of full speed. Finally, the last cam on the shaft to operate throws open a normally closed lever switch in the circuit of the lower solenoid winding and cuts out that winding; but its core is held in its elevated position, at the top of its upward movement, by the upper solenoid winding, and in turn holds the cam-shaft so that its cams will maintain the switches in position, the resistance switches closed, and the solenoid circuit switchs open. When it is desired to stop the motor, the hand-switch is opened, whereupon the core of the lower solenoid winding drops by gravity, rotating the cam-shaft back to its initial position and allowing a spring to close the solenoid circuit switch, and the resistance switches to fall back to open position by gravity, and then the core of the upper solenoid winding drops."

According to the specification the resistance switch levers are of magnetic material, each having an electromagnet in its path, which is

energized with the lower solenoid winding. Such levers, however, are not in the magnetic field or influenced by the electromagnets when in an open position, but when they travel inward or towards the fixed contact they come within the magnetic field and are quickly attracted to butt against the terminal contact, thus closing the circuit. It should be understood that the cams on the shaft are arranged to cut out the electromagnets whenever the cam on the shaft breaks the solenoid circuit. The specification, speaking of the arrangement of the cams, says:

"It will be seen, therefore, that through the action of the several cams, the timing of the apparatus is such that the levers *50*, *49*, and *48*, successively establish their contacts with the plates *59* and then the lever *62* is moved away from its contact-plate by the action of the cam."

Importance is attached to this feature and to the action of the cams, which, after making contact and after the motor is rotated at full speed, holds the switches in contact mechanically without the expenditure of current energy. The advantages claimed for the self-starter are that they may be started or stopped by merely pushing a button, or inserting a plug to make switching contact or by other means, without, however, any manual effort. For instance, the claim is that, in motors used to drive pumps and to keep a tank filled to its capacity with water, it does not during the pumping operation require the presence or activity of any human agency. It is frankly admitted that none of the elements of the claims in suit are new, and that the claims 1, 2 and 3, if construed broadly without regard to the specification, would not be sustainable in view of the prior patents to Thomson-Houston Company (British) No. 18,617 of 1900, Sinclair No. 566,874, Herrick No. 507,125, Parker No. 531,961, Bell No. 738,281, and other patents to which counsel for the defendant directs attention, viz., patents to Richardson, Ihlder, Piatt, and Herdman.

The element of a starter for a motor aside from the switching mechanism is not specified in any of the claims in issue, and yet the unqualified contention of the defendant that such feature cannot be considered to prevent anticipation is not thought sound. The specification and evidence show that the switching mechanism and the arrangement of the parts by which their co-operation is secured possessed such original characteristics that for the first time means were provided in electric controllers of rotary shaft type to start the motor automatically and move the levers to close the circuit. It may be conceded that claims 1, 2, and 3, if given an unqualified construction, are lacking in novelty when standing alone and unassociated with the arrangement of the parts by which the mode of operation was secured to achieve the result. All of the elements of the combination may even have heretofore been combined in similar structures to perform the functions expected of them, but in considering whether invention was involved in the combination in suit it is important to ascertain whether such old elements have not been combined by the patentee in a new and unusual way to accomplish a result not hitherto attained. The scope of the claims, it is true, must be ascertained from their wording, and it is quite proper to examine the specification and drawing and the state of the art to ascertain the principle of operation of the in-

vention—not to add or vary the claims, be it understood, but to arrive at a better understanding of their meaning. White v. Dunbar, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303. Therefore the claims must be limited to the actual combination of elements which are assembled or correlated in a new way to secure a distinct co-operation and result. Thus limited, none of the prior patents in evidence are thought anticipatory.

The crucial question resolves itself to this: Did it involve invention at the date of the Sundh application to gear the electromagnetic engine in the form of a solenoid, having a core and dash-pot, to the cam shaft of the lever to make butt contacts with the co-operating fixed contact terminals in such a way as to automatically start the motor and move the levers successively? It was old in the art to use a solenoid and core in co-operation with a dash-pot and shaft to move or automatically slide a contact arm over a series of fixed contacts. But in the earlier devices the starting was by hand lever or rope to raise fixed weights or actuate a spring to move the switches. Such a combination of elements the patentee designed to improve by combining them differently. Other patents introduced in evidence by the defendant show drum type structures which in operation also make sliding contacts with spring-pressed contact terminals, and another type of starters wherein the movable contacts are actuated one after another by a revolving cam shaft or a reciprocating cam belt such as shown and described in the patents to Eaton, No. 685,326, and to Liggett, No. 731,375. In the Eaton patent, which employs a gravity engine, the shaft is rocked by hand in each direction, and as the shaft is rocked it lowers a cam to connect with the switch levers for the purpose of cutting out resistance. The cams, it is true, are placed in relation to each other as to time and operation, but the motor is started manually, and therefore does not anticipate the patent in suit. So in the Liggett patent the cam shafts are rotated by hand rope or cable, which controls the main and reversing switch mechanism. Although such method of operation includes in its elements a plurality of stationary contacts connected with the armature resistance of the motor and a plurality of pivoted levers to control the resistance of the cam type switching mechanism, it does not limit the claims in suit.

Stress is laid by the defendant on the Richardson patent, which has a plurality of cams on the shaft, one for each lever, to operate them successively and to close the circuit. The specification shows that a weight in its descent actuates the cam shaft so that it makes a partial revolution, and another cam actuates the pivoted switches which have the characteristic of turning on and off electric lights. There is no gearing between the core and shaft to rotate the latter. The arrangement of the core on the solenoid with its retarded movements by the dash-pot is essentially different, and in view of the state of the art was not the equivalent of the Richardson means for actuating the switches. The Ihlder patent, No. 742,031, filed June 10, 1902, is unquestionably the defendant's best reference, and it so closely resembles the Sundh patent in suit that the supposition arises that both Ihlder and Sundh were engaged at the same time in solving the problem and

each invention performs substantially the same function. Like the patentee here, Ihlder combined the solenoid engine with its core and dashpot of the switching mechanism; each lever is provided with a cam plate to make a butt contact. Ihlder adapted his switching mechanism to a reciprocating cam, and he actuates his switch levers in pairs and not separately, as does the complainant.

[1] But such patent does not anticipate the patent in suit for the following reasons: The Ihlder and Sundh applications for patent were pending in the patent office at the same time, Ihlder application being filed first, and patents were thereafter granted on both applications, to Sundh first and later to Ihlder; and hence such later patent was not of the prior art and cannot negative the novelty of the claims in suit. This point has been passed upon in several prior adjudications. Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68; Diamond Drill & Machine Co. v. Kelly Bros. (C. C.) 120 Fed. 282; Thomson-Houston Elec. Co. v. Ohio Brass Co. (C. C.) 130 Fed. 542; Eck v. Kutz (C. C.) 132 Fed. 758. In Thomson-Houston Electric Co. v. Ohio Brass Co., supra, Judge Hale said:

"References are also made to certain patents which are subsequent to those in suit, although their applications appear to have been filed prior to the issue of these patents. The study of the prior art in a patent case is necessary in order to prevent the unlawful appropriation of the invention of another, when that invention had become public. An application prior to the patent in suit can have weight only if there has been some actual use of the invention, so that there may be elements of publicity. Such an application cannot be said to be a part of the prior art unless this element of publicity is present."

It is not claimed that the invention described in the invention of patent No. 742,031 was in prior use or known to the public, and accordingly such invention cannot be considered to anticipate the patent in suit.

Referring again to the question of novelty, the defendant contends that the primary object of the Sundh patent was to devise means for quickly closing the contacts and to close the circuit and snap the levers by the magnetic attraction; that the mechanism of Sundh was merely to start the levers in their movement, and not to complete the movement to the contact terminal; that if the claims were considered broadly, and without reading into them the snap action feature, they are anticipated by Herrick, Parker, and Richardson. But to this view I withhold my assent. The claims in issue speak of the cams moving the lever to close the circuit, and such words cannot be reasonably restricted to a mere starting movement. The specific feature by which the levers come into the magnetic field of the electromagnets to rapidly complete the movement by snap action are features included in other claims. The patentee was not obliged to include a specific element in the claims in issue to impart novelty to them. McCarty v. Lehigh Valley R. R. Co., 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358; Los Angeles Art Organ Co. v. Æolian Co., 143 Fed. 880, 75 C. C. A. 88.

Nor am I impressed by the argument that what Sundh did was open to him and was merely a matter of selection of old elements from other manually operated switches, such as were claimed to have been operated

automatically or semiautomatically. The vast number of prior patents in evidence in support of the claim of anticipation is persuasive testimony that the claims were for an actual combination, and that there was invention in assembling the elements so as to change the hand-starting device into a device which automatically opens and closes the switch mechanism. It was not merely transforming the hand lever switching mechanism of Eaton and Liggett, by adding or substituting a reciprocating solenoid. On the contrary, to effect a reorganization of such prior devices it was necessary to change or remove portions of their mechanisms, and gear the core of the solenoid to the cam shaft, by which not only the switch levers were actuated, but by which successive contacts were made. This may not now be regarded as of troublesome consummation. The earlier patents indicate that the skilled in the art were striving to perfect an automatic starter. It was in their minds to do so, and they tried and failed, leaving it to Sundh to successfully solve the problem.

[2] As to infringement: The switch levers, 11 in number, of the defendant's device, are mounted on a switchboard and the essential elements are associated together in such a way as to make butt contacts with fixed contact terminals arranged in the path of each lever; such levers being successively actuated by suitable cams mounted on a cam shaft. An electromagnet of the solenoid type, together with its core, gives rotary motion to the cam shaft. In the back of the core there is formed a rack which engages a gear wheel mounted on a cam shaft. The switch levers on the right side of the device are normally held in a closed position by springs, and are moved away from their contact terminals to open the circuit by the cams, while the others, the resistance switches, are normally held open by gravity and close the circuit by gravity, but remain closed by the action of the cams. In short, the defendant uses an electromagnet, an armature, a shaft, and means for rotating such shaft similar to that of complainant. It has circuit-closing levers, similar to those of complainant numbered 48, 49, and 50 in the drawing, and contact-terminals, and a cam on said shaft co-operating to close the circuit at the terminal contact. The defendant's arrangement of its series of circuit-closing levers is such as to enable closing the circuit successively. It does not use electromagnets to snap the levers, and although there are differences of construction as to the form of the levers and contacts, such differences are immaterial, in view of the fact that the essential elements by which the result is achieved are combined by it in substantially the same way to secure a result similar to that attained by the complainant and as specified in the claims in controversy.

It follows that the defendant infringes such claims, and the complainant is entitled to the relief prayed for in the bill, with costs.

So ordered.

E. I. DU PONT DE NEMOURS POWDER CO. et al. v. MASLAND et al.

(District Court, E. D. Pennsylvania. April 12, 1915.)

No. 1279.

INJUNCTION ⊂⊃169—MOTIONS TO VACATE—DENIAL PRO FORMA.

In a suit to restrain former employés of plaintiff from disclosing trade secrets, in which defendants, upon announcement of their purpose to do so, were enjoined from consulting experts as to whether the processes shown by plaintiff's depositions, the formulæ of which were kept in camera, were secret processes or processes which any one in the business had a free right to use, where on the trial defendants were claiming in good faith that it was necessary to confer with experts, their motion at the trial to vacate the injunction would be denied pro forma, the trial being continued until they could have a review of the ruling by an appellate court, as to grant the motion would compel plaintiff to abandon the suit, without being able to secure a review of the ruling.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 372, 384; Dec. Dig. ⊂⊃169.]

In Equity. Suit by the E. I. Du Pont De Nemours Powder Company and another against Walter E. Masland and others. On motion to vacate a preliminary injunction and restraining order. Motion denied pro forma.

See, also, 216 Fed. 271.

Prindle, Wright & Small, of New York City, for plaintiffs.

George Quintard Horwitz, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. An unusual situation is presented in this case, the only way to cope with which is by a pro forma refusal of the present motion and the entry of an order continuing the trial of the cause until the question can be passed upon by an appellate court. The question arises out of this condition of facts:

The bill was filed to restrain the defendant from disclosing what are claimed to be the trade secrets of the plaintiff, knowledge of which came to the defendant while in plaintiff's employ, and which were confidentially communicated to him. An application for a preliminary injunction was refused, because, among other reasons, no finding against the defendant of any intention to disclose was at the time justified. The case was met in the highly commendable spirit on both sides of a due regard for the rights of each other, and it was arranged that no disclosure should be made by defendant without notice beforehand sufficient to give plaintiff time to apply for relief, and express leave was granted plaintiff to renew its application for a preliminary injunction or restraining order, should need for protection arise. Efforts were then made to devise some method of trying the case without divulging any of the processes claimed to be the property of the plaintiff. To this end depositions were taken, and the defendant given information of what the claimed secret processes were, the formulæ of which were kept in camera. A predicament then arose. The defendant maintains that some of the claimed secret processes are not

such at all, but processes which any one in the business has the free right to use. The truth of the averments on the one side and the other are asserted to be the proper subject of expert knowledge and testimony.

The defendant, therefore, notified the plaintiff and the court that they proposed to exercise their claimed right of employing experts and discussing with them the features of the case which were in controversy. This, as was to be expected, alarmed the plaintiff, who renewed its application for a preliminary injunction or restraining order. The dilemma in which the plaintiff was placed could not be ignored. The exigencies of the case were met by the order of the court allowing the injunction. This was made with the thought in mind that there was no immediate need for the employment of experts, and that the cause might proceed to trial in the hope that some method of conserving the rights of both parties could be found. Leave was therefore given the defendant to move to vacate the order at any time, and, if unprepared at the trial to present his defense, to move for a continuance. To this, as a practical expedient, defendant had no objection, provided he was fully protected in the assertion of his claimed rights. The order was therefore made, and an exception allowed to the defendant, and the parties proceeded to trial. To further raise the question, witnesses for the plaintiff were asked on cross-examination to state the formulæ embodying the secret processes, and the present motion to vacate was made.

This brings us face to face with the predicament which now must be met. The dilemma of the plaintiff has become acute. It would, of course, be idle to the point of flat absurdity for the trial judge to compel the plaintiff to publicly disclose its processes in the act of protecting them from disclosure. This difficulty could be met by an appropriate order for keeping the answers to the questions asked in camera. There is an admitted necessity that the trial judge, parties, and counsel on both sides should know. To this plaintiff does not object. Counsel for defendant claims (and we cannot do otherwise than find this to be in good faith) that it is necessary for them to employ and confer with experts. They claim this to be their right. If it is allowed by the trial judge, the practical result is that plaintiff is driven to an abandonment of its case without being able to have the ruling reviewed by an appellate court. The only way out of this dilemma is for us to pro forma refuse the defendant's motion and continue the preliminary injunction, restraining the defendant from disclosing to expert witnesses employed by them the processes claimed by the plaintiff as its secrets, in order to afford an opportunity to the defendant to appeal from this order and to have their rights in the premises declared.

This order is accordingly made, and an exception is allowed the defendant.

LOEWE et al. v. UNION SAVINGS BANK.

(District Court, D. Connecticut. April 26, 1915.)

Nos. 1801, 1802, 1805, 1807.

1. COURTS ⟸65—TERMS OF COURT—DURATION.
When a term of court begins, a prior term ends.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 230, 246; Dec. Dig. ⟸65.]

2. COURTS ⟸354—UNITED STATES COURTS—CONFORMITY TO STATE PRACTICE—"FINAL JUDGMENT."
In actions in the nature of scire facias, in consummation of actions begun by process of foreign attachment, the United States District Court cannot open defaults after the expiration of the term at which the defaults were entered, notwithstanding Gen. St. Conn. 1902, § 748, providing that any judgment rendered upon a default may be set aside at the term succeeding that at which it was rendered, as the question is one of power, and not of practice; defaults being in their nature "final judgments."
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 934; Dec. Dig. ⟸354.
For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

At Law. Actions in the nature of scire facias by D. E. Loewe and others against the Union Savings Bank, against the Norwalk Savings Society, against the South Norwalk Savings Bank, and against the Savings Bank of Danbury. On motions to open defaults in each action. Motions denied.

Daniel Davenport, of Bridgeport, Conn., and Walter Gordon Merritt, of New York City, for plaintiffs.

John R. Booth, of Danbury, Conn., for defendant Union Savings Bank.

John H. Light, of South Norwalk, Conn., for defendants Norwalk Savings Society and South Norwalk Savings Bank.

J. Moss Ives, of Danbury, Conn., for defendant Savings Bank of Danbury.

THOMAS, District Judge. These are all motions to open defaults obtained by the plaintiff for failure to answer a demurrer within the time fixed by the District Court rule, which requires all such pleadings to be filed within 30 days from the return day, unless such time is extended by order of court.

The actions are of the nature of scire facias under section 943 of the General Statutes of Connecticut, Revision of 1902, in consummation of actions begun by process of foreign attachment.

[1] The defaults were entered by the clerk, as of course, on February 16, 1915, during the December term, 1914, and the motions were made on February 25, 1915, and dates subsequent thereto, but all of them after the opening of the February term under the statute, and after the December term had ceased to exist by limitation of time. The proposition that, when a term of court begins, the prior

term ends is firmly established. Bronson v. Schulten, 104 U. S. 410, 415, 26 L. Ed. 797; Ex parte Friday (D. C.) 43 Fed. 916, 918.

[2] There is nothing in the federal statutes which takes the case out of this rule, and the sole question is whether the action is to be governed by the rule obtaining in the federal courts, or by the practice in the state courts of Connecticut. The Connecticut practice is stated in Weed v. Weed, 25 Conn. 337, and the statutes, sections 748, 749, General Statutes of Connecticut, Revision of 1902, providing for the opening of a default at the next succeeding term.

An examination of the authorities leaves no doubt that the state statute and practice have no applicability here, for the reason that the court has no *power* to hear the application, which was not made during the term at which the judgment was taken, and is entirely without discretion. The rule is tersely stated by the Supreme Court in Bronsson v. Schulten, supra, 104 U. S. 417, 26 L. Ed. 797:

"The question relates to the *power* of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered: and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts."

This proposition is firmly established as an essential part of the jurisprudence of the federal courts, and has been very recently reiterated by the Supreme Court of the United States in United States v. Mayer, 235 U. S. 67, 69, 70, 35 Sup. Ct. 16, 59 L. Ed. ——, where numerous authorities are cited. Manifestly it includes defaults, which are in their nature final judgments. Falken v. Housatonic R. Co., 63 Conn. 258, 27 Atl. 1117; Lennon v. Rawitzer, 57 Conn. 583, 19 Atl. 334; Raymond v. Danbury & Norwalk R. R. Co. (Shipman, J.) 14 Blatchf. 133, 43 Conn. 596, Fed. Cas. No. 11,593.

Indeed, this has been expressly ruled by Judge Chatfield, in the Eastern district of New York, in United States v. One Trunk, etc., 155 Fed. 651. The decisions of the Circuit Courts prior to their consolidation with the District Courts were, apparently without exception, to the same effect. Austin v. Riley (C. C.) 55 Fed. 833; Allen v. Wilson et al. (C. C.) 21 Fed. 881; Klever v. Seawall, 65 Fed. 373, 12 C. C. A. 653; Newman v. Newton (C. C.) 14 Fed. 634; School District No. 13 v. Lovejoy (C. C.) 16 Fed. 323.

Especially is this the case here, where all that remains after the default is the administration of the cause as an incident of the main litigation, but not necessarily as a part of it. St. Louis, Iron Mountain & Southern R. R. Co. v. Southern Express Co., 108 U. S. 24, 2 Sup. Ct. 6, 27 L. Ed. 638. The rule is undoubtedly harsh, especially in these cases, but the authorities make an escape from it impossible.

The motions must be denied.

HERBERT et al. v. SHANLEY CO.

(District Court, S. D. New York. May 1, 1915.)

1. COPYRIGHTS ⟸66—INFRINGEMENT—PERFORMANCE WITHOUT PROFIT.
A performance of a copyrighted dramatico-musical composition need not be for profit, to infringe the copyright.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. ⟸66.]

2. COPYRIGHTS ⟸66—INFRINGEMENT—PERFORMANCE.
A performance in words and music only may infringe a dramatico-musical copyright, and it is immaterial whether the performance is only of a scene or a part thereof.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. ⟸66.]

3. COPYRIGHTS ⟸66—INFRINGEMENT—ACTS CONSTITUTING.
Authors of a comic opera, who take out a copyright on a song with orchestral accompaniment, dedicate to the public the right to sing the words to the music, accompanied by an orchestra.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. ⟸66.]

In Equity. Suit by Victor Herbert and others against the Shanley Company. On motion for injunction. Denied.

The plaintiffs are together the authors of a comic opera, "Sweethearts," of which Herbert composed the music and the other three individual plaintiffs wrote the words. This has been performed in New York and elsewhere, and the words and music together have been printed by the corporate plaintiff, G. Schirmer, Incorporated, which took out a copyright upon the whole opera and upon various pieces as musical compositions. The plaintiff Harry B. Smith also took out a copyright upon the libretto of the opera, in so doing complying with all formalities necessary to procuring a copyright as a dramatic composition.

The defendant owns and keeps in the city of New York a restaurant with a large dining room on the ground floor, in the center of which it has erected a stage without proscenium, wings, or back-drop. Upon this stage during the evenings, and while the guests are eating, actors and singers appear, who sing songs to the accompaniment of an orchestra, and who at times accompany the songs with dancing. This is called a "cabaret." The defendant charges no admission to the dining room, and gets its profit from the food and drink sold to the guests while they listen to the performance.

In the opera, "Sweethearts," appears a solo with chorus, entitled "Sweethearts," with orchestral accompaniment; the words and music being separately published by G. Schirmer, Incorporated, and copyrighted as a musical composition. The defendant employed a singer who had purchased a copy of this song from G. Schirmer, Incorporated, to sing it to the accompaniment of a small orchestra. The performance was without chorus, not in costume, and without any further effort to reproduce the opera than is involved in singing the words and music.

The plaintiffs move for an injunction on the theory that the performance infringed the copyright of the dramatico-musical composition.

Nathan Burkan, of New York City, for plaintiffs.
Francis Gilbert, of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] That the opera was a dramatico-musical composition

seems to me to admit of no question; a performance need not, therefore, be "for profit" to infringe, under the rule in Church Co. v. Hilliard, 221 Fed. 229, 136 C. C. A. 639, decided by the Circuit Court of Appeals for the Second Circuit February 9, 1915. Furthermore, a performance in words and music alone infringed the dramatico-musical copyright, for words and music alone may constitute a dramatic performance (Russell v. Smith, 12 Q. B. 217), and it did not matter that the performance was only of a scene or part of a scene (Brady v. Daly, 83 Fed. 1007, 28 C. C. A. 253). So far the case is all with the plaintiffs.

[3] However, the authors took out a copyright upon the song separately as a musical composition, and in so doing they necessarily gave into the public domain all musical rights, except as they were covered by the resulting copyright. Whatever be the minimum of musical rights, it includes the right to perform the music publicly without any unnecessary accessories. Singing the words to the music, accompanied by the orchestra, is therefore within the musical rights so dedicated. On the other hand, we now have it, on the authority of Church Co. v. Hilliard, supra, that a public performance of this kind is not within the statutory copyright which the plaintiffs received as consideration for their dedication. It seems necessarily to follow that the performance did not infringe.

This result no doubt involves the abandonment of some rights, secured by the dramatico-musical copyright, but that is because the plaintiffs wished a double protection. There can be no justice in preserving their dramatic rights at the expense of the public's rights arising from taking out a musical copyright. Had they wished to retain a complete dramatic monopoly, they had it in their power to do so. As it is, that monopoly remains to their complete protection, except so far as its limitation is necessary to give full scope to the musical copyright. For instance, if the performance here had been anything beyond the least essentials to a musical reproduction of the copyrighted song, it would be protected; but it was not. The plaintiffs are really trying to eat their cake and have it; they would get the full benefit of a musical copyright, while they prevent the public from enjoying the corresponding rights.

The motion is denied.

In re AUTOMOBILE CO-OP. ASS'N OF AMERICA.

(District Court, S. D. New York. May 3, 1915.)

1. DEPOSITIONS ⇐56—NOTICE—REQUISITES—NAME OF WITNESS.

Under Gen. Code Ohio, § 11531, providing that depositions may be taken out of the state, and section 11534, providing that written notice of intention to take a deposition shall be given, the notice should state the name of the witness whose deposition is to be taken, since the "deposition" is the sworn testimony of a witness.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 90–117; Dec. Dig. ⇐56.

For other definitions, see Words and Phrases, First and Second Series, Deposition.]

2. DEPOSITIONS ⇐56—NOTICE—REQUISITES—NAME OF WITNESS.

A deposition taken to be used in an action in the federal court on the ground that the witness resides more than 100 miles from the place of trial, which is not a ground for the taking of a deposition under the Code of the state in which the action was pending, is taken under Rev. St. § 863 (Comp. St. 1913, § 1472), permitting the taking of a deposition on that ground, and if the notice fails to state the name of the witness whose deposition is to be taken, as required by that section, the witness can decline to be sworn.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 90–117; Dec. Dig. ⇐56.]

Application by the Automobile Co-Operative Association of America to punish William M. Sweet for contempt in declining to be sworn as a witness, so that his deposition could be taken. Application denied.

Howard H. Williams, of New York City, for petitioner.
Charles Neave, of New York City, for respondent.

LACOMBE, Circuit Judge. Upon the argument, the court indicated why, in this district, it had been repeatedly held that the notice stating that a witness was to be examined de bene esse in some place remote from the forum should give the name of the witness. If this be done, counsel for the adversary party can determine whether he may safely allow the examination to proceed, instructing some local counsel to be present, or whether it is necessary that he should attend personally, perhaps at great expense to his client. Any other practice is embarrassing and tends to increase the cost of lawsuits, a matter which courts should discourage. The federal practice recognizes this, for section 863 expressly provides that the name of the witness shall be stated in the notice.

[1] Petitioner contends that the act of March 9, 1892, makes the mode prescribed by the laws of the state of Ohio (in a federal court of which state controversy is pending) applicable. Counsel cites from the Code of that state sections 11531 and 11534. The first of these sections provides that "depositions" may be taken out of the state. A "deposition" is the sworn testimony of a witness. Section 11534 provides that written notice of the "intention to take a deposition" shall be given. I should understand this to imply that the notice should state that the testimony of some particular witness is to be taken, and find nothing to the contrary in the section. Surely the statement that the notice shall specify the action, the name of the court, the time and place where deposition will be taken does not require a construction which will leave the notice silent as to the most important piece of information to be given to the adverse party, viz., who it is that the other side intends to examine.

[2] This discussion, however, is probably academic, because the notice and the petition both state that the ground for taking deposition is that the witness resides "more than 100 miles from the place of trial." No such ground is stated in the sections of the Ohio Code which have been quoted in the brief. The phrase, however, is found

in section 863, Rev. Stat. U. S.† From this circumstance it is apparent that the notice with which we are here concerned was given under section 863. Since it was concededly defective under that section, the witness quite properly declined to be sworn. Motion denied.

BLOEDE v. VAN DYKE et al.

(District Court, D. Maryland. April 6, 1915.)

REMOVAL OF CAUSES ⊂⊃52—SEPARABLE CONTROVERSIES—SUITS FOR PARTITION.

In a suit for the sale of a franchise from a city for distribution of the proceeds among the owners thereof, no separable controversy which could be removed to a federal court existed between plaintiff and certain nonresident defendants, it being the settled law of Maryland that there can be no partition which will not in its result vest in each person a sole estate in a specific part of the property, and that no sale for the purposes of partition can be decreed unless a decree for partition could be properly passed, if the property were susceptible of partition in kind without loss or injury.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 102, 103, 105; Dec. Dig. ⊂⊃52.]

In Equity. Bill by Victor G. Bloede against John W. Van Dyke and others. On motion to remand to the state court. Motion granted.

Robert Biggs, of Baltimore, Md., for plaintiff.

Joseph R. Gunther, of Baltimore, Md., for defendants Van Dyke, Burr, and Tome.

Edward C. Carrington, Jr., of Baltimore, Md., for defendant Fentress

ROSE, District Judge. In this cause the bill alleges that the plaintiff is the owner of an undivided one-fourth in a franchise granted by the mayor and city council of Baltimore; that the defendant Fentress owns another undivided one-quarter, which has, however, been assigned to the defendant Tome as collateral security for some indebtedness due by Fentress to Tome; that the remaining one-half interest belongs to the defendant Van Dyke, though at various times the defendant Burr has claimed some right, title, or interest in such one-half. Of the nature of such claim plaintiff professes himself ignorant. The bill says that the franchise is not susceptible of partition in kind, and asks that it be sold and the proceeds distributed among the parties in interest.

The plaintiff and the defendants Tome and Fentress are citizens of Maryland. The defendants Van Dyke and Burr are citizens of Pennsylvania. In due season and in proper form the defendants Van Dyke and Burr asked to have the case removed to this court, on the ground that they were citizens of Pennsylvania, the plaintiff a citizen of Maryland, and that the controversy between the plaintiff and themselves is a separate and distinct one from that between the plaintiff and the other defendants, which controversy can be fully determined as between

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Comp. St. 1913, § 1472.

the plaintiff and the removing defendants. The petition makes no other specification of the way in which the controversy to which the petitioners are parties is supposed to be separable, and none was suggested at the argument at this bar. The petition to remove was granted by the state court, whereupon the plaintiff here moved to remand. The motion must be granted.

Under the settled law of Maryland, there can be no partition which will not in its result vest in each person a sole estate in a specific part of the property, and no sale for the purposes of partition can be decreed unless a decree for partition could be properly passed, if the property were susceptible of partition in kind without loss or injury. Dugan v. Mayor and City Council of Baltimore, 70 Md. 1, 16 Atl. 501. The Supreme Court of the United States still earlier determined that all part owners of or tenants in common in real estate of which partition is asked in equity are indispensable parties. Barney v. Baltimore City, 6 Wall. 280, 18 L. Ed. 825.

GOLDEN v. NEW YORK, N. H. & H. R. CO.

(District Court, S. D. New York. April 26, 1915.)

1. COSTS ⊜277—REMEDY FOR COLLECTION—STAY OF SUBSEQUENT ACTION.
While the stay of an action until the payment of the costs in a prior action is in part to compel payment of the costs, it is also used to prevent vexatious litigation, and should be favored.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1048–1060; Dec. Dig. ⊜277.]

2. COSTS ⊜277—REMEDY FOR COLLECTION—STAY OF SUBSEQUENT ACTION.
Where plaintiff, after the dismissal of an action in the state court, commenced an action in the federal court on the same cause of action, and no reason was given for relieving her of the usual results of an unwarranted litigation, nothing appearing to aid the court in exercising its discretion, except the fact that the first action was dismissed, a stay should be granted until payment of the costs of the former action, unless plaintiff takes an oath in forma pauperis, swearing that such stay will prevent her from prosecuting the action, and also stipulates, in the event of success, to allow defendant credit for the costs upon any execution taken out.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1048–1060; Dec. Dig. ⊜277.]

At Law. Action by Bridget A. Golden, as administratrix of Martin A. Golden, deceased, against the New York, New Haven & Hartford Railroad Company. On motion by defendant to stay the action until the costs are paid upon the dismissal of an action on the same cause in the state court. Motion denied on conditions.

James J. Mahoney, of New York City, for the motion.
Charles F. Dalton, of Port Chester, N. Y., opposed.

LEARNED HAND, District Judge. [1] That the stay of a second action till payment of costs is, in part certainly, to collect the costs appears from the fact that, if the plaintiff's body be seized on execu-

tion, the rule does not apply. However, the rule does not wholly depend upon this. Ex parte Stone, 3 Cow. (N. Y.) 380. It is also used merely to prevent vexatious litigation (Flemming v. Insurance Co., 4 Pa. 475), and in the interests of justice. It has been applied in the state court where the prior action was in a federal court (Jackson v. Carpenter, 3 Cow. [N. Y.] 22); and it has been applied, also, when the first action was in the state court and the second, though brought in that court, had been removed (Buckles v. Chic., M. & St. P. Ry. Co. [C. C.] 47 Fed. 424). It is true that it is not applied between two foreign states, and perhaps the reason is not clear, if it be not wholly to compel payment of the former costs; but it is a just rule, arising to prevent needless litigation, and should be favored.

[2] So far as concerns this court's discretion, no facts appear in the case at bar, except that the first action was dismissed. No reason is given for relieving the plaintiff of the usual results of an unwarranted litigation. If she is wholly destitute, and will within five days take an oath in forma pauperis, swearing as well that the condition imposed by this order will absolutely prevent her prosecuting the action, she will be relieved; but, if she has the means of paying the costs, she must pay them. As a further condition she must stipulate, in the event of success, to allow the defendant to credit the judgment for costs, with interest, upon any execution she may take out herein.

The motion is denied upon these conditions; otherwise, it will be granted.

UNITED STATES v. UNITED SHOE MACHINERY CO. OF NEW JERSEY et al.

(District Court, D. Massachusetts. March 18, 1915.)

No. 301.

1. MONOPOLIES ⟸14—COMBINATIONS IN RESTRAINT OF TRADE—MANUFACTURERS OF PATENTED ARTICLES.

The union in one corporation of a number of others, each of which had been engaged in the manufacture of patented noncompeting machines, but which were used successively in a manufacturing business, is not a combination in restraint of trade, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1913, § 8820).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. ⟸14.]

2. MONOPOLIES ⟸14—"COMBINATION IN RESTRAINT OF TRADE"—CONSOLIDATION OF SHOE MACHINERY COMPANIES.

The United Shoe Machinery Company was formed by the consolidation of a number of companies, each engaged in making patented machines for use in the manufacture of shoes, for the most part noncompeting. During the ensuing 11 years it also acquired the patents, property, and business of a considerable number of other manufacturers of different classes of machinery, all of which was used in the manufacture of shoes, and comprising a group of machines covering practically all of the operations required in such manufacture, by which means the company obtained a very large percentage of the trade in such machinery, although it appeared that neither its property nor its business was acquired by unfair means, but, on the contrary, that in most cases its purchases from

others were made at their solicitation, and that in many more cases it refused to buy the business of others which was offered. *Held*, that such facts did not characterize the company as a "combination in restraint of trade," or evidence an attempt to create a monopoly, within the meaning of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (Comp. St. 1913, §§ 8820, 8821).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. ⊂⊃14.

For other definitions, see Words and Phrases, First and Second Series, Combination in Restraint of Trade.]

3. MONOPOLIES ⊂⊃14—ANTI-TRUST ACT—MANNER OF CONDUCTING BUSINESS. Neither is illegality of the company's business shown by the fact that, instead of selling its machines, it leases the same for long terms, with a license for the terms of any patents covering parts thereof, for a royalty based on the number of pairs of shoes on which they are used, with a provision requiring the lessee to use the machines to their full capacity so far as its business warrants, nor because of further provisions, in some of the leases of certain machines, requiring the lessee to also lease other related machines from the company under penalty of cancellation of the lease, where such clause was optional with the lessee, who was charged a smaller royalty when it was included.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. ⊂⊃14.]

In Equity. Suit by the United States against the United Shoe Machinery Company of New Jersey and others. Decree for defendants. See, also, 198 Fed. 870.

James A. Fowler, Asst. Atty. Gen., William S. Gregg, Sp. Asst. Atty. Gen., Asa P. French, U. S. Atty., Edwin H. Abbot, Jr., Sp. Asst. U. S. Atty., and Allen Webster, Sp. Asst. U. S. Atty., all of Boston, Mass., for the United States.

Frederick P. Fish, Charles F. Choate, Jr., William A. Sargent, Malcolm Donald, Harold G. Donham, Walter B. Farr, and Lafayette R. Chamberlin, all of Boston, Mass., for defendant.

Before PUTNAM and DODGE, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. Of course, a proceeding on the criminal side of the court cannot operate as an estoppel in a civil proceeding; but it may be referred to safely in an introductory way, and in explanation of questions of law to be relied on.

The general features of this case are largely stated in United States v. Winslow, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481, and United States v. Winslow (D. C.) 195 Fed. 578; but there are differences, so that we will quote extensively from the bill in the present suit.

In so much of the bill as relates to the organization, we have no occasion to make any distinction between the United Shoe Machinery Company and the United Shoe Machinery Corporation, two New Jersey organizations who are made respondents; and we do not know that we will have occasion to refer to the subordinate organizations made respondents and known as the United Shoe Machinery Company of Maine, etc.

The bill alleges the organization of the United Shoe Machinery Company of New Jersey, as follows:

"Defendants Sidney W. Winslow, William Barbour, Elmer P. Howe, John H. Hanan, George E. Keith, Edward P. Hurd, George W. Brown, Wallace F. Robinson, Rudolph Matz, and others, owners, officers, directors, and agents of said Goodyear Shoe Machinery Company, International Goodyear Shoe Machinery Company, Goodyear Shoe Machinery Company of Canada, Consolidated & McKay Lasting Machine Company, McKay Shoe Machinery Company, Eppler Welt Machine Company, International Eppler Welt Machine Company, and Davey Pegging Machine Company, not being satisfied with the benefit of the lawful monopolies and rights belonging to them under letters patent of the United States and of other countries, which they had enjoyed for many years, pertaining to shoe machinery, and parts thereof, and designing and intending unduly, unreasonably, and unlawfully to extend, expand, and perpetuate said monopolies and rights, and to enhance the value thereof at the expense of the boot and shoe manufacturers and of the public generally, and to use the same as a means for unlawfully controlling interstate and foreign trade and commerce in shoe machinery to a greater extent than was warranted by said letters patent, determined to acquire a complete monopoly of the manufacture, sale, and lease of shoe machinery, destroy existing competition among the manufacturers and dealers in such machinery, and through unlawful combinations and agreements to exclude all others from said trade and commerce. For the accomplishment of this purpose they conceived the idea of acquiring the ownership or control of all concerns engaged in manufacturing and dealing in any and all kinds of shoe machinery, and then to refuse to sell or lease any of the essential machines to the manufacturer of shoes, except on condition that he buy or lease of them practically all other machinery of whatever kind necessary or useful to such manufacturer of shoes, and thereby to exclude all competition by other manufacturers of such shoe machinery and to monopolize the trade and commerce therein among the states and foreign countries. The various contracts, combinations, conspiracies, and acts hereinafter described were steps in carrying out the above mentioned unlawful project. A preliminary agreement was made, and in February, 1899, they incorporated United Shoe Machinery Company, under the laws of New Jersey, with an authorized capital of $25,000,000 ($12,500,000 preferred, $12,500,000 common), with broad powers under its charter to manufacture, buy, sell, lease, operate, and deal in and with all kinds of machinery, tools, and implements, and especially in everything in any way connected with or used in the manufacture of boots and shoes. For the stock allotted to each, and for cash, at values far in excess of real worth, four of the old concerns, to wit, Goodyear Shoe Machinery Company, International Goodyear Shoe Machinery Company, Consolidated & McKay Lasting Machine Company, and McKay Shoe Machinery Company, conveyed to the new corporation, as going concerns, their business of manufacturing, selling, leasing, and dealing in shoe machinery, including their letters patent of the United States and of other countries, and all property and rights used in connection therewith, wherever situated, and their principal owners, managers, directors, and officers became managers, directors, and officers in the new company. Stock of the new company was allotted and received as follows."

At this point the bill shows the distribution of the shares of capital stock of the new corporation among the prior corporations combined in it, or their shareholders. It alleges that the prior corporations conveyed to the new corporation their business, patents, and property rights "for the stock allotted to each and for cash, at values far in excess of real worth." No proof was offered in support of this final allegation, and it has not been insisted upon by the United States.

The bill proceeds:

"Prior to the organization of United Shoe Machinery Company of New Jersey, boot and shoe manufacturers, purchasing or leasing machines from one

of the aforesaid companies, were not compelled to use exclusively machines mentioned in the aforesaid groups manufactured by either of the other companies. For example, the shoe manufacturer who held lasting machines under lease from the Consolidated & McKay Lasting Machine Company was not required to use, in connection with that company's lasting machines, welt-sewing machines or outsole-stitching machines of the Goodyear Shoe Machinery Company, or those of any other company, and he was free to obtain such machines wherever he could procure them to the best advantage. The same was true of the trade in welt-sewing machines and outsole-stitching machines, heeling machines, and metallic fastening machines. Defendants, however, not being satisfied or contented with said portion of the trade and commerce in shoe machinery which they acquired through the organization of United Shoe Machinery Company of New Jersey, and with the intent to acquire complete control of the business of manufacturing and selling or leasing of shoe machinery among the states and with foreign countries, to exclude all others therefrom, to enhance the cost of said machines to users thereof, and to wrong and to oppress the public, discontinued the sale to boot and shoe manufacturers of each and all of the machines included in said groups of machines, and unlawfully devised, adopted, and put into effect arbitrary, oppressive, and unreasonable lease and license agreements, which boot and shoe manufacturers have been and are required to agree and conform to in order to obtain from said defendants any of the machines included in said groups."

On the whole, as the case developed, no objection was persisted in by the United States to the fact that the policy of the Shoe Machinery Company was to lease its machines, instead of selling them. It was plain that this policy was not injurious in a large sense. It enabled manufacturers of small and moderate means to embark in manufacturing to an extent which would have been impossible for them, if they had been obliged to purchase machinery, because many machines are so expensive as to lock up capital and render it dead for practical purposes of financing shoe manufacturing. It is also apparent that a portion of the conditions and provisions of leases were in use without complaint before the United Shoe Company was organized; but it is not necessary that we should detail these facts, because we must take the result of the development as to this topic, at least, as it was found at the time the bill was filed in 1911, and, while the prior condition might mitigate any complaint on that point, it cannot answer it.

The bill further proceeds as follows:

"These agreements contain provisions, not found in their former lease and license agreements, which compel boot and shoe manufacturers leasing any of such machines from defendants to agree to use exclusively one or more of the classes of machines included in said groups of machines owned and controlled by them, upon penalty of having all the machines included in said groups so leased to them by defendants immediately reclaimed and taken away and the lease and license agreements canceled. These contracts further require boot and shoe manufacturers to take each of said machines for a period of not less than 17 years, regardless of the terms of the patents relating thereto. Lessees thereunder are compelled to obtain all duplicate parts, extras, mechanisms, and devices of every kind needed or used in operating, repairing, or renewing the leased machinery from defendants, at exorbitant prices fixed by them from time to time. Many of these agreements further provide that the lessee shall, at the expiration of 17 years, and after he has paid large royalties throughout that period, if he shall then have no further use for the machines, return the same to defendants at their factory at Beverly, Mass., and shall pay to them a return charge, which in some cases amounts approximately to the original cost of building the machines. Defendants have continually, persistently, and arbitrarily enforced the provisions of said lease and license agreements by all the means in their power as against

the boot and shoe manufacturers, and have made it their general policy and practice to refuse to furnish such machines to any and all boot and shoe manufacturers who fail to comply with the terms or spirit of the provisions of said lease and license agreements, and to otherwise injure them.

"Defendants, in pursuance of their general purpose, inserted in and made a part of each lease and license agreement provisions reserving to themselves the right to forthwith terminate and cancel all existing lease and license agreements between them and the boot and shoe manufacturers, if the latter should fail or cease to use exclusively and to their full capacity machines leased or controlled by defendants, thereby prohibiting said manufacturers, not only from using competing shoe machinery manufactured in the United States, but also from using any such machinery manufactured in foreign countries and imported here for sale or lease."

There is no proof that the United Shoe Company has enforced its leases in any arbitrary or unreasonable manner. On the whole, it seems to have been moderate with reference to such enforcements, and the number of cases in which anything in the way of a forfeiture has been demanded has been so small that, on looking over the great mass of the operations of the United Shoe Company, such enforcements have been so few as to be practically negligible, and there is no evidence that the duplicate parts, extras, and other incidentals furnished by the United Shoe Company have been sold at exorbitant prices fixed by it, or that the cost involved in the return of machinery has in any way approximated its original cost, unless, possibly, in some exceptional instances which have not caught the eye of the court. We do not think the case as developed has turned on these particular allegations.

It might have been expected in a proceeding of this importance, involving so many aspects, that the parties would not, at all times, have been in accord as to the pleadings of the United States. Referring to the allegation that the respondents "conceived the idea of acquiring the ownership or control of all concerns engaged in manufacturing and dealing in any and all kinds of shoe machinery," the utmost that the case can in any event be said to show is a purpose to acquire control of certain machinery connected with bottoming shoes, or later of certain clicking or eyeletting machines; and of this the United States became during the trial so far satisfied that it asked permission to amend the above allegation accordingly. On the rules of equity pleading, however, which also are applied to some extent to pleadings at common law, an allegation of the whole field covers any part of it, and may be accepted as such without involving any variance.

Allegations such as the following, which run through these pleadings, color them all, and are to be accepted as controlling the entire bill, namely:

"Not being satisfied with the benefit of the lawful monopolies and rights belonging to them under letters patent of the United States;" "and intending unduly, unreasonably, and unlawfully to extend, expand, and perpetuate said monopolies and rights."

The bill in the same line claims that the alleged confederates had, from the outset of the confederation, taken certain action described in the bill for the purpose of perpetuating the rights they had under existing patents after those patents should expire. We are dealing

now with allegations which seem to assert that the machines acquired by the corporation on its organization were covered by patents, and that its then purpose was to maintain this position, even after the then existing patents expired. This supports the proposition of the respondents that the machinery offered by the respondents was at all times protected by patents succeeding each other. At any rate, it must be accepted that, from the beginning, the machinery offered by the respondent corporation was, in all its essential elements, protected by patents, and that there has been no proof to the contrary. So that, for the purposes of this case, the machinery has been mainly, if not entirely, of that character.

To prevent possible misunderstanding of the position of the respondents in reference to the fact that the Shoe Machinery Company's machines are protected by patents, we repeat and accept what the respondents say, as follows:

"The extent and character of the rule of property established by the patent laws of the United States, under which this entire shoe machinery work from the very beginning has been carried on, is perfectly clear and definite. The industry has grown up under, and has been based upon and made possible by, the rights established by those patent laws."

The propositions thus quoted from the respondents are substantially supported by the record. It also may well be gathered from United States v. Winslow, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481, that the United States, which were then free to put their case as they saw fit, thus put it with reference to the date of the organization of the Shoe Machinery Company, and thus gave it color which we are free to accept as abiding with the organization so long as effectual proof of change to the contrary was not furnished, as it was not. Under the circumstances of the case, this special observation is justifiable, notwithstanding United States v. Winslow was a criminal proceeding, because, no doubt, the natural presumption is that the United States made their case as they had reason to believe it to be. Indeed, it affirmatively and emphatically appears at various places in the bill, and it runs all through it, that all the essential interests which entered in 1899 into the combination forming the United Shoe Machinery Company were, at the time of the formation of that corporation, covered and protected by patents, and there has been no evidence that at any time in the history of the corporation there was any change from its original purposes.

It was at one time largely understood that the Supreme Court substantially held that all combinations of patents were outside the Sherman Anti-Trust Act. Bement v. National Harrow Co., 186 U. S. 70, 90, 91, 22 Sup. Ct. 747, 755 (46 L. Ed. 1058), decided on May 19, 1902, was thought to declare this view. In this case, at page 90 and sequence, some peculiar limited exceptions are referred to, as, for example, a statute requiring an inspection of burning oils and providing a penalty for its violation. The opinion then proceeds, at page 91:

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that

any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

This impression was apparently strengthened by expressions in United States v. Winslow, 227 U. S. 202, 217, 33 Sup. Ct. 253, 57 L. Ed. 481. It is true this case also gave effect to the fact that, on the face of the combination of patents then under review, there was an effort for greater efficiency; but the opinion continues that the machines involved were patented, and it assumes that making them was a monopoly in any case, and that the exclusion of competitors from the use of them was the very essence of the right conferred by the patents. Then the opinion refers back to the Paper Bag Patent Case, 210 U. S. 405, 429, 28 Sup. Ct. 748, 756, 52 L. Ed. 1122. There it appeared that the patent in suit had been locked up by the complainant, its owner, and that the complainant had neither used it nor allowed any one else to use it. There was neither lack of means, nor any other excuse for locking up the invention, except the desire to protect other machines which the complainant was manufacturing. After some incidental explanations, the court there said:

"As to the suggestions that competitors were excluded from the use of the new patent, we answer that such exclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive."

What was said there was directly in issue.

But other late decisions of the Supreme Court seem to demonstrate that the cases we have cited do not state the whole law, but only lead up to the general rule, without showing how this general rule yields to exceptional circumstances. Moreover, this position does not give full effect to the second section of the Sherman Anti-Trust statute, which covers "every person who shall monopolize or attempt to monopolize," as well as those who combine or conspire with any other person, or persons, to monopolize. Certainly in United States v. Reading Co., 226 U. S. 325, at page 358, 33 Sup. Ct. 90, 57 L. Ed. 243, reliance was placed on Swift & Co. v. United States, 196 U. S. 375, 396, 25 Sup. Ct. 276, 49 L. Ed. 518, where a plan said to consist of many parts or elements was held to constitute a monopoly forbidden by the act. There the court observed that whatever we may think of the elements separately, when taken up as distinct charges, they are alleged effectively as elements of a scheme. It is true that in the Reading Company Case there was an underlying combination among the principal promoters of what resulted; but we find there this recognition of what may happen where there is no such combination, given in the language we have cited from Swift & Co. v. United States.

The case, however, that controls the present proceeding in this important aspect is Standard Sanitary Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, decided on November 18, 1912. There the opinion was drawn by the same learned justice who drew the opinion in the Paper Bag Patent Case, so that we may assume that the two cases go along hand in hand. The opinion in the Standard Sani-

tary Company Case refers twice to the opinion in the Bement Case, once at page 40 and again at page 48 of 226 U. S., at pages 11 and 14 of 33 Sup. Ct. (57 L. Ed. 107). At page 48 it is said as follows:

"There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was part of a contract and combination with many other companies and constituted a violation of the Sherman law, but the fact was not established and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in Henry v. A. B. Dick Co., 224 U. S. 1 [32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880], which contravenes the views herein expressed."

Thus the Standard Sanitary Company Case, and consequently the present proceeding, were, and are, by express language distinguished from the Bement Case, and the distinction thus made is that relied upon by the United States here, namely: Instead of dealing with one or more contracts between one or more parties, incidentally made and having no relation to each other, we are dealing with a vast scheme which unavoidably affects the public interests. We need not elaborate other late decisions which indicate and enforce the proposition that a monopoly may be established in violation of the second section of the Sherman Anti-Trust Act, conforming to the explanation of the Bement Case which we have given, and without a formal combination; as, for example, United States v. Patten, 226 U. S. 525, 541, and sequence, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, United States v. Union Pacific R. R. Co., 226 U. S. 61, 85, 86, 33 Sup. Ct. 53, 57 L. Ed. 124, and Strauss v. Publishers' Association, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, at various points in that opinion. Therefore, in view of what we have said, it is necessary for us to go a step further and point out that we have here an organization, supported merely by a diversity of patents or machines patented in whole or in part, and inquire whether the alleged resulting monopoly is arrived at by injurious provisions contained in the licenses and leases referred to, which go beyond what the respondents might justly require.

We should now state generally that the United States claim that, while there are no contracts in form as between the different customers of the United Shoe Machinery Company, the matters are so tied together by the provisions of these licenses and leases, and the scheme created thereby is so complete, as to have the same practical effect of producing the alleged monopoly which the statute prohibits, as though there had been agreements in a multiple form executed by the United Shoe Machinery Company and its various customers. They also claim that this results in a scheme such as we have already referred to. The allegations in this particular are for a large part of a very general character, and it may well be doubted whether the larger portion of them are not so general as to fail to require our attention according to the proper rules of pleading. Perhaps, however, on that score the variety and number of the leases, and of the various provisions thereof, are so great, and the parties with whom the United Shoe Company have been dealing were and are so numerous, that it would be unreasonable

to require the complainant to set out the facts in detail. We have, however, given the language of this part of the bill verbatim, and we can approach it with the general statements substantially in effect that there is nothing in the terms of the leases justifying any allegation indicating a purpose to enhance the cost of the machines to the users thereof, to wrong or oppress the public, or to impose any arbitrary, oppressive, or unreasonable terms.

The bill also alleges that these provisions are not found in the earlier leases and agreements existing prior to the organization of the United Shoe Company. Whether they were or not we regard as immaterial, except as excusing the respondents from any wrongful intention, because we agree with the United States in the proposition that whether or not the conduct of the respondents is in fact in restraint of trade does not depend on the effect of any element considered singly, so that every element considered singly may be wholly innocent; but the question of an existing monopoly, or an intended monopoly, is to be determined by the effect of all the elements which are in fact combined.

The bill gives us no particular rule by which we can determine whether the provisions of the leases and licenses referred to are abnormal, or unjust, or unreasonable, nor where, nor how far, they are within the allowances which the law makes for the protection of legitimate trade and manufacturer. We have nothing bearing directly on this topic except the apparent admission that the common provision contained in the leases and licenses, understood and called the "full capacity clause," standing alone, would be valid, and except, also, expressions like those found in Eastern States Lumber Association v. United States, 234 U. S. 600, 609, 34 Sup. Ct. 951, 58 L. Ed. 1490, decided on June 22, 1914, summing up the previous decisions of the Supreme Court, that the Sherman Anti-Trust Act, "in its proper construction," "was not intended to reach normal and usual contracts incident to lawful purposes and intended to further legitimate trade."

Nevertheless, we fail to find, in the development of the United Shoe Machinery Company and its operations, any support for the alleged charges in the bill of intended oppression, arbitrary conduct, or anything of that nature, especially so far as any allegations cover any attempts to destroy or cripple competitors. Looking at the great mass of facts proven in the case, and the immense number of transactions of the United Shoe Machinery Company, the evidence offered in that direction is so ineffectual that its weakness furnishes of itself satisfactory proof against what was intended to be established thereby. We find no evidence of what was shown especially in the Tobacco Company Cases, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, namely, a purpose to destroy what could not be acquired by straightforward methods. The fact that the United Shoe Company has acquired so large a percentage of the business of the country to which it devoted itself comes so largely from the use of extraordinarily competent methods as to shut out from the eyes of the impartial investigator suggestions of other methods. So we lay aside that part of the case, and deal only with the proven facts, and the legitimate results of those facts,

with little consideration, however, for any charges in this connection, or elsewhere, of intended oppression or unreasonable course of procedure, or of results which can be attributed to any unworthy motive. This, however, according to the well-known rules of law, does not necessarily relieve the respondents from what actually resulted from whatever they did, or from being responsible for these results so far as they might be expected to be foreseen.

The result of our consideration of what appears in the bill on this topic, and of the very general expressions found in it, and found in the authorities applicable hereto, have rendered necessary that we set out, as we will do with very considerable fullness, the claims of the respondents as to the nature and amount of the operations of the United Shoe Company, for the purpose of making clear the just amount of flexibility of the provisions of the leases and licenses as complained of by the United States, which should be regarded as applicable to what is admitted, or must be admitted, to be legitimate for the business of the United Shoe Company.

We may well call attention to some particular provisions in the leases and licenses, although they do not carry us very far towards solving the whole case before us. Among other provisions is one requiring lessees to use exclusively one or more classes of machines included in groups of machines, under penalty of having all the machines included in those of other groups reclaimed. The licenses also cover periods of not less than 17 years, thus regardless of the unexpired terms of the patents relating thereto. Also they cover a requirement that the lessees obtain from the United Shoe Company all duplicate parts, extras, mechanisms, and devices used in operating, repairing, or renewing. With this there is an allegation that the parts can be obtained only at enormous prices. The record, as we repeat, gives us no definite rules for determining how far each of these provisions is legitimate, or otherwise. It nevertheless appears that the prices for duplicate parts, etc., were never exorbitant, but that the contrary is true. Also it appears that, to a large extent, the requirement that duplicate parts, etc., should be obtained from the Shoe Machinery Company is for a large part reasonable. This and some other provisions may relate to the standardizing, and to continuous harmonious use of a long line of successive machines, for which standardization and harmonizing lie at the foundation, as they are the very like of some modern systems of production. Other allegations with reference to this topic are either frivolous or too general to support of themselves any practical results. Consequently it becomes necessary for us to state the case more fully as claimed by the respondents, in order to attempt to furnish some tests as to how far provisions of the kind complained of are legitimate with reference to some portions of the business of the Shoe Machinery Company which every one must admit it is entitled to pursue. The positions and peculiarities of the case are so extensive and novel that it is impossible to apply with any satisfaction any ordinary tests of what are reasonable and normal, and what are unreasonable or abnormal, requirements of the leases or licenses, without a particular view thereof. The case in these respects, as stated by the

respondents, has so many phases that the determination of what portions of the provisions of the leases and licenses are normal, legitimate, or reasonable as applied thereto is a complex topic, requiring much investigation, supported with great patience and care. What we now extract from the positions of the respondents in reference thereto is substantially supported by the record.

These extracts commence with the fact that the circumstances appearing in the well-known Standard Oil Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and the American Tobacco Company Case, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, are so far unlike the circumstances appearing here that no particular assistance can be derived therefrom with reference to what conditions or requirements should be normal, legitimate, or reasonable here. The respondents say:

"This particular business of shoe machinery started about 1860 with the McKay sewing machine. There are men now alive who saw the first McKay machine, introduced about 1860. At the time the machine was invented by Lyman Blake, there was not in a shoe factory a single machine outside of the sewing machine for stitching the uppers, except a machine for making strips of outsoles and a knife organized into a frame which roughly shaped the outsole. There were a few crude pegging machines in use. There was not another machine, and shoes were made absolutely by hand. The business was insignificant as a whole even, and the individual units were most insignificant. McKay had $140,000 when he bought it. He thought that it was a perfect machine, but his $140,000 was gone before he was able to sew a shoe on it commercially. And that is the history of all these machines. They have been most expensive in their development. One unexpected failure after another has broken the hearts of the inventors and promoters before success was attained."

"Then came the Civil War, and the demand for shoes for the soldiers was such that the McKay machine was able to get a start which otherwise it might not have gotten."

"At the moment when McKay started to put this machine out, Elias Merwin and McKay together invented for this business the royalty system, and that system has prevailed throughout the shoe machinery business from the beginning. It was a system of leasing machines, adopted in order that the shoe manufacturers might be induced readily to take the machines. Because in the case of each new machine it was all an experiment, the shoe manufacturers did not dare to take such machines and invest their capital in them. They did not have the capital to invest. This policy was satisfactory to the last degree, and from McKay's time to the present day the royalty and lease system has been the prevailing and characteristic method of the shoe machinery business, so far as the great variety of elaborate and refined machines which have followed the first McKay machine are concerned. One thing which the government asks in the case is that the leasing system which has prevailed from the start in this industry should be destroyed. If the court should declare illegal, as the United States ask it to do, the protective clauses in our leases which we have put there to make the system safe and practicable, the leasing system would have to go."

"There are two important aspects, at least, in which this shoe machinery business is unique. One is that, in every single step in this business up to the point where to-day we are building 350 machines, the machines have been patented machines, always patented, and likely to be patented for an indefinite time in the future, because this art is not yet exhausted. Thirty-five millions of dollars of the property of the Shoe Machinery Company is in the hands of these shoe manufacturers. It finances them to that extent. It keeps those machines in repair, so that the shoe manufacturers have no question of maintenance—no cost of maintenance to deal with. It sees that information calculated to make the operation of the machinery more effective is collected

and disseminated throughout the factories. The shoe manufacturers who deal with our company do not have to be on the watch to get the best possible machines. They know that the defendant will supply them with the best. They know that their machinery is the best in the world, and that, if better is devised, they will surely have it. There is nothing for them to look after except the question of labor, the purchase of material, the design of their goods, and selling them. It is with this business, not with any other, that the court has to determine whether what these respondents have done, what contracts they have made, have been in the normal, orderly, natural line of development."

"McKay had his lasting machine, Thompson had his lasting machine, soon Copeland came along with his lasting machine—all patented; and the impression right straight through of those working in this art who were most intelligible was this: That you might do many things with machinery in shoe manufacturing, but you never could last by machinery, because you are dealing with leather, which is a most difficult thing to deal with. It is so expensive that every scrap should be saved, and none injured. No two adjacent centimeters of leather are the same in character and condition. In flexibility and capacity for stretching no two spots are alike, the surface character constantly varies, and yet you must make a finished shoe without waste or loss and as perfect as possible, and the two shoes of every pair must be perfectly matched. It was the general belief that the lasting machine was an idle dream."

"But the lasting machine has come; and so has every other machine that was required in this industry. The 150 processes that are employed in making shoes are all done to-day by machinery. It is only a short time ago that there was some talk about cutting out the uppers; men said that you never could do that. Human intelligence seemed absolutely essential for the work. Now we have a machine that doubles the efficiency of the human operator in cutting or dieing out the uppers, and does it much better. This is the clicking machine."

"Moreover, the No. 5 laster of to-day is of such a character that the Ideal and the Chase of 1899 are practically obsolete machines. The welter and stitcher of to-day are enormously more useful, efficient, and economical than those of 1899, as the record shows. The rough rounder has been perfected; and so it goes right straight through with every machine in use in 1899, as to all of which there have been a long line of patented improvements, one succeeding another at frequent intervals, every one of which does something that previously was done by hand, or was not done at all. So that to-day you have a completely developed organization of machinery adapted to the manufacture, under the most favorable conditions, of the shoes that the public require. If the requirements change, the machinery is at once changed to meet those new requirements, and there has been a continuous and large gain in economy and efficiency.

"We talk chiefly about the welt shoe, because that is the most important shoe of all, and the one to which our business most largely relates. There were only 17,000,000 of them made in 1898, or less than 10 per cent. of all shoes made. In 1910 there were made over 86,000,000 pairs, and the proportion of welt shoes to all shoes made has been steadily increasing. And why this increase? Because we have given to the shoe manufacturers, between 1899 and the present time, better machines and radically new machines, which enabled them to make those shoes successfully and at a low cost. We are solely responsible for this entire development. The whole credit of it belongs to us."

"Now it is not unreasonable to look at this complex and complete shoe machinery system in this way. Take a screw machine. There there is an organization on one frame which feeds the bar, cuts off the right length, puts in the screw thread, makes the point, makes the head, and cuts the slot in the head, thus making a complete screw. The manufacture of a shoe in a modern factory is practically a unitary operation, like the making of a screw; every one of the many steps being co-ordinated to the others, as if all were taken in a single machine. Everything is aimed at one product, and every single machine is definitely related to the machines that follow it, and to the

machines that are back of it. These machines, that we have talked about as being classified into 'departments,' cover sometimes machines of one department 'tied' to those of another; yet there is no consecutive relation of one department to another in the order of use of the machines in making a shoe, but you start in with one machine from department 'A,' and take the next from department 'D,' and then one from 'C,' and then one from 'E,'—the result being that, when you get through, they have all been interwoven, and the sequence worked out, not department by department, but one machine after another, in any order as far as the departments are concerned. That is, the whole is a continuous process, aimed at one unitary result; and each of the machines, whatever the distribution among the different departments, is organized to succeed the prior machine efficiently, and to prepare the shoe for the next machine. Any one of the machines may spoil a shoe; and the result is that one of the great problems of this art has been to organize each machine, so that not only will it do its work without injury to the shoe, but that there will be no difficulty when you come to the subsequent machines. The work of each machine must be done so that the next machine will work with the required accuracy."

That the whole system thus described, past and present, is, and has been, supported and covered by patented machinery, is shown by the extracts we have already made in that connection.

What we have submitted about the leasing system, and the propositions of the respondents which we have cited, and which cover so large a field, constitute an organization so successful in its operations, continuing so long a time, and so harmonious in its major parts, that anything which would bar out provisions in the leases and licenses necessary to the maintenance thereof must be admitted to be injurious to the manufacturers of shoes, as well as to the manufacturers of machinery, with regard to what each justly desires to accomplish. However, the numerous provisions prevailing in a very considerable variety of leases and licenses, in a very considerable variety of forms, involve so much investigation and so much study that that investigation and that study should not be claimed or expected from any court of justice as primary work; and it should first be taken in hand by a master. This proposition, moreover, is enormously enforced by the systems of standardization, and of other special peculiarities, involved in the enormous work of repairs, and incidentally of supplying parts, which the Shoe Machinery Company is now accomplishing at important, but distant, parts of the United States, at an annual expense said to be in the employment of over 600 men, giving their services exclusively thereto, and all to the unqualified satisfaction, and the very great saving of time and expense, of the shoe manufacturers' industry. The better practice is to refer all such matters to special masters.

In this connection we make no special reference, and have come to no conclusions, in regard to the effect on the pending case of the legislation of Congress enacted since this case was submitted to us, nor with reference to the question whether or not the rights of the parties affected by this legislation would require supplemental pleadings. All such matters would primarily be a part of the special master's finding, if appointed.

We are brought next to a series of independent transactions on which the United States rely, relating to the acquisition of, and control by, the United Shoe Machinery Company of certain businesses,

alleged to have been acquired for the purposes of destroying competition, and thus extending the monopoly alleged in the bill, and covering various periods from March, 1899, to the time of trial, amounting, by the schedule given us, to something more than 50 instances. Some of these on their faces are only "efforts after greater efficiency," as suggested in United States v. Winslow, 227 U. S. 202, 217, 33 Sup. Ct. 253, 57 L. Ed. 481, already referred to. Those that remain which are of any consequence are connected with the acquisition of patents, either directly or indirectly, and are covered by what we have already explained. Of this latter class, so far as we can understand it, is the acquisition of the capital stock of the Goddu Sons Metal Fastening Company. This case is worthy of being treated as a typical one. The transaction occurred in March, 1899, the month after the United Shoe Machinery Company was formed, and more than 11 years before this bill was filed. It related to patentable inventions for metallic fastenings. This transaction seems to be disposed of by the general propositions we have already laid down about patent rights. It also involves a complaint several times made that the United Shoe Machinery Company has taken agreements from inventors barring them from competing with it; but such agreements are legitimate in connection with sales so far as they run parallel to the sales, or wherever they avoid unnecessary competition. The law on this point, within this generation, has been extensively altered and broadened, so that now covenants of this kind may be taken coextensively with the breadth of the trade bargained for in connection with them. So far as we have been able to discover, the various agreements of the character spoken of, and included in the prosecution, have been no broader than the law now allows. There may be some minor exceptions, but they have not been brought specifically to our notice.

We come now to the transactions with Thomas G. Plant as alleged in the bill. The real life of this transaction is in what we have said about the patent rights involved here, and about the provisions of the leases and licenses. Without those it would be impossible to construct any case of restraint of trade under the Sherman Anti-Trust Act mapped out by the bill we have before us. Without them there can be no illegal structure whatever. All the property, including that acquired from Plant personally, covered by these matters, has been broken up and lost sight of as an entity, except only the shoe manufacturing business, the control of which was acquired by the control of Plant's shares of stock in the T. G. Plant Company, while the shoe manufacturing business is not within the purview of this prosecution, because there is no claim of a monopoly acquired in that occupation. Whatever else was acquired from Plant was either patented machinery, or patents, or inventions which stood for incipient patents. So much, therefore, of the property acquired from Plant, except the shoe manufacturing business property, is subject to what we have already said about patents, and the provisions contained in the leases and licenses we have referred to, incidental thereto. Moreover, as to all of these incidental matters, the learned counsel for the complainants said as follows:

"The leasing system in and of itself is not a violation of law; the acquisition of competitors was not a violation of law; the threats and intimidation of competitors did not constitute, in and of themselves, a violation of law; but when all of these things are taken together they form an unlawful plan; therefore the plan will make the parts unlawful; so that if we started in 1899 with a lawful combination, and that combination is used to build up a monopoly, we see no reason why the court cannot go back to the original combination, and separate it for the purpose of restoring competitive conditions, because that combination has been used as an instrument for monopolizing the business."

This can justly be construed as a proper admission that the subject-matters submitted by the bill are to be taken substantially as a whole; so that, if the fundamental matters, which lay at the foundation on which the structure was intended to be built, go out, the whole goes out. The court is not called on to reconstruct what was intended to be built by the United States, if the most essential parts of that structure have disappeared. It is well to observe that, to a stranger, the transaction with Thomas G. Plant seems a very large one; but, as compared with the manufactured product of some of the witnesses who testified in the case, it was a minor thing, and particularly so when compared with the product of 86,000,000 pairs of welt shoes in 1910, and as compared with the great transactions to which this prosecution relates.

There have been many unthinking criticisms of the respondents in this case, both federal and state, some semiofficial, and some personal, and therefore irresponsible; but the conduct of this long and laborious trial before this court has been a model for those who witnessed it. It has been conducted with extraordinary persistency and ability, but with fair and open hand, and constantly with that courtesy due the counsel and this tribunal.

The court having carefully considered the pleadings of the parties and their evidence, and heard the counsel, it is ordered, adjudged, and decreed that the bill of the United States herein be dismissed.

DODGE, Circuit Judge. 1. United Shoe Machinery Company of New Jersey, organized early in 1899 by consolidation of the properties and business of several constituent companies, is charged to have been formed in violation of the Anti-Trust Act.

This claim is based on two alleged grounds: (1) That it destroyed competition between the component companies; (2) that it was brought about with an unlawful intent on the organizers' part to destroy such competition and to use the consolidation as a step in carrying out an unlawful project formed by them to acquire a monopoly. (Petition, pages 18, 80, of record.)

Has the United States proved that such destruction of competition resulted from the consolidation as made it a combination in restraint of trade? Taking the facts to which the evidence relates in order of time, this is the first question presented.

The restraint or monopoly alleged in the petition is restraint or monopoly of interstate commerce in "any and all kinds of shoe machinery"; i. e., in shoe machinery generally.

But it appeared early in the trial that no such charge could be

proved, because neither the business of the component companies in 1899 nor that of the United Shoe Company from its beginning until the bill was filed related to "all kinds of shoe machinery." Both were always limited to certain kinds only. This was finally conceded, and the field of trade in shoe machinery with which this case is concerned limited by concession of the complainant's counsel to machines of the following kinds: (1) Lasting or "pulling over" machines, used for adjusting and attaching the upper of a shoe in process to a last; (2) machines for preparing bottoms and heels and fastening them to uppers; (3) machines for finishing bottoms and heels after they have been so fastened; (4) eyeletting machines for inserting eyelets in uppers; (5) "clicking machines" for cutting out uppers. The "shoe machinery" as to which restraint or monopoly is charged, therefore, includes machines of the above kinds only, for the purposes of all questions hereinafter considered. It is to be noted that such machines are insufficient for the making of a complete shoe, and that no attempt to control machines for stitching uppers is charged.

We are concerned only with the first three of the above classes, so far as regards the above consolidation in 1899. None of the constituent companies then made or dealt in eyeletting or clicking machines. These originated with the United Company. It introduced and developed them later on, at different times during the development of its own business after 1899. Its eyeletting machines were first produced about 1902; its clicking machines in 1908 or 1909.

The United Company was formed February 7, 1899, taking over, in exchange for its own stock, or for cash, or both, the business and property of each of the following concerns: Goodyear Shoe Machinery Company and International Goodyear Shoe Machinery Company (both in the same line of business and hereinafter together called Goodyear Company); Consolidated & McKay Lasting Machine Company (hereinafter called Consolidated Company); McKay Shoe Machinery Company (owning and controlling Davey Pegging Company and hereinafter called McKay Company). From money obtained by issue and sale of other shares of its own stock it bought in March, 1899, the stock, business, and property of the Eppler and International Eppler Welt Machine Companies. These, though strictly acquisitions of the newly formed United Company, after its formation, may, for the purposes of the present question, be regarded as constituent companies.

To allegations found in the petition (page 18) that the business and property of the Goodyear Company, the Consolidated Company, and the McKay Company were taken over by the United Company "at values far in excess of real worth," reference is made at this point only in order to state that no proof of any kind was offered in support of them, it was not argued on the petitioners' behalf that they were true, and they therefore require no further notice for any purpose in the case. There can be no doubt that each concern had an established business already of great value and possessing great possibilities of development, or that each also owned patents and property of very great value in connection with its business.

Up to the time of their union each constituent concern had been

dealing, generally speaking, in a line of shoe machinery for the most part distinct from that dealt in by the others. Thus the Goodyear concern's business had been that of making and dealing in welt-sewing and out-sole stitching machines and auxiliary machines for use therewith, all designed for the manufacture of Goodyear welt shoes; also one kind of lasting machine, called the "Ideal," designed for lasting women's welt shoes. The machines of the Consolidated concern were lasting machines of three kinds, designed respectively for lasting men's welt shoes (this was called the "Chase"), heavy metallic fastened or pegged shoes, and McKay sewed shoes. The machines of the McKay concern were heeling machines, metallic fastening machines, and Davey pegging machines. The Eppler machines were welt-sewing machines and certain auxiliaries therewith used in making welt shoes (not Goodyear welts). After the union the United Company proceeded to make and deal in all the above machines.

It is here to be noted that the Goodyear welt method is only one of several methods of uniting the upper and sole of a sewed shoe. This method was from the outset in direct competition with the McKay method, and it has so continued until the present time. The Eppler welt machine was for doing the same thing by still another method. As the McKay method is and has been open to all the world, shoe manufacturers are and have been always able to obtain machines for sewing uppers, and machines (i. e., McKay sewing machines) for attaching bottoms to uppers, independently of the United Company or any of its constituent companies.

The various machines produced as above by each constituent concern were, as the petition alleges (page 15), all made "under letters patent of the United States and of other countries." The patents belonged to the respective concerns and covered improvements from time to time embodied in each machine during the course of its development by the concern producing it. Each concern had so far developed and improved its own machines that they were, in 1899, the machines principally in use by shoe manufacturers throughout the United States, in doing the respective kinds of work for which each was adapted as above. All the patents referred to passed by the consolidation to the United Company. Each concern had further improvements upon its machines under trial, and all the rights in these inventions also passed to the company.

The combination was not unlawful so far as it did no more than put the different groups of noncompeting patented machines into one control. United States v. Winslow, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481. It was not unlawful unless, to an extent injurious to the public interest, it destroyed competition. In support of the charge that there was such destruction of competition, the United States contends that before the combination (1) the Goodyear Company and the Consolidated Company were competing in lasting machines, and (2) the Goodyear Company and the Eppler Company were competing in welt-sewing machines. Unless the termination of such competition as existed between these concerns in respect of these machines made the combination unlawful, it was not unlawful because of any destruction of competition involved in it.

(1) As to the alleged competition in lasting machines, it is not claimed that there was any, so far as two of the three kinds made by the Consolidated Company are concerned. These are the "McKay-Copeland" laster for lasting heavy metallic fastened or pegged shoes or brogans, and the "hand-method McKay" laster for McKay sewed shoes; and neither of them could be used to last welt shoes, for which purpose alone the Goodyear Company's "Ideal" laster was adapted. The only question here is whether the latter machine can be regarded as competing with the remaining laster of the Consolidated Company (the "Chase"). With still another laster with which the Consolidated Company was experimenting in 1899, for use on welt shoes, we are not here concerned, because, though this laster was afterward further improved, developed, and finally furnished to users by the United Company, it had not been made an article of commerce in any practical sense when that company was formed.

There is no proof of any actual use of the "Chase" laster otherwise than for its intended purpose of lasting men's welt shoes. It could not work well for use with the lighter leather whereof women's shoes are made. The "Ideal" laster, used almost exclusively for its intended purpose of lasting women's welt shoes, could not be relied on to work well with the heavier leather whereof men's shoes are made. The proof relied on to show that it competed with the "Chase" went no further than to show that a number of "Ideal" machines, small in proportion to the total number then in use, were being used in a few factories on men's shoes, notwithstanding their want of adaptation to such use. That there was any attempt to put either machine into the market as against the other does not appear. No competition between the two in the usual sense of the term is shown. After the consolidation, by the addition of a patented "hold-down attachment" added by the United Company to the "Ideal" in 1901 or 1902, some of the defects referred to were removed, but not until then can it be said to have been commercially successful for work on men's shoes. Before this improvement, it possessed at most a limited possibility of such use. I am unable to consider it established that competition in any practical sense was destroyed when the United Company became owner of both machines.

(2) As to the alleged competition in welt-sewing machines, the question is to what extent the Eppler welting machinery can be regarded as competing with the Goodyear welting machinery. Outside of that produced by these two concerns, no other welting machinery appears to have been on the market at the time.

The Eppler machines were adapted to produce men's thick-soled welt shoes only. They could not produce women's welt shoes (except perhaps those having the thickest soles), nor turn shoes of any kind, nor Goodyear welt shoes, either men's or women's, because of the difference between the respective machines in the character and position of the seam left in the inner sole of the shoe. The Goodyear machines could produce shoes of all the above kinds. The differences referred to resulted from differences in the character and operation of the machinery belonging to the different systems. These differences in character and in possible field of use had resulted, when the

United Company was formed in 1899, in the fact that over 2,500 Goodyear welting machines were in use as against 30 or 40 Eppler machines; one-third of these being used in the factory of the president of the Eppler Company. The evidence leaves me unable to believe that the possible field of competition between the two machines was large enough, or any actual existing competition significant enough in amount, to warrant the conclusion that the acquisition by the United Company of both machines involved such destruction of competition as rendered it unlawful. The Eppler machines were not suppressed by the United Company. It continued to supply them until the progress of improvement in such machinery superseded them. The patents covering them have long since expired, and it is open to any one to make and use such machines if he desires. There is no present monopoly in them, and no action taken by the court could restore them to the field of competition, or encourage or create competition by them.

Nor, if such competition as is shown to have existed between the "Chase" and the "Ideal" laster be taken together with that shown to have existed between the Eppler welting machinery and the Goodyear welting machinery, do I find it credible that the avoidance of both amounted to a consideration of any substantial importance, so far as the formation of the United Company was concerned. No reason appears for supposing that the real purpose for which the constituent companies were brought together, as disclosed not only by the evidence regarding all the circumstances as they existed in 1899, but by the evidence as to the course of development thereafter pursued by the United Company, was other than that stated in a circular letter to the Goodyear stockholders issued February 8, 1899, the day following the organization of the United Company. (Petitioner's Exhibit 152.) This dwelt upon the advantages to be secured by putting into one control "the most efficient types" of shoe machinery. In United States v. Winslow, above cited, which was decided more than a year after the present bill was filed, it was said that the combination here in question was, on its face, "simply an effort after greater efficiency," and the legality of combination for such a purpose is fully recognized.

Under their respective patents upon the "Chase" and the "Ideal" lasters there was litigation pending in 1899 between the Consolidated Company and the Goodyear Company, each claiming that the other's machine infringed its patents. Also under the patents covering their welt-sewing machines there was similar litigation pending between the Eppler Company and the Goodyear Company. A result sought to be attained by both parties to these controversies, and accomplished by them through the acquisition of all the patents by the United Company, was the termination of all this litigation. Reference is made below to other later acquisitions by the United Company, an important feature of which was that litigation, troublesome and expensive on both sides, was avoided or terminated. In so far as any of the defendants' transactions were in order to accomplish results of this kind, it cannot be said that their purpose was unlawful.

For the reasons stated, I am unable to find the charge that the United Company was unlawfully formed because of competition which it de-

stroyed sufficiently supported by the evidence. It would, in any case, be difficult to regard this as sufficient ground for a decree dissolving the company into its component parts, under a bill not filed until more than 12 years had passed since the combination complained of was accomplished. During this period, as the evidence shows, investments of a very large amount had been made, not merely by the defendants, but also by the outside public, in the extension and development of the company's united business, the component companies passed out of existence, and the machines as made by them in 1899 were so far developed, improved upon, or added to by the United Company as now all to have become obsolete. To put the parties or the public back into that state of the prior art which existed in 1899 is, of course, an impossibility.

2. Coming next to the question whether or not it has been proved that the United Company was formed with an unlawful intent on the part of its organizers to destroy competition in the future and use the consolidation they then effected as a step in carrying out an unlawful project to establish a monopoly, we are brought to the consideration of the acts and doings of the United Company, or of the other defendants through its means, from the time it was formed until the filing of this petition in December, 1911. It appears that the United Company itself, and what has been done in connection with it during that period, has been under the control, speaking generally, of the same defendants who brought about its formation in 1899. Of their actual intent in forming it, and in taking the various steps which they have taken as above in connection with it, there is no direct proof overcoming their denial that it was such as the petition charges, and no way of judging, except from the necessary results of all the steps proved to have been taken by them, as a whole.

But it is important at this point first to determine how far certain allegations of the petition, which characterize the defendants' alleged project and their motives for forming it, have been sustained by the evidence. These are found on pages 15 to 17 of the record, and they are in substance that the component companies were, in 1899, manufacturing their respective machines and parts thereof under patents, that "many of the basic patents on the principal machines were about to expire," that their manufacture and use was thus about to become open to the public "in the near future," and that the defendants, not being satisfied with the rights they had enjoyed under the patents and intending to expand and perpetuate them to the public detriment, devised the alleged project of acquiring a monopoly which the petition thereafter describes.

This trial began on May 20, 1913. On June 27, 1913, the petitioner, having introduced substantially all its other direct evidence, stated that it desired to offer proof in support of the allegations just referred to, but was not then prepared to go into the matter.

By consent, an order of reference to a Special Examiner was thereupon entered (pages 262 T, 1996) for the purpose of taking such evidence as either party should offer regarding those allegations, out of court. Such evidence was required to be completed by October 11, 1913, but successive extensions of the time were afterward found nec-

essary and allowed by consent. Before the examiner, the petitioner did not complete its direct evidence until October 6, 1913, and the evidence on both sides was not completed until November 19, 1913.

At the final arguments, however, on June 2, 1914, the statement was made by petitioner's counsel that so many machines and patents were involved that examination of more than a very few had been impossible. It seems obvious, therefore, that the allegations in question could not have been founded, when they were made, upon any adequate or complete investigation of the facts.

Nor can it be said that they have been sustained by the evidence before the examiner. It seems unnecessary to spend time in considering what patents could and what could not properly be regarded as "basic," in view of the fact that, of the patents principally relied on as such by the petitioner, those protecting the welter and stitcher of the Goodyear Company, there were two, one upon its welter, the other upon its stitcher, which ran until 1908 and 1909, respectively. The petitioner's final position, indeed, as to what was proved by the evidence before the examiner, was by no means that taken in the allegations referred to, but was only that the two machines above mentioned, and others protected in 1899 by patents not insisted on as "basic" patents, became free to any one to make or use—without any of the patented improvements added to them by the United Company since 1899, but nevertheless capable of successful commercial use—before the filing of this petition in 1911. In view of all the above, I must regard the allegations here in question as not sufficiently supported by proof, and hold that no such motive is shown to have prompted either the organization of the United Company, or any of its subsequent doings. The effect of the evidence and of the petitioner's argument is to show that Goodyear machines of the old type are capable of commercial use and could have been made by anyone who chose to make them. That, after the expiration of the two so-called basic patents, machines constructed according to them were not used, is sufficiently accounted for by the superiority of the newer machines which the defendants had introduced. For that reason the older machines did not enter into competition with them, and the defendants cannot be charged with suppressing such competition.

3. The combined business of the component companies, as conducted and developed since 1899 by the United Company, related most largely to the machines used in producing welt shoes. The use of such machines (and thereby the production of and demand for such shoes) is shown to have been very greatly promoted by patented improvements made upon the machines of 1899 by that company, greatly increasing their efficiency and capacity, and by improvements effected by that company since 1899 in the methods of manufacturing them. It appears that the total number of welt shoes produced in this country in 1899 was about 17 million pairs, and in 1910 about 86 million; the total production of all kinds of shoes increasing during the same period from about 175 to about 280 million, and the Goodyear welt shoe being all this time in direct competition with the McKay sewed shoe.

It is further shown that the above improvements in the machines

and their manufacture were accomplished by means of constant investigation, experiment, testing, and invention by competent experts employed by this company, involving a very large expenditure on its part. These efforts were directed, not only toward making each machine as efficient as possible by itself, but also toward increasing its efficiency for so performing its own operation upon a shoe as best to combine it with the work upon the same shoe by the numerous other machines required for performing the remaining necessary operations—in order that all the many successive operations performed should co-operate toward the most economical and efficient accomplishment of the best final result in product. And besides thus developing and improving the machines of 1899, the company kept pace with the requirements of manufacturers by the invention and production of many other machines or improvements, unknown in 1899, as the need for them became apparent.

There is no question that the above-described development of the United Company's business has resulted in a very great commercial success. Its machines, as was the case with those produced by the component companies in 1899, have ever since been those which shoe manufacturers in general can use to the best advantage and therefore prefer. The increase in the number of its machines in the hands of users has been very large. Nor is there any question that of all the machines, of the kinds to which this case relates, in use when the petition was filed, those of the United Company constituted all but a very small proportion.

It is nevertheless true that, considering the whole field of machinery for stitching together the bottoms and uppers of shoes, there has all the time been free competition. The use of other machinery to accomplish the purpose has always been open to shoe manufacturers. In that part of the field of trade in shoe machinery to which the case is now limited as above, the defendants have been not monopolists but competitors. Their only means for holding the field have been legitimate means—better machines. Their specialization in machines for bottoming shoes, and not a monopoly of such machines, has been the cause of their success.

No support is found in the evidence for the charge in the petition (paragraph X) that "enormous and unreasonable profits" have been made. This allegation is made in connection with, and apparently depends upon, the allegation of which, as above stated, there is no proof —that the properties combined in 1899 were taken over at excessive valuations. Nothing shown by the evidence warrants the conclusion that profits unreasonably out of proportion to the extremely large cost at which the business has been developed and is maintained, the great investment of capital it has required, and the enterprise, inventive skill, and business ability devoted to it, have been realized. Nor has it been made to appear that the charges made for the privilege of using the machines are exorbitant or unreasonable, especially in view of the great benefit to manufacturers using them, in lessening their cost of production.

If there is any sense in which the result attained as above can be called a "monopoly," it does not follow, in view of the circumstances

shown, that the defendants have either restrained trade or been guilty of monopolizing or attempting to monopolize within the meaning of the act. Nor can I regard the case as one in which any presumption arises, from the fact that so large a proportion of the users of these machines use the defendants', that the defendants have committed any of the above forbidden acts in accomplishing the above result. The proof is too complete that it has been in fact reached by the use of methods entirely lawful, the leading features whereof are below indicated. As has been said, the field they have occupied is a special field, and the product for which their machinery is adapted is of higher price and quality than the product of the machinery of others.

The business which the defendants have developed and established is not and has never been one in which everybody might freely engage. No one else could lawfully make or use machines containing improvements covered by the defendants' patents. Nor can it be said that the demand for such machines which they have supplied existed independently of the defendants; on the contrary, they have created it by the new methods of shoe manufacture which their improvements have educated and enabled manufacturers to follow. It cannot justly be said that the case is one in which a field of commerce normally belonging to all has been captured by a single concern. The principles applying in such cases cannot justly be applied here. In so far as the defendants' occupation of the field has been due to the greater desirability of their patented machines, and to the superiority of their methods of making and supplying users with such machines, no reason appears for holding it unlawful, whatever its extent.

Supplementing the production and development of its various patented machines, methods introduced by the United Company for keeping them in efficient operating condition while in the hands of their various users throughout the country have most effectively aided the development of its business. It has undertaken, not only to train operatives in the proper use of the machines and to secure the prompt repair of any machine disabled in use, but also to supply each user from time to time with the latest improvements, either by adding them to the machines or by substituting improved for superseded machines, without extra cost to the user. This service it has furnished by maintaining at central points bodies of competent employés who attend to the above matters whenever and wherever they are notified by users that such attention is desired.

A system of standardization, introduced since 1899, whereby corresponding parts of the various machines have been so constructed as to be interchangeable whenever possible, has, in connection with the service furnished as above, effected a great reduction in the time lost by machines in waiting for repair. The introduction of such a system could not have been effected by the component companies, because each carried on the manufacture of its machines at a different place. While each of them rendered to its users some service of the character described, this was done to a limited extent only; and the maintenance of any such system of rendering it as the United Company has pursued would have been impossible to them, because of the heavy outlay involved.

The service secured to users of the machines by the system just described has been furnished to users without charge in addition to the royalties paid by them under the leases of their machines. For duplicate parts, extras, etc., required in operation, repair, or renewal, the terms of the leases required payment. Allegations in the petition that exorbitant prices were charged for such duplicate parts, etc., were not sustained by the evidence, and have not been insisted on in argument.

That the degree of success attained, and the preponderance in number of users supplied which the United Company has secured, are fully accounted for by the superior efficiency it has developed in its patented machines for work in combination with each other, together with the superior facilities it affords as above for their most efficient use, must be regarded as shown beyond question. It is not disputed that, when the petition was filed, its machines represented, in number and amount, the highest development ever reached in the art to which they belong, or that they are most in demand by manufacturers of the higher grades of shoes for that reason.

So little room for doubt does the evidence leave that the success and preponderance referred to are the natural and legitimate result of the intrinsic merit of the patented machinery and service furnished as to require clear and convincing proof of any assertion that they are due to causes other than these. It cannot be said that of themselves they justify any such presumption that unlawful means have been resorted to in attaining them, as has been held to exist when, in a business whereof no lawful monopoly is possible, because it is normally open to all, the success of one competitor has been attended by the disappearance of such competition as previously existed.

4. The petition charges the United Company with acquiring and absorbing the business of 60 different concerns or persons, described as "competitors," in pursuance of their alleged unlawful scheme, and as one method whereby what is called its "monopoly" has been built up. The nature and circumstances of these transactions are next to be considered.

As to one of these concerns (Boston Blacking Company), also made a defendant in the case, the charge was withdrawn early in the trial, and the petition dismissed by consent so far as it is concerned. (Record, p. 261 A.)

The petition has also been dismissed as against two other concerns, also made defendants (J. C. Rhodes & Co. and Thomas G. Plant Company), though the charge regarding the acquisition of their business is still urged against the remaining defendants. The transaction involving the concern last mentioned requires consideration by itself. The 58 remaining charges of unlawful acquisition may be more generally dealt with.

The 58 concerns or individuals referred to made transfers to or agreements with the United Company at one time or another during the years 1899 to 1910, inclusive; and the transactions related more or less immediately to shoe machinery in general, if the term be taken in its most inclusive sense. So far there is no dispute.

Eleven of the transactions were at various times in 1899; eight in 1900; six each in 1901 and 1902; three each in 1903, 1906, and 1908; nine in 1904; one each in 1905, 1906, and 1909; five in 1910. Though thus extended through a period of years, and though widely varying each from the others in character, both in respect to the nature of the transaction itself, and also regarding the circumstances attending it, the petition sets them forth as if all had been in pursuance of one and the same scheme, there described as a scheme to control shoe machinery in general, though now called a scheme only to control the particular classes of shoe machinery before mentioned.

The nature of some of these acquisitions may be regarded as enough of itself to prevent them from being called indications of a purpose to control any of the particular classes of machinery now important, however it might have been were the scheme now asserted the one originally alleged, for controlling all shoe machinery in general.

This seems clear in the cases where the business of concerns engaged in selling sand paper, or in making patent brushes, or in making peg wood, was taken over; and hardly less clear, without further evidence, in the cases where the business acquired was making wire and spare parts for use in an obsolete metallic fastening machine, or making treeing machines and parts thereof, or making needles, awls, and rawhide mallets, or making nails and tacks, or dealing in cement, blacking, and second-hand sewing machines, or making metallic heels and counters to go outside the shoe whereon they were used.

The business of four of the concerns acquired is described in the petition as that of making eyelets, enameled or not. Neither is alleged to have been making any eyeletting machine. The eyeletting machinery wherewith we are concerned, however, has been repeatedly described by the petitioner as machinery for inserting eyelets in uppers; i. e., such as the machine first leased by the United Company in 1902.

To the cases wherein inventions or machines for pasting outer leather to linings, or for cementing fabric to uppers, were acquired, little significance can be given, in view of the petitioner's abandonment of the claim of any scheme to monopolize machinery for producing uppers.

In several others of the transactions specified there was no acquisition of any tangible property whatever. These consisted of contracts only—either contracts for employment by the United Company, or contracts in which undertakings by it were accepted in substitution for obligations previously assumed by one of the component companies. In none of these cases is it made to appear that the party contracted with was a "competitor" in any kind of shoe machinery, or that the business of any such "competitor" was "absorbed."

There remain a number of instances involving the acquisition of patent rights, patents, or machines relating to or capable of being included within some of those kinds of shoe machinery whereto the case is restricted as above. In the larger portion of these the device or machine acquired is shown to have been of a kind not then being produced by the United Company. There being nothing unlawful, as above stated, in the acquisition of different groups of noncompeting

patented machines, it is clear that, by such enlargements of the United Company's field of operation, no "competitor" can be said to have been absorbed or driven out of business, and that no reason appears for holding the acquisitions thus made unlawful either in themselves or because made in furtherance of an unlawful purpose.

The instances then remaining in which the United Company was at the time producing or trying to develop for production a patented machine for doing work more or less similar to that for which the invention of the machine acquired was intended are the only ones capable of being regarded as of any possible significance for the purposes of the petitioner's case. In all such cases it appears that the acquisitions made were of patented improvements, whether or not embodied in an actual machine, enabling the United Company to increase the efficiency of its own machines, or to complete the development of others with which it was then experimenting, or had not yet succeeded in rendering commercially successful.

No case, however, is found among the acquisitions of the character last described wherein it has fairly been made to appear that actual competition existed between the device or machine acquired and any machine then being produced or experimented with by the United Company, of such consequence as justifies either the conclusion that the acquisition was for the purpose of suppressing such competition, or the conclusion that a material restraint of trade was thereby accomplished. In most of the cases of this sort the machine or device acquired was claimed to infringe patents belonging to the United Company, or the patent acquired was one which some machine belonging to it was claimed to infringe, or the application acquired was in interference with applications of its own, and the object of the acquisition is shown to have been the avoidance or compromise of pending or threatened litigation. In such cases it is still less possible to say that any wrongful absorption of a "competitor's" business has been proved.

The acquisitions above regarded as the only ones of any possible significance in the case were made at various separated times during the period of 11 years or thereabouts above referred to. It cannot be said that the later ones were in contemplation when the earlier acquisitions were made, bcause there is nothing to show that the circumstances attending any of them were such as could have been anticipated as likely to occur at the time of the preceding acquisitions. The most that can be said is that as, in the progress of events, the needs of the United Company became manifest and these opportunities presented themselves, they were availed of.

Taken together, the acquisitions of this class are, in importance and amount, only of a consequence relatively small in proportion to the entire field then lawfully belonging to the United Company. It does not appear that they contributed anything essentially important to that degree of commercial success obtained by the company as above. If they assisted in obtaining it, it was by assisting the development of the machines to whose ultimate efficiency it was due. It can hardly be said as to any of them that they afforded anything more than a basis whereon to build. Speaking of them generally, it may be said that the invention or machine obtained required further development in the

company's hands before it could be properly used. Thus in the case of the Goddu Company, the first instance of alleged unlawful acquisition specified (page 28), the metallic fastening machines acquired by purchase of a controlling interest in the company were none of them in the hands of users; their then state of development does not appear to have been such as made them capable of commercial use, whatever the merit of the inventive ideas they sought to embody; nor is the evidence sufficient for a belief that without reconstruction, radical in character, any one could have used them as competing machines. In not a few of the cases specified, the patent or machine, being wholly experimental when obtained, proved an ultimate failure so far as commercial success went, notwithstanding much time and money expended in the attempt to develop it.

It further appears that, during the same period of time, the cases wherein the business of a concern producing shoe machinery was offered to the United Company, and refused by it, were far more numerous than the cases of acquisition specified by the petitioner. As to several, at least, of these instances of refusal, the evidence warrants the belief that the business offered and refused much exceeded in importance to any such scheme of monopoly as now charged any of the specified acquisitions. The cases in which inventions were offered and refused during the same period were many times more numerous than the patents or inventions acquired. If a monopoly of all machinery for attaching bottoms to uppers was really undertaken, it is hard to believe that opportunities would have been neglected, as they were, such as those for acquiring the Union lock stitch machines, or the welters and stitchers of the R. H. Long Company, all of them patented machines for use on welt shoes, or for acquiring a considerable business in producing McKay sewing machines, though these were unpatented and not capable of use on shoes of that kind.

The petition charges generally that covenants in writing were taken from substantially all those whose business was acquired as specified: (1) Not to engage for long terms of years in competition with the defendants in commerce in shoe machinery; (2) to convey all inventions or patents in shoe machinery which they might make or acquire during such terms to the defendants.

These charges are not justified by the documents themselves, which have been produced. They are by no means uniform in their terms, there was no generally prescribed form for them, nor were they all the work of the same hands. Each was framed according to the circumstances of the particular transaction. In many cases, at least, the agreements required only that there should be no competition in the line of business involved in the particular transaction, or that all patents or inventions thereafter made in the particular line to which the acquired invention belonged should be transferred. There are enough of the agreements in these cases, which are without covenants of the kind described, to leave the allegation unjustified that such covenants were required in substantially all. And of the instances wherein covenants are found in any degree answering the alleged description, it may be said generally that none are clearly shown to have ex-

ceeded what the law permits. Still less reasonable would it be to regard what is found in them as indicating a consistent purpose on the defendants' part to exclude all those with whom the agreements were made from all possible future competition with the United Company.

An allegation in the petition that the business of many competitors was bought at exorbitant prices fails of support in the evidence relating to any specified instance of acquisition among those thus far considered. As to them, indeed, no claim of the kind seems to be seriously urged.

5. The acquisition in September, 1910, from Thomas G. Plant, consisting principally of a large number of patents, or applications therefor, relating to shoe machinery—machines embodying those inventions and Plant's controlling interest in the stock of the Thomas G. Plant Company, a shoe manufacturing concern—is the most important in amount of the acquisitions specified, and the one most relied on by the petitioner.

According to the petition, Plant was a competitor of the defendants, and they acquired his business in pursuance of their unlawful purpose.

The evidence does not show Plant to have been a competitor in the ordinary sense. He was not carrying on any going business in shoe machinery. He was neither producing his machines, nor supplying them to users upon any commercial scale, nor was he prepared so to supply them, though he had issued an illustrated catalogue of them. The petition alleges that he had been inventing and patenting his improvements for at least two years before 1910. In one factory only were machines embodying them being operated. This belonged to the Thomas G. Plant Company, whereof he owned a majority of the stock. He installed them there in May, 1910, displacing the United Company's machines previously used there in order to do so. Before he installed them there, he had offered to equip two other factories with them without requiring royalties for their use, but these offers had been declined.

There is uncontradicted evidence of declarations by Plant in 1909 that his intention was to equip these two other factories and his own with his new machines and then sell out to the United Company. That the effecting of such a sale, and not any actual competition in the market with machines then in use, was his real purpose, is hardly left doubtful by the history of his subsequent negotiations with the defendants. These, set on foot by him and at first stopped by the defendants' unqualified rejection of his proposals, he persisted in renewing, through various intermediaries, until they resulted in the purchase above described. It appears without contradiction that Plant was for a time under agreement to pay an influential shoe manufacturer, whose assistance he procured, $250,000 if he succeeded in bringing about the desired sale; also that he later offered, and ultimately had to pay, a commission of 5 per cent. on the price obtained to another intermediary, who undertook to put the transaction through for him.

The evidence regarding Plant's negotiations with the defendants sufficiently proves that they were never sought by the defendants, and

that there was never any attempt on their part to get Plant to sell them his inventions, or machines, or anything else, but that, on the contrary, all the efforts toward such a purchase were made by him. The first overtures toward it came from him; he began them soon after he had put his machines into the Plant factory; they led to interviews, all of which he sought, and at which his proposals were declined, without encouragement to renew them. Nowhere in the evidence is any indication found that, before Plant's overtures were thus made, any purchase whatever from him had been suggested to or considered by the defendants.

Whatever the merit of Plant's inventions, these machines in which he had first embodied them are not shown by the evidence to have been commercially successful in September, 1910, or to have been capable of such success in their then stage of development. They are shown to have been lightly built, not adapted to produce men's shoes, and by no means satisfactory in making women's shoes, the kind of work to which the Plant factory was devoted. The evidence is uncontradicted that, while operated there, they fell behind the United Company's machines, which they had supplanted, in efficiency; that breaking down and defective work was more frequent with them, and the cost per pair of making shoes with them distinctly greater. Though some of them, as later developed and improved by the United Company, proved to have merit, the most that can be fairly said of them in 1910, on the evidence, is that they were more or less promising experimental machines. There was no complete set of them for combined operation; for that purpose several important machines were yet to be developed. In the state in which the United Company took them over, they were not found capable of profitable use. Nothing is found in the evidence which affords reasonable support for the petitioner's contention that they were "right at the threshold of extensive competition with the United Company."

The petition alleges that a group of shoe manufacturers were in conference with Plant, in Boston, in September, 1910, "with a view to purchasing an interest in his inventions and machines, or to make some arrangement which would enable them to obtain machines for use in their factories and thereby be relieved from the domination and control of defendants." It further alleges that the defendants were "advised of the purpose and intent of said manufacturers," knew that if they succeeded in making arrangements with Plant there would be further removal of their own machines and competition thus created, and agreed with Plant upon the purchase made from him in order to prevent such competition.

But the evidence fails to support these allegations. It does not charge the defendants with any knowledge, at the time they came to terms with Plant, of any negotiations between him and the manufacturers referred to. No reference appears to have been made to them or their doings during the defendants' negotiations with Plant, and no reason is found to believe that apprehension lest he might conclude some arrangement with them induced in any degree the defendants' final agreement with him. Were it important, it might be added that, so far as the evidence can be said to show anything regarding

Plant's intentions toward them, it shows that he never really meant to enter into any arrangement with others if he could get the defendants to take off his hands everything which he desired to sell; and no purchase so extensive as this appears to have been at any time contemplated by the manufacturers mentioned in the petition.

The terms finally agreed on with Plant were so much more favorable to the United Company than any he offered when he first approached them, and so inconsistent with his previous attitude toward them, as to leave no reasonable ground for believing that the defendants had ever sought, expected, or planned for the transaction as carried out. And in what they were thus unexpectedly enabled to acquire from him there was included so much that was plainly of far greater consequence to them than could have been the avoidance of such competition as they can reasonably be supposed to have apprehended from his incomplete and undeveloped line of inventions—patents and machines also included—as to leave no sufficient ground for believing that avoidance of competition was their principal motive in accepting the opportunity offered. The normal, natural, and obvious business reasons, of wholly different kinds, why they should accept instead of refusing it, appear to have been so complete and sufficient as to render the conclusion unreasonable that it was accepted in order to escape competition.

Six million dollars, half in cash and half in United Company common stock at twice its par value of $25, was the price finally accepted by and paid to Plant for everything acquired from him. In the transaction no separate valuation was set by the parties upon the inventions, patents, and machines transferred, distinct from that of the controlling interest in the shoe manufacturing establishment. That part of the acquisition is, of course, beyond criticism so far as the Anti-Trust Act is concerned. That it was of great value is shown beyond question by the dividends then and afterwards paid on the stock acquired by the United Company. These, and the ultimate disposition of the stock itself, afford every reason to believe its actual value, when acquired, sufficiently great to reduce the actual cost of the patented improvements, also acquired, to a comparatively small proportion of the total payment made to Plant. Taking the transaction as a whole, if the total amount paid by the United Company was large, the total value of all that was received in exchange also appears, not as matter of opinion merely, but by actual results shown, quite sufficient to negative any claim that the defendants paid an exorbitant price for what they got.

The evidence that among these patented improvements obtained from Plant there were enough of sufficient value, in the defendants' hands and used as they only could have used them, in further developing and perfecting machines they were then producing or trying to produce, to make this part of the total acquisition extremely profitable to the United Company, was not met by any sufficient proof to the contrary. The agreement to take the patents and inventions was not made until after a careful examination and report as to their merits. The belief thereon founded that, used as above, they would be worth acquiring upon the terms proposed, is shown to have been justified

by the result; and the acquisition cannot be criticised so far as it was occasioned by that belief. As developed and added to its own machines by the United Company, some of the inventions acquired have proved to be of a value such as fairly justifies their claim that the patents acquired were the controlling feature of the purchase.

The evidence shows also, without serious contradiction, that one result of the bargain made with Plant was to relieve the United Company from an amount of litigation, then pending or in prospect, which would otherwise have burdened and hindered it to an extent far greater than it had ever had reason to apprehend from any litigation with which it had before been concerned.

A suit by it to restrain the Plant Company from breaking the leases of its machines, displaced in order to install the Plant machines as above, had been pending since May, 1910; and between Plant, or concerns wherewith he was identified, and the United Company, there were pending interferences, claims of infringement on both sides, and pending infringement suits, raising questions relating to his or its patents, so numerous, complicated, and important as to threaten interminable controversy.

It was part of the bargain with Plant, or followed from it as a result, that the above controversies were settled or avoided. That the prospect of accomplishing this result was a further normal, natural, and powerful inducement to the agreement made with him, cannot be reasonably doubted. In so far as the agreement was thus intended, no criticism of it can be valid.

The above reasons, none of them open to any charge of illegality, seem to me have been the really operative reasons which must have induced the defendants to enter into the Plant bargain upon the terms which he finally offered them. They appear so adequate, as legitimate business reasons for doing this, as in my opinion to leave no reasonable ground for holding, against the defendants' denial, that it was really a purchase to suppress competition. No such competition, or prospect of competition, at the time, is proved as would justify such a conclusion. The competition threatened by Plant, and his efforts to induce the defendants, in order to avoid it, to buy his machines and patents by themselves, were wholly ineffectual. They met with nothing but refusal on the defendants' part to consider his proposals. It was not until he offered, through the intermediary he last employed (Smith), the shoe manufacturing business of the Plant Company as well, that the defendants consented to deal with him.

While it may have been his plan to realize a profit by threatening competition, it was not until this proposition, based upon tangible property of substantial value, and of patent rights, was made, that any sale was effected. The property acquired being proved to have been worth the amount paid, the argument that the defendants were so anxious to hold a monopoly as to be willing to pay $6,000,000, or any other large sum, in order to get rid of a competitor, or that this was done in pursuance of a general plan conceived in 1899, fails completely.

6. In paragraph VI of the petition a variety of acts described as "unfair and monopolistic" or "oppressive" are charged to have been

committed by the defendants since the formation of the United Company by means of the predominance it has acquired. Of these, as set forth, "threats" of various kinds form a considerable proportion. It is charged that by "misrepresentations and threats" the defendants have induced competitors' customers to leave them, and have deterred others from attempting competition; also that they have threatened to use their financial or other power to secure to themselves the patronage of competitors. Under the above paragraph heading it is also charged that the defendants have bought up many patents for valuable inventions and held them long in disuse, that they have offered and granted rebates to such users of their machines as use them exclusively, and that they have bought out many competitors at exorbitant prices. There is a general charge of "many other unlawful acts too numerous to specify," and accordingly not specified, in the petition.

A long bill of particulars, containing alleged specifications of these charges, was filed upon the defendants' motion during the trial (June 25, 1913). But there are very many of the charges so specified in support of which no proof whatever has been offered. Of those to support which some evidence was introduced, comparatively few have been insisted on in argument. The charge that competitors have been bought out at "exorbitant prices" is found not established in the case of the Plant acquisition, as has just been stated. Nor is evidence found sufficient to establish it in the case of any one of the numerous minor acquisitions specified in the petition. It has not been insisted on in argument that this charge is proved as to any one of them.

Nor has there been any evidence sufficient to show a practice followed by the defendants of buying up patented inventions to hold in disuse. This charge also is one not insisted upon in argument.

The charge that rebates have been given to exclusive users of the United Company's machines rests upon (1) the vote of the executive committee January 29, 1900; (2) a circular letter addressed on the company's behalf to its lessees 10 years later, June 10, 1910. There is nothing sufficient to show that there was anything "unfair or monopolistic" about either the vote or the letter, or about anything done in pursuance of either.

The vote in 1900 was that royalties on the Gem insole machines be rebated to exclusive users of the company's machines. It appears that, having acquired the Gem Company, which had machines in use under lease at the time at a royalty of one-half cent per pair, the United Company added the machine to its Goodyear auxiliary set, and to users of such sets paid back the one-half cent per pair in order to leave the rate upon the entire auxiliary set the same as before it included the Gem machine.

As to the circular letter of June, 1910, it announces the company's intention of investing 15 per cent. of the royalties paid by lessees of the Goodyear welting, stitching, and turn sewing machines for three years, in the company's common stock, and of distributing this stock proportionately at the end of the term among those lessees who should have faithfully observed the covenants of their leases during that period.

Neither of these acts on the company's part can be said to answer to the terms in which the charge of offering and granting rebates is made. That either act was inspired by the purpose of giving exclusive users of the company's machines an unfair advantage over those who did not, or that either had that effect, cannot be said to have been proved, and the charge is not believed to require further notice. It would seem to have been suggested by those cases relating to railroads, wherein "rebate" has acquired an obnoxious signification.

It remains to consider how far the evidence proves the defendants to have used "threats and intimidations" of the various kinds described in the petition. As to far the greater part of the specified instances set forth in the bill of particulars, the charges of this kind have been allowed to go wholly without attempt at proof. Of those regarding which any such attempt was made, six only have been insisted upon in the petitioner's briefs or argument. No reason whatever to believe that any greater significance could be claimed for any others of the specified instances than for these appears from the evidence regarding them to be found in the record.

Mr. Winslow, president of the United Company, Mr. Barbour and Mr. Hurd, vice presidents, all of them directors, are the only defendants charged in these instances with using any threats or intimidations. The other persons charged with making them are Mr. Bayley and Mr. Willson (since deceased), managers for the company at various times, but never made parties to this suit.

The only "threats" which Barbour is charged with making are testified to by James N. Darrah, vice president in 1900 of the Standard Shoe Machinery Company. According to Darrah, Barbour, at a talk in New York in April of 1900, tried to get him to sell out stock in his company by telling him, in substance, that, if competitors of the United Company could not be bought out, they would be forced out. Barbour has denied that any such conversation took place. Darrah's evidence was not corroborated; and there is no proof that his concern, though it went out of business in 1901, was ever forced out or crushed by the defendants.

Mr. Winslow is charged, in testimony by Charles H. Morse, with having said to him at some time in 1901 or 1902, "You don't suppose we are going to allow you to put them on the market"—referring to certain pegging machines then being made by the Fifield Company, with which Morse was connected. Morse, on his own testimony, was then negotiating with Winslow about a sale of the Fifield Company business to the United Company, but they failed to agree as to price. Its business was sold in 1906, but not to the United Company. There is nothing to prove that the United Company ever interfered with the marketing of this machine.

Mr. Winslow is also charged, in testimony given by Charles S. Johnson, with having said to him during negotiations in 1902 or 1903, regarding a sale of the Tripp Giant leveler, in which he was interested, to the United Company:

"You had better sign that contract, because we are going to have your business any way."

But the negotiations did not result in a sale, and the Tripp Company's business, though sold out in 1905, was not acquired by the United Company. Not long after, according to Johnson's testimony, the United Company put on the market machines considered by him to be substantially the same as the Tripp Giant leveler, but there is no other indication of any interference with the Tripp Company or its business by the defendants.

Mr. Winslow is also charged, in testimony given by Merrick and Luitweiler, president and treasurer of the Union Lock Stitch Company, then developing machines not yet put on the market, with having told them in 1905, while attempting to persuade them to sell out to the defendants, that they would not be allowed to make any money, that the United Company would build their machines, that their business would come round to it and be taken by it, and that it was cheaper to kill competitors than to acquire them. The alleged statements are denied by Winslow. The business referred to is one never acquired by the defendants, nor is any interference whatever with this business shown. This was admitted, and the testimony of the two witnesses named is that they have put out 350 to 400 of the machines in question.

Bayley, a department manager for the United Company, is charged, in testimony given by Irving A. Hadley, then representing Kimball & Hadley, manufacturers of awls and needles, with having said to him in January, 1904, in answer to a claim by him that Kimball & Hadley could sell needles as cheap as the United Company, that the United Company could give them away if necessary.

It does not seem possible to attach any serious importance, for any purpose, to the remark, if made, even if anything said at the interview can be supposed to have had reference to a possible purchase by the defendants of the Kimball & Hadley business. Bayley was in a sanitarium, unable to testify, at the trial. Further testimony from Hadley, however, that certain factories had refused needles offered them by him for fear of controversy with the United Company, was contradicted by the managers he mentioned. The business of Kimball & Hadley was one of those acquired by the United Company, but it was not acquired until the following June. It consisted in making Goodyear needles, which, at the time of the acquisition, the United Company was not making at all. An attempt by Kimball & Hadley, in litigation with the United Company some time afterward, to prove that threats and intimidation had been used in acquiring their business, wholly failed. See United Co. v. Kimball, 193 Mass. 351, 79 N. E. 790.

Mr. Hurd is charged, in the testimony of Harry E. Cilley, with having said to him in 1901, during a conference with respect to a possible sale of his business to the United Company:

"You can't do any business except on our sufferance, and you can't get a new dollar for an old one."

It appears that Cilley's business at the time consisted in building a sole-leveling machine, that he was not satisfied with an amount suggested by Mr. Hurd as a proper price for it, told Mr. Hurd he con-

sidered it "outrageous," and never renewed the negotiations. Neither the business of this witness nor the remarks testified to, if made, can fairly be regarded as of any serious importance, in view of all the circumstances shown.

It thus seems clear that nothing proved as to the above instances of so-called "threats and intimidations" is sufficient to justify such allegations as are made in paragraph VI of the petition about them. Even if anything said by a representative of the United Company on these occasions can properly be called a "threat," in view of all the surrounding circumstances shown, there is certainly no adequate reason established for believing that any competitor's customers have been induced to abandon them, or that anybody has been prevented from attempting competition, by what was said. The instances relied on are widely separate in time and distinct as to circumstances and persons. They cannot reasonably be regarded as showing a concerted purpose to suppress competition through intimidation, such as paragraph VI purports to charge. In every instance the expressions said to have been used by a representative of the United Company were in interviews with persons interested in some concern or machine which the United Company was asked or might be asked to buy. As has appeared, propositions of this kind were constantly being made to its representatives, and many more of them were refused than were accepted.

Not in paragraph VI, but in the preceding paragraph V, of the petition, the charge is made that certain provisions of the leases, under which the United Company's machines have been operated by users, have been arbitrarily enforced, in pursuance of a general policy and practice to refuse machines for failure to comply with the terms and spirit of the leases, "and to otherwise injure" users so failing to comply.

In the above bill of particulars filed, as has been said, on June 25, 1913, "in amplification of section VI of the petition," the defendants are charged, in a number of specified instances, with threatening to remove or removing machines from the factories of users, because competing machines or machines obtained from other concerns were also being there used, or because such use of other machines was in contemplation. No proof whatever has been offered as to a considerable proportion of the instances thus specified.

In the instances specified regarding which there is some proof, nothing more is shown than that the United Company insisted, to a greater or less extent, upon observance by the lessee of provisions in his lease to which he had expressly agreed when he took the machine, and which he was purposely violating or proposing to violate to the detriment of the lessor, because such violation would tend to decrease the number of pairs of shoes operated on by the machine and thus the royalty to be paid for its use by the lessee.

If the provisions referred to in the leases are contrary to law, it was unlawful to insist upon them. The question here involved is later considered. But unless the provisions were unlawful, the evidence regarding these specified instances in which their observance was insisted upon wholly fails to show that in any instance the defendants did

or attempted anything whereof either the lessee of the machine or any one else had any right to complain.

It may be said generally that the instances in which machines were in fact removed from the factories of lessees under the provisions referred to have been so few in proportion to the total number of leases as to leave the general charge that such provisions have been arbitrarily or oppressively enforced destitute of any sufficient foundation. Only five such cases appear in the evidence. In each, the lessee's conduct was in willful disregard of the lease agreements, and afforded a complete justification for the lessor's action, unless none is possible.

The bill of particulars filed June 25, 1913, brought into the case for the first time allegations that the defendants have endeavored to organize strikes in factories of shoe manufacturers wherein shoe machinery competing with their own was operated.

The only specifications under this charge are, in substance, that in June, 1910, Willson, then general manager of the United Company, assured certain employés of the Thomas G. Plant Company that, if they would organize a strike in that factory, the United Company would pay all expenses and reward the leaders "handsomely"; that, in reliance upon said assurance, about 300 of the operatives were brought into such an organization and a large sum of money expended by the organizers; that Plant thereupon had the organizers watched, and no strike resulted.

The only evidence to show that Willson ever gave any such directions or assurances came from three witnesses, employés at the Plant factory in June and July, 1910, who gave their testimony in person before the court. No one else was present, according to their statements, at the various interviews they described between Willson and themselves during the two months just referred to. Willson having died in 1911, and before these charges were made, no direct contradiction was possible of their statements as to what was said by him to them.

He told them, according to their testimony, that if they would organize a strike at the factory, and give him all the information they could about the Plant machines, he would pay their expenses, get them jobs, and pay them also $2,000 in cash, according to two of them—$1,000, according to the other.

Willson never did pay them any money, as they all agreed. But their testimony was that they got about 300 men into an organization and spent about $1,500 of their own money in doing so, mainly in entertaining the men who joined. According to their further statements, $600 was contributed by one of them, $500 by another, and $400 by a third; their wages at the time were $15 per week; these sums were the savings of 11 or 12 years; accounts, lists, and vouchers, containing details of their doings and expenditures, were kept; but all of these were either surrendered to Willson or destroyed by them. No written evidence of any kind was offered in support of their story.

It appeared that there was some prospect of trouble between Plant and the employés at the factory at the beginning of June, 1910, but, after meeting a committee with regard to an increase of pay asked for, Plant granted it and no strike or other trouble ever occurred

There was no proof whatever that he ever employed detectives to watch the three witnesses in question, or that any attempt by them at organizing a strike ever came to his knowledge.

The testimony of these three men was not corroborated by any others of the then employés at the factory. On the contrary, several of them, shown to have had ample opportunity for knowing the facts, had there been any such organization attempted as testified to, denied any knowledge of such organization or of any such preparation for a strike.

Winslow, president of the United Company, testified that Willson had told him, in June, 1910, that three Armenians had been to him asking that he furnish them with money to start a strike in the Plant factory, and that his instructions to Willson thereupon were to have nothing to do with them. No money of the United Company was ever paid out for any such purpose.

Not only does the evidence of these three witnesses appear unworthy of belief in view of its improbability, its lack of corroboration, and the evidence tending to discredit it, but it is difficult to understand how the petitioner could seriously have expected the court to accept such testimony, or have considered itself justified in offering it.

The history of the proceedings in this case indicates that efforts which may fairly be described as extraordinary have been made to bring before the court, so far as possible, all sayings or doings of any of the numerous defendants or their representatives, during the period beginning with 1899 and ending with 1911, which might afford ground for charging them with oppressive, coercive, or like unfair conduct toward competitors of the United Company or the public. In view of the long period and wide fields thus searched, the numerous abandoned attempts to prove something of the kind above indicated, and the insignificant result of the evidence actually offered and finally relied on, the conclusion seems fully justified that the policy and methods pursued by the defendants and by the United Company have been, in general, above reproach in any of these respects.

7. It remains to consider the charges made in the petition as to certain provisions in the leases and license agreements, under which the United Company permits the use of its patented machines, that they are either unlawful in themselves, or have been devised, adopted and used by the defendants for the purpose of destroying competition. (Paragraph V.) Upon these charges the petitioner may be said to have finally put its main reliance.

With regard to the provisions in question, as with regard to many of the matters heretofore considered, the position finally taken by the petitioner has differed widely from that originally taken in the petition as filed.

None of the constituent companies were, in 1899, selling outright the patented machines they manufactured. The bill alleges the contrary, and charges that one of the steps taken after 1899, in pursuance of the alleged scheme to restrain or monopolize, was to discontinue sales and compel leases. An attempt to support this charge by evidence wholly failed. Nothing of the kind was done, nor is it

easy to see what grounds for making the charge could ever have been supposed to exist.

It appeared, on the contrary, that the method of marketing their patented machines followed by the constituent companies in and before 1899 was exclusively that of leasing, for a royalty upon each pair of shoes whereon the lessee should use the machine. Some of the leases also required an initial payment; others did not. The evidence also shows that the general system of leasing in this manner was and had long been the usual and accepted method of dealing between the makers of patented shoe machinery and those desiring to use their machines, and that, in its main features, it had thus become so widely and firmly established as to render the substitution of a different system practically impossible.

The defendants continued the policy which they found in use by the constituent companies, as to the kinds of machines to which this case now relates. Its machines of these kinds have never been sold outright; all users have taken them from the United Company upon leases granting the right to use the patented improvements embodied in them during the term of the lease.

It should be stated here, however, that as its business has progressed, the United Company has developed a very large number of machines of other kinds useful in shoe manufacturing, as to which the policy of leasing only has not been followed. Such machines, included in what is known as the company's "General Department," have been and are sold outright to anybody willing to buy them, without restriction of any kind—a course of business more liberal than that pursued by either component company. The number of different machines wherein the United Company deals in the manner stated has come to be very considerable.

There was finally no contention that any law has been violated merely by the company's continuance of the policy of leasing only, instead of selling.

That there was any violation of law in continuing, as the United Company did for a time after 1899, to maintain the leasing system and use the forms of leases which they found in use by the constituent companies, the petitioner is not in a position to contend.

There were suggestions in argument on its behalf that the system referred to was unlawful in some of its features, but the petition contains no such allegations. The claims therein made relate wholly to the leases put into use by the United Company after 1899, and rest on the proposition that these contain provisions "not found in [the] former lease and license agreements"; the new provisions complained of being immediately thereafter specifically described. The petition characterizes them as "arbitrary, oppressive, and unreasonable." (Paragraph V.)

The United Company, of course, became, after its formation, the sole lessor of all the patented machines formerly leased by the different component companies. During the 12 years which then followed before this petition was filed there were, as is not denied, changes from time to time in the lease forms used for leases under which the use of certain of its machines were permitted. Generally speak-

ing, one form was used with all leases of the same machine. There were some machines which might be taken under either of two alternative forms.

According to other allegations in the petition, it was part of the defendants' unlawful project, at the time of their combination in 1899, to refuse to sell or lease any essential machine, except on condition that the lessee buy or lease of them practically all other machinery necessary or useful to him as a manufacturer of shoes. No proof was offered at any stage of the case that the defendants had in mind, in 1899, the system of leases they later developed, or any of the modifications therein involved of the system which they found established in 1899.

At the argument the admission was made, on behalf of the United States, that there was no proof that, at the time they formed the United Company, the defendants "had in mind the adoption of the system of leasing which they later developed." And the position then taken by the petitioner in argument was that the leasing system referred to has resulted in illegal restraint or monopoly, and that the intent which prompted its development is therefore "absolutely immaterial."

As to the allegation that the defendants contemplated a policy of refusal to lease, except on condition that the lessee buy or lease of them "practically all other machinery of whatever kind necessary or useful" to him as a manufacturer of shoes, it requires no further notice, now that the charge of restraint or monopoly in "any and all kinds of shoe machinery" has been abandoned. The evidence abundantly shows that nothing of this kind was ever contemplated, attempted, or done, and that there was never any justification for the charge as made.

With regard to the modifications introduced by the defendants upon the leases in use by the constituent companies in 1899, the petition alleges in substance: (1) That under the former system lessees from one company were not held to the exclusive use of machines manufactured by any of the others. (2) That since 1899 the defendants have required their lessees, by provisions not found in the leases previously used, "to agree to use exclusively one or more of the classes of machines included in said group of machines owned and controlled by them, upon penalty of having all the machines included in said group, so leased to them by defendants, immediately reclaimed and taken away and the lease and license agreement cancelled." (3) That lessees are now obliged to hire each machine for a period of not less than 17 years. (4) That lessees are now compelled to obtain all duplicate or repair parts, extras, etc., from the defendants at exorbitant prices; (5) also to pay return charges at the expiration of the lease, sometimes amounting to the original cost of building. (6) That the defendants now reserve to themselves in each lease the right to terminate all existing leases between themselves and the lessee upon his failure to use exclusively and to full capacity any machine leased to him by defendants. (Paragraph V.)

The evidence failed to show that lessees from the United Company had ever been compelled to pay exorbitant charges for repair parts,

etc., or to pay any unreasonable return charges on leased machines. (4) and (5) of the above alleged modifications may therefore be now disregarded. In the subsequent sections of the petition no further reference to them is found.

In the "conclusion" section of the petition, the following only, among the provisions thus alleged to have been added to the leases by the defendants after 1899, are charged to have been unlawful: Agreements by the lessee (1) that he would use exclusively machines of the lessor to perform the same kind of work as that performed by the machines leased; (2) that he would use in work other than that for which the leased machine was designed only machines of the lessor; (3) that, if the lessee should violate either of said agreements, he would forfeit the use not only of the leased machine, but others, whether accomplishing the same or different work; (4) that he should use the machine leased for seventeen years.

The objections made by the petitioner, at the argument, to agreements contained in the United Company's leases were not confined to those specified in the petition as above, but included others nowhere therein referred to.

At the argument, certain clauses extracted from the leases shown to have been used by the United Company were said to embody the agreements objected to as unlawful.

By what was referred to as the "full capacity" clause, lessees agreed to use the machine to its full capacity on all shoes, etc., made by them in the manufacture whereof such machinery was capable of use.

By what was referred to as the "additional machinery" clause, lessees agreed that for any more work than their then leased machines could do, of the kind which machines belonging to the same department could perform, they would lease enough others to perform it from the lessor.

To neither of these two clauses was any reference made in the petition itself, as appears from the above summary of provisions in the leases therein complained of. The other clauses referred to at the argument were the following:

By what was referred to as the "exclusive use" clause, lessees agreed that, if they should cease to use exclusively machines leased from the United Company for doing work of the same kind upon shoes, etc., made by them, the lessor might, at its option, terminate all their leases of its machinery for doing work of that kind.

By what was referred to as the "prohibitive" or "tying" clause, lessees agreed that the leased machine should not be used upon shoes, etc., whereon certain other specified operations had been performed by machines not leased from the United Company.

By what was referred to as the "right to terminate all leases" clause, lessees agreed that failure on their part to observe any condition, either of the lease of the particular machine, or of any other lease from the United Company then in force, should give the lessor the right to terminate all leases of its machinery then held by them.

The above three clauses, and the alleged agreements requiring lessees to use the leased machine for 17 years, appear to be the only

provisions among those commented on in argument to which objection was made in the petition itself.

As to the use of such agreements as are expressed in the "full capacity" clause or the "additional machinery" clause, whereof, as has been stated, no complaint is found in the petition, the evidence shows that they were not new introductions by the United Company, but were contained in certain of the leases used by the component companies before 1899.

By neither was any agreement made which the evidence has shown to have been abnormal or unusual, or to have exceeded what was reasonably necessary to protect the lessor's interests in the contemplated use of its machine.

The lessor might well accept for the use of its machine a smaller royalty per pair, based upon the understanding that the machine would turn out as many pairs as its capacity permitted, than it could afford to accept without any such assurance.

Similar considerations apply to the "additional machinery" clause. Without it, the lessee would be at liberty to do his slowest and most difficult work on the leased machine and the easiest on others or by hand.

The petitioner, indeed, conceded that both the above clauses might be unobjectionable had they not been used together with the others; but it relied upon their use with the others as tending to show the existence of an unlawful scheme. That this is an afterthought only is shown by the failure to set forth either clause, in that aspect, in the petition. Moreover, as to the "additional machinery" clause, the defendant had discontinued its use altogether two years before the petition was filed, a fact inconsistent with any claim either that it assisted monopoly or was intending to do so.

The consideration of the remaining clauses raises, in the first place, the question as to the truth of the allegations in the petition that such provisions were not found in the leases used before the consolidation of 1899, but were modifications thereafter introduced by the defendants, in pursuance of their alleged intent to monopolize the business.

The following facts appear regarding the leases in use by the component companies before 1899:

In the case of the more important machines an initial payment, of greater or less amount, was required of the lessee in addition to the royalty per pair stipulated in the lease. Such initial payments were required by all the leases from the Goodyear Company. The Consolidated & McKay Lasting Company required such an initial payment in leases of two out of the five patented lasting machines wherein it dealt; in its leases of two others no initial payment was required; and its remaining machine was leased either with or without initial payment at the lessee's option, the royalty being higher in the latter case than in the former. The McKay Company was the only one of the component companies whose leases did not require initial payments, whether those of the patented heeling or metallic fastening machines, which it made, or those of the Davey pegging machines, which it controlled.

It may be further stated, with regard to the leases made by the constituent companies, that two or more machines of the same company, intended for use in substantially the same operation, were generally leased as a group. Thus Goodyear Company leases required its welter and out-sole stitcher to be used together, and permitted the auxiliary machines intended for use therewith to be used only on shoes welted and stitched thereon. As to its Ideal laster, the use thereof on welt shoes was restricted to use with its welter and stitcher. The leases of this company did not provide that the lessee should use its machines exclusively, and that unless so used the lease should terminate; but there were such provisions in the leases of the other companies. The Lasting Company's leases required use to the full capacity and the taking of additional machines for any additional work.

All the above leases were for terms for the most part either indefinite, or until cancellation by the lessor, or for the life of the patents embodied in the machines, or for 17 years and thereafter during the life of any patent embodied.

In the forms of leases or license agreements which they found in use as above, the defendants made no change whatever until about a year had elapsed since the formation of the United Company. This the evidence shows without contradiction, and it further shows that, when there were substitutions of new forms of leases in place of any of those in use as above, there was no change made all at once or in pursuance of any general plan, still less of any arbitrary plan, but, on the contrary, the change in each case was because special circumstances affecting the particular group of machines had come to render such change desirable.

The history of the successive changes adopted, and of the reasons for each, was fully brought out in the evidence. Beginning with the first new lease form, adopted in March, 1900, the adoption of others followed at various times during the subsequent years. Some of the provisions most objected to by the petitioner were not adopted until 1904 or 1905.

Regarding the various modifications so introduced, it may be said in general that they tended to relax previous restrictions upon the use of leased machines, and to reduce the cost to the lessee of installing them. The most important changes made were, in substance, as below:

For agreements whereby the lessee expressly promised exclusive use of the lessor's machines belonging to the same group with that leased, there were substituted options to cancel, reserved to the lessor, in case the lessee should discontinue such exclusive use.

The requirements found in leases used by some of the component companies that the leased machine should be used to its full capacity were extended to apply, in general, to all such machines, of the classes involved in this case, as were used in factories to measure the amount of work done, and thereby fix the amount of royalties to be paid upon the machines used in doing it.

As to certain groups of machines, provisions were introduced restricting the lessee's use of all machines belonging to the group to use only on shoes operated on by one or more of the other groups of

United Company machinery. But in all such cases, without substantial exception, there was also offered an alternative lease form not containing such restrictions. An initial payment was required from all lessees preferring the latter form; no such initial payment was required from lessees under the form first mentioned.

A uniform term of 17 years was adopted for all the leases

Considering the clauses objected to in the light of what preceded them, and of the circumstances attending their adoption by the defendants, the petitioner has not, in my opinion, proved that the defendants' object in adopting them was the prevention of competition by others. Such prevention might indeed follow from the more favorable terms offered lessees, but modifications made in the existing system for the direct purpose of otherwise better adapting it to exclude competitors, would have been different in character from the modifications represented by these clauses.

Not only would it have been unreasonable, as has been said, to expect the defendants to substitute a wholly different system from the leasing system which they found in use, but the evidence affords no reason to believe that anything of the kind was desired by manufacturers in general. The advantages to them of not having to tie up capital in patented machines, and of paying for the privilege of their use only according to the amount of use, were advantages which they cannot be supposed desirous of surrendering.

Modifications in the contracts offered them tending, as these are shown to have done, to enable the company, through provisions adapted to increase the number of shoes worked on by each machine, to lessen the royalty charged per pair, and to diminish or dispense with the initial payment before required, were so obviously prompted by the purpose of developing the company's business through the perfectly legitimate method of offering them on terms more advantageous to users, that it would be unjust to treat them, on evidence no stronger than that here presented, as really intended to accomplish an arbitrary exclusion of users from any dealings with others.

If it were made to appear that the leases containing these clauses accomplished in and of themselves an unlawful restraint of trade, or necessarily secured to the defendants an unlawful monopoly, the intent to accomplish these results would, of course, be imputed to the defendants without regard to their actual purpose in adopting and using them. But the evidence seems to me insufficient for the conclusion that such results are so accomplished. The contention that they are fails, in my opinion, to take into account the defendants' rights in the field lawfully secured to them in the various patented improvements they had lawfully controlled and combined, and fails also to concede them proper scope for the rights properly incidental to their control of said improvements, to make such agreements with their lessees as would best promote the efficiency in combined operation of the machines leased, and thereby best enhance and safeguard their just return therefrom in the form of royalties.

The complaints made regarding leases embodying the clauses referred to are not directed against those pertaining to any particular

kind or kinds of machines, as more objectionable than others. It is their entire combined effect which is attacked.

Concurring as I do in the views expressed regarding them by Judge BROWN, I am obliged to regard the petitioners' allegations of their illegality as not sustained by the evidence.

In my opinion, the bill should be dismissed.

BROWN, District Judge. The United States charges that certain provisions in the lease and license agreements of the United Shoe Machinery Company with shoe manufacturers restrain interstate commerce and tend to create or perpetuate a monopoly of interstate commerce in shoe machinery.

We may examine this topic, which comprehends a large number of very long and elaborate documents and a very large portion of the briefs and arguments on each side, most conveniently by considering the effects which the United States claims result from such provisions, rather than by attempting to set forth in full the provisions themselves.

Complaint is made of the effect of such provisions:

I—Upon the shoe manufacturers.

II—Upon other manufacturers of shoe machinery.

The rights of these two classes and the effect of the leases upon each present quite distinct questions. The only competitors, or possible competitors, are other manufacturers of shoe machinery. The shoe manufacturers, as such, are not competitors. As the complaints of the United States on behalf of the shoe manufacturers and on behalf of other machinery manufacturers relate to distinct matters, they should not be taken cumulatively, and should not be confused.

The Effect of the Leases upon the Shoe Manufacturers.

This may be considered in three aspects:

As bearing upon the question of the legality of the original combination or organization of the United Shoe Machinery Company.

As an alleged illegal and oppressive outgrowth of power obtained by combination.

As restricting the shoe manufacturer's freedom of choice in taking the machines of other manufacturers, as preventing him from using the machines of others, and as compelling him to use the machinery of the defendants.

The petition of the United States charges that the defendants—

"conceived the idea of acquiring the ownership or control of all concerns engaged in manufacturing and dealing in any and all kinds of shoe machinery, and then to refuse to sell or lease any of the essential machines to the manufacturer of shoes except on condition that he buy or lease of them practically all other machinery of whatever kind necessary or useful to such manufacturer of shoes, and thereby to exclude all competition by other manufacturers of such shoe machinery and to monopolize the trade and commerce therein among the states and with foreign countries."

It is also alleged that certain lease and license agreements constitute steps in carrying out such project.

It is urged in effect that such plan comprehends a denial to shoe manufacturers of such opportunities to obtain machinery as existed

before the consolidation, and a compulsion upon them, if they desire a special kind of machinery, to take also other machines of different kinds from the defendants.

There seems to be in the case no other basis for such allegations than the leases themselves.

This bill was filed December 12, 1911, before the decision in United States v. Winslow, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481. In that case the argument of the United States as to the so-called "tying clause lease" shows a conception of the character and effect of the leases similar to that set forth in the bill of complaint in the present case. It was supposed that the effect of such leases was to compel customers to take all of their machines from the defendants, or all from other sources, and that this was a direct restraint upon competition and trade by depriving them of the existing right to use some machines without also using others.

The argument as to the effect of the leases both in United States v. Winslow and in the present case seems to be based rather upon an ingenious theory of bringing the defendants within the Sherman Act than upon any proper interpretation of the leases or accurate information as to the facts.

The union of noncompeting businesses in a single company would appear to have no tendency in itself to suppress competition. The union in a single company of distinct companies dealing in distinct patented inventions for performing different operations would seem remote from the sphere of the Sherman Act. To charge defendants, who were engaged in the manufacture and sale of patented machinery, with an attempt to monopolize, had little plausibility in the face of the fact that grants of monopoly had been made by the United States.

The alleged plan of a refusal of what before could be had separately, as a means of compelling the taking of other machines, was a principal ground for invoking the Sherman Act.

The leases in evidence, as documents, fail to substantiate the charges either as to the contrivance of such a plan, or as to its execution. It appears that after the consolidation there was no refusal, or imposition of conditions as alleged, but that the defendants continued to give manufacturers terms which were substantially the same as before, and in some instances better than those offered by the constituent companies before the consolidation. This is shown not only by the exhibits of "independent" leases, but by the testimony of officers of the company.

The charge seems to have been based upon certain so-called "tying clauses." There has been some confusion as to the scope of the term "tying clauses." The United States gives the following definition:

"'Tied to' means that machinery cannot be used in the manufacture of boots and shoes with machinery other than that owned and controlled by defendants."

This seems to require consideration of clauses of two kinds:

(a) The "exclusive use" clause.

(b) The "prohibitive" clause.

The "exclusive use" clause reserves to the lessor a right to cancel the lease in case the lessee shall fail or cease to use exclusively ma-

chinery of the kind leased. This kind of tying has no direct bearing upon the question of the legality of the combination. What was before separate is separate after the consolidation.

The "prohibitive" clause provides that the leased machinery shall not be used in the manufacture of shoes that have been, or are to be, operated upon by machines of certain specific kinds, not leased from the lessor. Though a similar clause was in use before the consolidation, it related only to machines of the kind made by one of the constituent companies. After the consolidation it related also to machines of other kinds formerly made by other of the constituent companies.

The prohibitive clause, therefore, is the one that has relation to the supposed scheme of using the power acquired by combination to refuse machines that before were separately obtainable, and to offer such machines only on condition that other machines of different kinds should also be taken.

"Tying," therefore, does not mean that the manufacturer is required to agree, or agrees, not to use the machines of others, but merely that he has secured only limited rights of use, and that if he exceeds such limited rights he may lose his lease. It is not a question of the legal effect of the lease, but of the practical consequences of securing only restricted rights of use. The term is misleading in its implication that the manufacturer is bound by contract not to use the machines of others. He is bound only not to use the leased machinery in violation of the terms of the lease. "Tying" is an inexact and equivocal term, which may refer merely to the machine, or may mean either that the lessee is bound by contract or merely is under strong practical inducement.

The restricted or prohibitive leases do not in themselves as documents prove the denial of the right to procure, as before, independent leases for individual machines. As matter of fact, independent leases which did give the right to use the machines with machines of other kinds, made by other machinery manufacturers, were always procurable. This was the general rule, and if there were any exceptions they were, so far as appears, inconsiderable.

It is a result of the consolidation that the United Company offers more attractive contracts for a group of machines of different kinds than for machines of one kind only; but as it still offers the contract for machines of one kind on as good terms as before it is difficult to see how that is detrimental to the shoe manufacturers.

The charge of this supposed scheme to deprive former customers of the right to use some machines unless they would also use others seems to have originated either in the erroneous assumption that a prohibitive lease was the only kind procurable, and that the former customer had no choice, or in disregard of the fact that it was merely an alternative form of lease. As the leases prove no such plan, whether of the extent alleged or of less extent, and as the evidence proves the exact contrary of what is charged, we think that the United Shoe Machinery Company is, upon the merits, entitled to a full clearance from this charge.

It was, however, urged upon final argument, despite the decision in United States v. Winslow, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed.

481, that because the union of distinct lines in a single hand put it within the power of the company to devise and carry out such a scheme, the combination had such potentiality of evil that it should be disintegrated. This argument extends beyond reasonable limits the import of certain expressions of the Supreme Court in cases where there was such combination of competitors as to eliminate competition. This was within the statute, though none of the evils resulting from destruction of competition might yet have ensued.

In this case the mere consolidation of noncompetitive businesses did not suppress competition, nor deprive customers of rights previously given by the constituent companies, and has no necessary or probable tendency to develop such a scheme as is unjustly attributed to the defendants. There must be added to the combination, from which naturally no such results would flow, an entirely new scheme.

The defendants having completely answered the charge that they devised or carried out such a scheme, the rejoinder that they might have devised and carried it out if they saw fit is entirely too far-fetched to bring the defendants either within the terms or within the spirit of the Sherman Act. Not only is there a failure of proof of the existence of such a scheme or of such a practice, but there is strong evidence to the contrary; not only in express denial, but in the undisputed fact that the defendants' Goodyear welter and stitcher have never been put out on leases that prevented their use with machines of other kinds obtained from other manufacturers. These are the most important of the defendant's machines and the center of its system; they are the principal royalty paying machines, and are furnished with a recording appliance to determine the number of shoes operated upon. The denial of their unrestricted use would have best served the alleged purpose of forcing the use of other kinds of machinery. The fact is that after the consolidation, as before, these machines, which the complainant's expert testifies are the only essential machines, and which are essential only if a shoe manufacturer chooses to make the special kind of shoes for which they are specially adapted, rather than shoes of other kinds, were put out only upon leases which did not contain the prohibitive clause.

The validity of the combination, therefore, is in no wise affected by the subsequent use of the prohibitive clauses.

We may next consider whether the shoe manufacturer who has chosen to take a lease permitting only a restricted or limited use of a particular machine is in any way injuriously or improperly affected by the fact that the businesses which before were in separate hands are now in a single hand.

It cannot be denied, and is practically conceded by the United States, that the "prohibitive clause," which is said to have the practical effect of tying together machines of different departments, is a limitation of the use of patented machines. The licensee has no right beyond the express provisions of his license, but is not bound by contract to take a machine for the performance of any other operation. If he desires to use for certain other operations the machinery of other manufacturers, he is met by the fact that the lease he has chosen, because it has

been offered upon better terms than an unrestricted lease, gives him no right to continue the use of the leased machine. This, of course, may constitute a strong practical inducement to take other machines for other operations from the defendants, rather than from other manufacturers. This inducement will be as strong as his desire to retain his lease. This, then, becomes not a legal, but a business, proposition.

The shoe manufacturer may untie the leased machine by taking another form of lease which contains no restriction, but requires an initial payment—though the royalties are the same. The amount of the "initial payment," which is a defined sum of money, seems, therefore, to constitute both the inducement to choose the restricted lease and the deterrent from changing a lease once taken for an independent lease.

This reduces the matter to one of dollars and cents. The defendants charge more for a machine used with machines of other manufacturers than for machines used as a part of a defined group of defendants' machines. Had they not combined the different companies they would have no occasion to do so.

The attack of the United States upon the "tying clause" makes no distinction between new machines which originated with the defendants and those in existence before the consolidation. There is, moreover, no attempt to show that the cost of independent machines has in any respect been increased since the consolidation, and the evidence from the defendants is to the contrary. Nor has the United States made any attempt to show by evidence that the prices charged for independent or unrestricted leases are excessive, or such as to prevent the manufacturer from using them profitably. The necessity of meeting the defendants' showing that there is no substantial obstacle in the way of a manufacturer who may desire to equip different departments with machines taken both from the United Shoe Machinery Company and from other manufacturers is recognized by the United States, and the brief states:

"The amount of the initial charge for installing machinery under the so-called independent lease, and the cost for changing from one form of lease to another, is so excessive as to restrain the manufacturers from choosing the independent system and to coerce them into taking the restricted forms."

Under this heading the United States relies merely upon the difference in price between the independent lease and the restricted lease. This is fallacious and does not meet the point. If the prices for independent leases are reasonable prices, if the shoe manufacturer can obtain what he could before, and upon reasonable terms, the fact that he and others are offered better prices for prohibitive leases is, of course, immaterial.

It is very earnestly contended that by this clause a shoe manufacturer is "bound hand and foot," and "is obligated" to take other machinery from the defendants. But when we consider that he has voluntarily chosen the limited right to use, and has merely declined to pay the price for the unlimited right to use, that he has got all he was willing to pay for, it seems fair to say that the only restraint upon him is the fact that he cannot make use of another's property without his consent, and that this consent will cost him money.

It might well be said upon the authority of Henry v. Dick Co., 224 U. S. 1, 35, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, that the patentee's right embraces the lesser right of permitting others to use upon such terms as the patentee chooses to prescribe, and that the reasonableness of the terms offered for unrestricted use is not open to inquiry. But surely, if the argument is made that there is coercion through an excessive price, such an argument can have no weight whatever for any purpose legal or ethical unless the fact that it is excessive affirmatively appears. From such evidence as is presented in this case as to the amount of initial charges upon independent leases we can draw no support for the charge of coercion through excessive charges.

The United States contends that the fact that independent leases are also offered is immaterial, and that the validity of the prohibitive lease must be determined upon its terms alone. But this contention is clearly wrong. The tying of which complaint is made is merely the practical effect of the shoe manufacturer's choice of a restricted rather than an independent lease. When he wishes to provide himself with machines for other departments, his choice of the machines of other manufacturers may result in displacing machines leased from the defendants. If, however, he may still obtain the defendants' machines by the payment of an initial charge, then the only restraint upon his free choice is the sum of money required to retain such of the defendants' machines as he has already installed. When a factory is equipped in the first instance with defendants' machines adequate in number for all departments, the choice between independent and restricted leases is a question merely of the comparative cost of installation. After a special equipment is outgrown, and there arises a demand for other individual machines to supplement it, then the manufacturer may desire a partial equipment with other machines of other manufacturers. Here arises from the prohibitive clause the substantial obstacle above referred to: That the installation and use of such machines may result in the removal of the whole equipment which he has taken from the defendants.

But the situation is one that can result only from a direct violation of one or more of his leases. While this may seem a harsh consequence of a breach of contract or of an infringement of the defendants' patent rights, it cannot be said to touch the question of the validity of the prohibitive clauses. Even should we regard the agreed consequences of a breach of contract as serious, this does not relieve us from deciding the question whether the contract in itself is valid.

As it is not the purpose of the defendants to take their machines out of factories, but rather to put them in, we must consider those clauses which are designed to induce their installation, rather than those clauses that are designed to prevent a breach of contract, or which reserve a right to terminate the leases upon an infringement of patent rights.

We may assume that the prohibitive leases with the reduced prices are adopted by the defendants as an inducement to the manufacturer to take also several different kinds of machines, and that, having once taken a restricted lease, the manufacturer remains under a strong in-

ducement to take machines of other departments from the defendants, and not from other shoe machinery manufacturers.

The United States contends that the patent laws confer upon the owner of a group of machines, each protected by a distinct patent, no right to handle the entire group as a unit, thus making one patented machine aid another.

It is true that the right granted to the patentee to exclude others from the use of his patented invention is confined to the subject-matter of that invention. It does not include the right to exclude the use of any other machine, patented or unpatented. When, however, a patentee has installed in a factory several distinct machines, each upon a restricted lease, he has as to each a full right of exclusion from other than the licensed use, and thus may legally exclude all machines that compose the group. But the proposition that patented machines cannot be handled as a group is stated too broadly. If what was before in separate hands is grouped in a single hand, and handled only as a unit, this might result in a refusal of what before was obtainable. But if the patented machines are handled both as individual machines and as a group, so that there is a free choice between the taking of individual machines and a group, we see no ground for objection.

One patented machine may be made to aid another in two ways: By using a refusal to deal with them separately as a means of compelling the taking of both; or by offering both at a lower price than the sum of the separate prices for each. The first is the way charged in the petition, but disproved as matter of fact; the second is the common device of wholesaling instead of retailing.

Were the defendants exercising merely the ordinary rights of owners of property, it could not be said that an entire contract concerning a group of such machines was illegal.

It is conceivable, if a single person should assemble in his hands a large number of distinct patented articles previously upon the market, and refuse to sell any unless all were taken, that this in special circumstances might constitute such obstruction to a former freedom of trade as to fall within the Sherman Act. Where the patented machines were originated and first put upon the market by the defendants, it is difficult to find any reason why they should not be grouped; but where there is no obstruction to a former freedom of trade, where there is no refusal of any article upon the former terms, it cannot be illegal to offer a group for a price which is lower than the sum of the separate prices—or, what is the same thing, to offer each article at a lower price if other articles also are taken at a lower price.

We are unable to see that a shoe manufacturer has any just cause of complaint that the defendants offer him and their other customers restricted leases. One who refuses these leases, and takes the independent leases, may complain that other shoe manufacturers are getting their machinery on lower terms; but the royalty rate will be the same, and the cost of initial payments is fixed and may be weighed as against the estimated value of taking machinery from other manufacturers. It is a mere question of dollars and cents. It is legal for the defendants to discriminate in price between customers who take

large amounts and those who take small amounts. In fact, it appears that certain large manufacturers have contended that it was unjust to them to fix the same royalty for a large manufacturer as for a small one, which has been the practice of the United Company.

We conclude, then, although the prohibitive leases, in so far as they tend to group together machines of different departments, may be regarded as a direct outgrowth of the consolidation, that the consolidation was not for this reason in any way detrimental to the shoe manufacurer, but, on the contrary, was for his benefit, since it enabled the United Company to offer him better terms, and enabled him to equip his factory cheaper than before. The argument of the United States upon the tying of department to department shows no reason for invoking the Sherman Act in behalf of the shoe manufacturer.

The effect upon other manufacturers of shoe machinery is a distinct topic to be considered later.

The leases are also complained of as restricting the shoe manufacturer's freedom of choice in taking the machines of other manufacturers, as preventing him from using the machines of others, and as compelling him to use the machinery of the defendants.

We may for the present disregard the fact that the United Shoe Machinery Company was organized by combining distinct companies.

The "exclusive use" clause relates only to machines of a particular kind or department, thus differing essentially from the prohibitive clause. It was in use before the consolidation, and after the consolidation was not changed in this respect. Though it does not relate to grouping what before was separate, this clause imposes a limitation upon the right to use machines of a particular kind. The legal effect of it is merely a reservation of a right to cancel the lease in case the lessee should fail or cease to use the defendants' machines exclusively for work of a particular kind. It does not have the legal effect of a contract by the lessee not to use the machines of others. It is merely a limitation imposed by a patentee upon the right to use.

The reiteration by the United States of the statement that the lessee must use, or is required to use, defendants' machines exclusively is misleading. The distinction between a contract requiring a lessee not to take other machines, and a limitation of the right to use the leased machines, is very material.

The supplemental brief of the United States contends:

"There can be no defense under the patent laws as to any provision complained of in the leases, unless it be as to the use of the prohibitive clause."

But no distinction can be made in this respect between the exclusive use clause and the prohibitive clause. Both are limitations imposed by a patentee upon the use of his invention. The exclusive use clause is effective only when the lessee is operating machines of other manufacturers for doing work of a kind for which defendants' machines are available.

Here, again, the right of a patentee to so limit the license would seem to be directly sustained by the statement in Henry v. Dick Co., 224 U. S. 1, 35, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, already referred to.

The United States complains that it is the policy of the defendants to say to a lessee that for doing work of a particular kind he must use all or none of its machines.

If the general insistence upon the exclusive use clause is evidence of refusal by the defendants to lease their machinery for use with the same kind of machinery taken from other manufacturers, yet this refusal precedes any contractual relation between the defendants and the licensees. At this time the parties are unquestionably free to contract or not to contract, and by refusing the terms offered the shoe manufacturer loses nothing which he had before. "The public is always free to take or refuse the patented article on the terms imposed." Henry v. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

The United States replies that the shoe manufacturers are not free to take or refuse; "they have entered into contracts which constitute an endless chain with respect to the use of the United Company's machines."

It is in evidence that during the existence of the United Company many new factories have been established and new installations made for persons who have voluntarily accepted these terms. Can the shoe manufacturers be permitted to complain, or the United States upon their behalf to complain, of what has thus been agreed to? These agreements have been entered into voluntarily by parties assenting on terms of equality. Can it now be urged that the acceptance of a limited right shall be declared a sufficient ground for making the right unlimited? Being free to choose in the first instance, and having chosen, can a lessee now urge that he is not free to use the defendants' property as he pleases as a reason for dispensing with the necessity of procuring that right from the owner of the machinery which he has installed?

It is merely rhetorical to say that these contracts constitute an endless chain. We have seen that as to the prohibitive clause there is a mere question of price. As to the exclusive clause there is a mere question of choosing between two different sets of equipment for one operation. The recent decision of the Supreme Court in Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. ——, January 25, 1915, should put an end in this case to any argument upon behalf of the shoe manufacturers which alleges compulsion or coercion, or which asserts a freedom to use the property of another without procuring from him the right to do so:

"For constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; he is not free to break it without accountability. Freedom of contract, from the very nature of the thing, can be enjoyed only by being exercised; and each particular exercise of it involves making an engagement which, if fulfilled, prevents for the time any inconsistent course of conduct."

We must keep this in mind: That it is no part of the policy of the Sherman Act to relieve men of full age from the obligation of their contracts, nor to interfere with contracts, except so far as they may restrain trade of contracting parties, or be aimed at the trade of third parties with a design to effect their exclusion from trade otherwise

than by supplying a demand in fair and lawful competition. It could not be said that the trade of the shoe manufacturer was restrained by the denial to him in the first instance of the use of patented machinery, whether arbitrarily or by offering terms he could not accept. It would be equally unsound to say that his trade is restrained by a contract which provides for him at a very low price the most efficient machinery known at the time of the contract.

It is probably enough to say that, under the uniform rule recognized in many decisions, the defendants have the right, both as owners and as patentees, to refuse the use of the patented machines of any department as they may see fit, whether unreasonably or reasonably. However, as it seems to be contended that these rights have been impaired, to some extent, by the Sherman Act, we may consider whether or not the exclusive use clause is inserted for reasonable and proper purposes.

It cannot be said that it is unreasonable or against public policy for the defendants to deal with shoe manufacturers only on the basis of a full equipment for a particular operation, when the subject-matter of the contract is not machines alone, but patented inventions as well. The inventions may reasonably be regarded as the principal subject-matter of the contract rather than the number of machines necessary to a particular manufacturer. While the manufacturer may prefer to contract with reference to each machine as a unit, the defendants may prefer to regard the number of machines with which a manufacturer is to be furnished as incidental merely to a policy of licensing those only who will pay royalty according to the amount of work they have for machinery embodying the patented inventions. The amount of royalties to be paid by the manufacturer is, of course, a primary consideration.

While in the early stages of the case there were some criticisms of any leasing system as opposed to a system of selling, the very great advantages to shoe manufacturers in general of being provided with machine equipment of the highest efficiency, and of being relieved of individual effort in that most costly and difficult part of manufacturing, and the general satisfaction with the system were so overwhelmingly proved, that all doubt that the leasing system in general is unimpeachable has been removed. Furnishing capital to shoe manufacturers in the form of shoe machinery embodying costly inventions as well as great mechanical skill in manufacture, the defendants are fully entitled to claim a proper share of the advantages resulting from what they have produced. How to obtain a just return for what they have contributed to the practical art has long been a problem with inventors. With many of them it has been a cause of complaint that a just share was denied them in what was attributable to their efforts. They have been accustomed, so far as they have been able, to reserve such rights as would secure to them a proper share in whatever business might be developed under the protection of patents covering their inventions.

In determining what is a reasonable share of profit when payment is to be made upon a royalty system, the value of the machinery as

a means of production must, of course, be considered. A contract that a lessee should pay in advance a gross sum computed upon the capacity of the machine, or a rental computed upon the capacity of the machine alone, could not be criticized as unreasonable. A royalty system, however, in which payment is made only according to use, is generally more acceptable.

If we are to consider such contract with regard to the rights of the lessor as well as to the rights and preferences of the lessee, it would be difficult to devise a more equitable arrangement than a requirement that the lessee should pay royalties according to the availability of the patented machinery for his use, rather than for such use of it as he may from time to time prefer to make. The lessor demands payment only so far as his machines are actually useful or available for the use of the lessee.

It is suggested in the brief of the United States that the lessor might accomplish all proper purposes by the fixing of a minimum amount of royalties; but such a suggestion does not solve the difficulty, for a minimum amount fixed in advance should include not only present use, but such future use of the invention as might be developed. A royalty which has regard both to the capacity of the machines which the lessor furnishes and to the amount of work which the lessee may have to do upon machines embodying the patented inventions, seems beyond reasonable criticism. It is of course essential not only to fix a royalty rate but to provide a rate of use and a period of time for the use. A contract of this character must have permanency, and may be reasonably continued over a long period of years. A royalty may be likened to interest upon a principal.

A contract involving so largely the subject-matter of inventions and of patent rights, and relating to the use of the tangible property of the defendants in the form of machinery and of intangible property in the form of patent rights, is substantially different from ordinary transactions of commerce, in that it relates so largely to the use merely of property, the title to which has not changed, and which continues for a long period in a fixed location, out of the path of interstate commerce. Browning v. Waycross, 233 U. S. 16, 34 Sup. Ct. 578, 58 L. Ed. 828. Where the annual use is small it would seem necessary that the period be protracted, in order to secure a fair return upon the investment. Where machinery is furnished which is of a capacity beyond the work which the lessee has to do, the efficiency of the machine, its great productivity, which is due to constant improvements, is not fully availed of; and it may be said that there is value lost owing to the limited business of such lessee. Where the product of a manufacturer is very large, and where the capacity of many machines is availed of, the manufacturer may think that the important thing is the gross amount which he is called upon to pay, and that there should be some reduction in the rate of royalty or in the amount of use required. On the other hand, it might well seem to the Shoe Machinery Company that if its equipment had proved especially valuable to a particular business it should receive its full share on a pro rata basis.

There would seem to be little chance for a difference of opinion

upon the question whether a shoe manufacturer who had been furnished with machinery of greater capacity than he was able to avail himself of should diminish his return of royalties by the employment of the machinery of others. The presence and use of other machinery would in such case be so directly inconsistent with the reasonable requirement that he should pay royalties to the extent of the use for which the leased machine was available, and use the machine to its full capacity so far as he had work for it, that the use of other than the leased machinery should be a sufficient cause for termination of the lease. It is said to be the case with a very large number—perhaps the majority in number—of shoe manufacturers that the machine equipment furnished them is more than sufficient for their work. The exclusive use clause, therefore, seems a necessary provision in these cases for securing what, from any point of view, must be regarded merely as reasonable compensation to the lessor.

With the large manufacturer the question is somewhat different. There will still exist the practical difficulty, if he introduces the machines of others, of determining what shoes are operated upon by such machinery and what by the defendants' machinery; but is there reason for denying to the defendants the right to invoke the exclusive use clause merely as a means of securing to themselves their royalty upon the entire work of that kind done by the manufacturer?

Here, undoubtedly, is a chance for a decided difference of opinion between the large manufacturer and the Shoe Machinery Company as to what part of the business success should be attributed to the defendants' patented machinery and what to the business ability of the shoe manufacturer, and for decided difference of opinion as to whether the claim of the Shoe Machinery Company to a royalty on all the work of a particular kind is reasonable. And here seems to be the only situation in which any question of the reasonable character of the exclusive use clause can arise. The terms, however, were fixed at the beginning, while both parties were free to contract or not. The machinery was installed with full notice that the lessee's right to its continued use was subject to the right of the Shoe Machinery Company to insist upon having royalties for all the work or to remove its machines if the lessee refused, as he has the right to do, to continue on that basis.

There is here no question of restraint of the trade of the shoe manufacturer, and no question whether a restraint of trade is reasonable or unreasonable. The lessee has contracted away no right which, but for the contract, he might freely exercise. The defendants stand ready to supply the manufacturer with machinery for the profitable carrying on of his trade. The shoe manufacturer has a full right to choose, and if the exclusive use clause is invoked is free from all obligation under his lease.

Furthermore, a contract providing that a manufacturer's business be carried on with machinery entirely adequate for the conduct of his trade, and which is the best machinery known for the purpose, does not injuriously affect him or the public. The reasons which underly the rule of public policy that forbids contracts in restraint of trade are absent.

A contract, requiring the use of certain machinery in a manufacturing business, between one who is to carry it on and one who is to furnish capital, or his own property tangible or intangible as a means for carrying it on, is a provision "for the prosecution of the business in a particular mode and not for its restraint." See Kinsman v. Parkhurst, 18 How. 289, 293, 15 L. Ed. 385; Chicago, St. L. & N. O. R. Co. v. Pullman, 139 U. S. 79, 89, 11 Sup. Ct. 490, 35 L. Ed. 97.

This cannot be treated as a petition for the reformation of contracts made between the defendants and the shoe manufacturers. An appeal to the public policy evidenced by the Anti-Trust Act cannot be made to extend the rights of the shoe manufacturers, under their contracts. There being no restraint of his trade, the United States shows no ground for intervention on behalf of the shoe manufacturer.

The "additional machinery clause," though not included in the government's definition of a tying clause, requires a brief consideration.

This is a contract by the lessee that, if he has work for more machines than were first installed, he will take from the defendants such additional machinery of the same kind as is necessary for doing all his work of a particular kind. This was an old form of contract in use before the consolidation, and to some extent afterwards, though abandoned some time before the filing of the petition.

The grounds upon which the exclusive use clause is held reasonable support this clause also. The exclusive use clause, however, represents the present policy of the company.

The "full capacity clause," by which the lessee agrees to use defendants' leased machinery to its full capacity so far as he has work for which it is capable of use, has already been referred to. The direct purpose of this is to secure a substantial amount of royalties. It is inconsistent with the use of the machines of others, but of this no just complaint can be made. Having a license for the use of patented inventions, the lessee must pay the agreed consideration, and if the licensor insists he must pay it whether he in fact uses the machinery or not.

The agreement to use to full capacity is auxiliary to the purpose of fixing the gross amount of royalties. It relates to machines with a recording mechanism which shows the number of shoes operated upon. Upon a breach of the agreement to use to full capacity it is difficult to see that there could be any basis for damages other than the amount of royalties that would have been paid had the machines been so used. An alleged breach of a somewhat similar provision for determining a quantity upon which royalty was to be paid was held not to be an independent cause of action; the provision being merely a subordinate part of an agreement to pay royalties. Jobbins v. Kendall Mfg. Co. (D. C.) 196 Fed. 216. See, also, In re O'Gorman Co. (D. C.) 195 Fed. 650.

But the general impracticability of determining the amount due, except in the way contemplated, fully justifies the provision for a cancellation of the lease upon a discontinuance of the use of the machine and the production of the proper record.

The United States concedes that if the "full capacity clause" stood

alone, thereby requiring the use of the leased machine alone as long as it could perform all work of that kind which the lessee had to do, it would be subject to little criticism. The objection is to its use in conjunction with the "exclusive use" or "additional machinery" clause. This conjunction of clauses, it is said, inserted in a large number of leases, shows a policy to force or create in the defendants the power to force its lessees to use exclusively machines of that class. This it is asserted is unlawful.

But the mass of leases has, in this respect, no cumulative effect upon the shoe manufacturer, for each lease taken singly gives to the lessee notice that his right to use may be terminated if he fails or ceases to use exclusively. The question as to him is whether such a reservation of right made by the lessor of patented machinery is unlawful.

If there is any "force" exerted upon him, it is from his lease alone, and not from the mass of leases taken by others, and, as we have seen, is merely the result of a limited grant made by a patentee, who may refuse him any right of use. But here, as we have seen, is nothing that can justly be deemed coercion.

Complaint is also made in behalf of the shoe manufacturer that the term of the licenses is too long—17 years—and it is said that this period is regardless of the terms of the patents. Allegations were made that these long terms were fixed for the purpose of tying up by contract what would soon be free from control through letters patent. It is true that the United States referred to certain licenses which ran beyond the terms of any patents mentioned in them. The evidence shows, however, that the leased machines were, as matter of fact, protected by letters patent throughout the period of the leases. Seventeen years, of course, is the term of a patent. Nothing is more common in agreements concerning patented inventions than to contemplate and provide for improvements. The shoe manufacturers who have assented to this period cannot complain of it. They have secured very valuable rights at a very reasonable sum for a long period of years. The history of the company and the experience of the manufacturers, who have not been required to sink their capital in machinery which, as the evidence shows, will afford them no banking credit, shows no just cause for complaint as to the length of the contracts. The evidence shows that full value has been furnished by the defendants for the royalties which they have received.

In considering the reasonableness, as between the defendant company and the shoe manufacturer, of a long term contract, we must look not alone to the fact that the shoe manufacturer may be bound for a long term. It is a case of reciprocal obligation, for the shoe manufacturer is bound for no longer period than that for which the defendants, upon a just construction of the lease contracts, are also bound. The requirement of use to full capacity, so far as the manufacturer has work, and the exclusive use or additional machinery clause, impose upon the defendants the corresponding duty to furnish machines and the shoe manufacturer is relieved from his obligation unless the defendants supply him with the means for fulfilling it.

It has been suggested that the terms of these contracts may be in-

definitely prolonged by furnishing additional machines only for new periods of seventeen years. Apparently there is no force in this suggestion; for a failure of the defendants to furnish what was necessary for carrying out the requirements of the contract, or the refusal to do so except on terms inconsistent with the original contract, would release the lessee from his obligation.

The insistence of the defendants upon the taking at the outset of an amount of machinery adequate for a lessee's entire work is, as we have said, unquestionably within their right. When additional machinery is sought, and the defendants insist upon the same general terms, their right to do so cannot be abridged by the fact that there has been a previous installation of machines. The policy is not altered from that of which the lessee was apprised at the outset.

The cancellation clauses, however, provide a practical means of escape for those who consider the term too long. They may install other machinery and run the chance, and if the machinery so installed is satisfactory they may use it for their full equipment when the machines of the defendants are removed.

It is contended for the defendants, and there is evidence in support of such contention, that the actual practice of the Shoe Machinery Company is not fairly represented by reference to the literal terms of the leases, but that it is much more liberal, and that it is customary to make modifications in particular cases.

The general policy of the company has been clearly brought to the attention of its lessees, and was exercised fairly and reasonably in those specific instances which the United States has brought to our attention.

It is stated upon the brief of the United States that the record shows that a number of the largest shoe manufacturers in the United States, lessees of defendants, are dissatisfied with their system of leasing. A number of these gentlemen have testified before us as to their very large production of shoes. They made no claim that the leases of which they complain have not furnished them with machinery entirely adequate for their business. Though the argument of the United States has urged upon us the unfortunate position of a shoe manufacturer after he has entered into contract with the Shoe Machinery Company, and deplores his supposed obligation to use the defendants' machinery throughout the contract period, yet these very intelligent gentlemen cannot be regarded as objects of unjust oppression or coercion, unless that term be used in the very loose sense which was rejected by the Supreme Court in the case of Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. —, January 25, 1915.

The hardship to a manufacturer if, during this long period, there should come upon the market superior machinery has also been urged. During the period of the leases no such situation has apparently arisen. This argument was very sensibly dismissed in the United Shoe Machinery Co. v. Brunet, [1909] A. C. 330, as based upon too remote a contingency. Such contingency was within the purview of the parties at the time they entered into the contract, and the choice of the restricted instead of the independent form of lease would seem to indi-

cate that the practical value of being able to meet it was not considered by the shoe manufacturers greater than the amount of the initial premiums for independent machines. A business contract, like a statute, is not to be upset "upon hypothetical and unreal possibilities if it would be good upon the facts as they are." Pullman v. Knott, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. Ed. ——.

As has been said, the Sherman Act was not designed to relieve parties from the obligation of contracts fairly entered into. It cannot be invoked in this case to abridge the right of contract in order to establish what Justice Holmes terms "the equality of position between the parties, in which the liberty of contract begins." Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. ——. Here the parties stand upon terms of entire equality. The large shoe manufacturers and the defendants seem to differ as to what are fair and reasonable terms, but the Sherman Act cannot be invoked to settle a trade dispute of this character between such parties.

To justify interposition in behalf of the public it must appear that the interests are those of the public generally, as distinguished from those of a particular class. The legislature may not, in the guise of protecting the public interests, arbitrarily interfere with private business. Lawton v. Steele, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385. The rules of public policy which make a given contract void are not to be extended arbitrarily. Baltimore & Ohio v. Voigt, 176 U. S. 498, 505, 20 Sup. Ct. 385, 44 L. Ed. 560.

There remains to consider upon this branch of the case, and as directly bearing upon the reasonableness of these contracts, the important fact that a very large number of very intelligent and competent men, heads of manufacturing establishments, have independently accepted these terms. The large number of leases is strong evidence that upon the whole the terms are reasonable, and that the requirements from the lessee, of which complaint is made, have not been regarded as more than could be advantageously accepted. Such manufacturers have had free option to manufacture boots and shoes of other kinds. They may have from the defendants by purchase, if they like, the assistance of some 170 machines from their general department. They may have manufactured for them, if they see fit, those commercially practicable welters and stitchers upon which patents have expired, or they may manufacture largely by hand methods. It must be remembered that the defendants' machines are largely labor-saving devices. The situation is not that of a monopoly, and the case of the United States upon that aspect has completely broken down. These contracts which the United States attacks, moreover, give to the lessees, many of whom seem entirely satisfied with them, very valuable rights. Nothing more impractical can be imagined than the prayer of the petition that these contracts should be canceled. To restore the parties to the original situation would probably result merely in agreements which would meet the objections of the United States, and would yet be in substance the same Payment of royalties according to use necessarily involves some provision as to the amount of use. The exclusive use clause can only be criticized as requiring too much use, and therefore

too high a price. It is, after all, a question of price, and the right of the defendants to fix their prices covers so many different modes that if this particular mode of payment is found objectionable, other modes less convenient, but accomplishing the same result, could readily be adopted.

The United States also objects to the fact that certain auxiliary machines for use in conjunction with the Goodyear welter and stitcher are supplied only to those who take the Goodyear welter and stitcher. These auxiliary machines are supplied without royalty, and for the purpose of increasing the production of the welter and stitcher; but there is no proof that the combination affected these. The right of a person to promote the sale or use of one class of goods by giving also other goods or tokens for goods, though it has been attacked by legislation, has been upheld in decisions which hold such legislation by a state unconstitutional. Van Deman & Lewis v. Rast (D. C.) 214 Fed. 827, 833; Little v. Tanner (D. C.) 208 Fed. 605, 610; State v. Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818.

The rule that a decree cannot be made which injuriously affects the rights of third parties would seem to require that before the court in any event could proceed to a decree to annul these leases the lessees should be before the court as parties. Minnesota v. Northern Securities Co., 184 U. S. 234, 235, 22 Sup. Ct. 308, 46 L. Ed. 499; Shield v. Barrow, 17 How. 130, 15 L. Ed. 158; Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792.

The Effect of the Leases upon Other Manufacturers of Shoe Machinery.

Here we have to consider the effect of the mass of defendants' leases upon persons who are not parties to them, and who, therefore, have not entered into any contracts in alleged restraint of their trade. The inquiry must be, therefore, whether, by reason of the insertion in a large number of leases of those clauses of which the United States complains, competition is suppressed to such extent as to tend to monopoly of interstate commerce in a field which otherwise would be open to competition.

It is most important to observe that the petition presented the leasing system as a part merely of a general plan of monopoly. The main brief of the United States so treated it.

The subject-matter to which these leases relate is a part only of the machinery dealt in by defendants. The supposed field of monopoly has now shrunk so that it is much narrower than the general field of shoe machinery, or of shoe machinery for the bottoming of shoes by stitches or otherwise, in which field it appears that there never has been a monopoly, but always active competition between defendants' machines and other machines.

The supposed monopoly, or suppression of commerce, relates to machines for performing a part only of the large number of operations necessary to complete a shoe. The leases relate to machines protected by patents; many of them were originated and first put upon the market by the defendants. Many of these machines have such in-

dividuality that there are no others which perform the same function, or with which they could be classed.

With articles of common production the existence of competitors may be assumed; but here no such assumption is admissible.

If the question here is whether the leases have the effect of unlawfully excluding competitors from interstate commerce in shoe machinery, we must at the outset inquire in a general way as to the present or possible existence of competitors. In United States v. Winslow, it was said:

"The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents (Paper Bag Patent Case, 210 U. S. 405, 429 [28 Sup. Ct. 748, 52 L. Ed. 1122]), and it may be assumed that the success of the several groups was due to their patents having been the best."

As the subject-matter of the leases is patented machinery, the presumption is that there are no competitors who can offer the same machinery. Whether there are competitors able to supply other kinds of machinery, patented or unpatented, which can be used for work of the same general description as that for which defendants' patented machines are adapted and used is matter of conjecture.

The competitor who is excluded from supplying the defendants' lessees, because the lessee is compelled to choose between his machines and the defendants' machines, may be, and as to many of the machines is likely to be, an imaginary being.

It appears, however, that for some of the operations for which the leased machines are adapted there are upon the market machines made by other manufacturers, and that in a general sense there are competitors.

To determine how far the leases have had the actual effect of excluding competitors, it would be necessary to consider in much detail the special subject-matter of the leases, the dates of patents, and the special and peculiar operations performed by the machines.

The defendants insist that in order to meet a charge so much narrower than that of the petition it would be necessary for them to offer evidence as to each unit, and to prepare a defense of an entirely different character from that required to meet the petition; and this seems probable. We may, however, refer to a few considerations of a general character.

In the first place, we must make a clear distinction between that which undoubtedly the defendants have the right to do and that which it is said may improperly affect competitors.

As owners of patented machinery and as manufacturers of machinery, whether patented or unpatented, they have the right to supply, to the best of their ability as many customers as can be induced to take their machinery. They have the right, for the reasons which we have stated, to enter into long term contracts with shoe manufacturers for the use of their patented machinery throughout the terms of the patents. Merely as manufacturers they have the right to enter into long term contracts for supplying their machine equipment to those who are willing to agree to long term contracts.

That, irrespective of the question of patents, a long term contract, 15 years, with exclusive rights, was not in general restraint of trade, and was not void as against public policy, was determined in Chicago, etc., R. R. Co. v. Pullman Car Co., 139 U. S. 79, 89, et seq., 11 Sup. Ct. 490, 35 L. Ed. 97.

The United States relies greatly upon United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, and seeks to establish an analogy between the so-called "65 per cent. contracts" in that case and the large number of contracts of the defendants with shoe manufacturers in this case. But the resemblance between the Reading Case and the present case lies only in the fact that in each is a large number of contracts. In the Reading Case an existing and definite supply of coal was monopolized, and a definite part of that supply was monopolized through the 65 per cent. contracts. In this case, so far as the leases are concerned, there is no question of monopolizing an existing supply. The monopoly, if any, is a monopoly of customers for machines for performing the particular operations to which the leases relate. The complaint is that defendants' customers are so bound by the leases that they are no longer customers for other manufacturers of shoe machinery.

The monopolizing of a definite and limited supply of a commodity and the monopolizing of customers for machines for performing certain operations in the manufacture of shoes are as far apart as possible. The number of customers, or possible customers, for shoe machinery has been very largely increased during the life of the defendant company. Many of these customers were first induced to be customers for shoe machinery by the fact that machine equipments were offered them adequate for the establishment of a manufactory of shoes. The customers are not a fixed quantity. They comprise such persons out of the entire population of the United States as may be induced to engage in a manufacturing business by knowledge that they can procure adequate machinery for that purpose on suitable terms.

We must take into consideration not only natural persons, but also those artificial persons easily created under general laws of incorporation for the conduct of any enterprise requiring a considerable amount of capital. A large number of shoe manufacturers concerning whom there is evidence in this case are corporations, and the leases relate to the activities of corporations. The individuals who are stockholders or officers of such corporations may in new corporate forms engage in shoe manufacture.

Upon the face of it any undertaking to monopolize such an undefined field as that of customers for shoe machinery seems impracticable.

Counsel for the United States inquire what possible hope there is for other manufacturers to deal with the customers of the Shoe Machinery Company, so long as their leasing contracts prevail. This inquiry would be substantially the same if all those provisions in the leases to which objection is made were stricken out.

Assume the existence of a large body of leases for only the period of patents and requiring merely payment for a right to use, but with the additional machinery clause, the exclusive use clause, and the prohibitive clause omitted; the inquiry would still be the same. It may

be said, however, that with these clauses in it is somewhat more difficult to deal with a customer who has secured from defendants either a complete or partial equipment.

The exclusion from trade which results from the fact that many customers are supplied cannot be complained of by the United States. The complaint must be limited to such exclusion as results from the clauses objected to.

Perhaps the simplest way of treating the leases in this connection is to consider whether if the defendants had agreed in express terms to furnish for 17 years entire equipments for shoe factories, and the shoe manufacturers had agreed to operate these equipments exclusively for that period, this could be condemned.

The true effect of the leases is much less than this, but if such agreements can be condemned it must be upon the theory that both the defendants and the shoe manufacturers have lost the freedom of contract which existed before the Sherman Act, and that contracts advantageous to both, and agreed upon by both, are invalid because they take customers out of the market.

The Sherman Act seeks to maintain competition as a means to the end that trades may be made and closed, and not to forbid contracts in order that competition for particular customers may be perpetually maintained.

A public auction affords perhaps the fairest means for competition, but when the hammer falls the purpose for which the public auctioneer was employed is accomplished; competition has achieved its end—a binding contract.

If, between the parties, the contract is fair and has relation to the consideration which each is to render, if nothing which has no relation to this is inserted, the contract must be upheld, even though it may destroy a third person's chances for competition. We must find in the leases, or in the conduct of the defendants in offering them, or in enforcing them, something which "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it." Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 48, 33 Sup. Ct. 9, 57 L. Ed. 107.

If, for the sake of the competing manufacturer of shoe machinery, it was sought to obviate the objection that the leases are too long, a reservation to the shoe manufacturer of a choice to terminate his lease at any time would seem to be all that could reasonably be asked. If allowed an opportunity to choose at any time between the machines he has taken and the machines of others, this should answer the objection to the length of the leases.

But the shoe manufacturer has such a choice.

The exclusive use and cancellation clauses serve to facilitate this choice and not to prevent it. If the defendants exercise their rights under these clauses he is freed completely, and thus becomes a possible customer for a competitor. If the defendants do not exercise their rights, he continues bound by his agreement for the payment of royalties; but, subject to this, he may, as we have seen, without actionable breach of contract, install at once the machinery of others.

The contention of the United States that it is unlawful to make the shoe manufacturer, by the exclusive use clause, choose between the defendants' machines and other machines, we have seen cannot be sustained on behalf of the shoe manufacturer. Nor can it be sustained on behalf of the manufacturer of shoe machinery, for it opens to him a chance for competition. All cancellation clauses if exercised are in one way favorable to him. They are unfavorable only so far as the shoe manufacturer may desire to retain the machinery of the defendants.

In reality what stands in the way of a competitor is the desire of the shoe manufacturer to retain his rights under the leases. If compelled to choose he will choose the defendants' machinery, and thus the defendants, upon such choice, will win in competition.

It is quite true that when a shoe manufacturer has installed several machines under the prohibitive leases the extra cost of changing all his prohibitive leases for independent leases may be so considerable that competition is difficult. He has taken the machines as a group, and one who has not a group to offer in substitution has little practical chance to compete. But a competitor must be able to compete. If leases for machines for use as a group are offered and accepted for sound business reasons, and if, because of the greater productivity of a group and of the less cost of maintenance, better prices can be made, the defendants and the shoe manufacturers need not forego the making of such contracts for the sake of possible competitors who may have only single machines to offer. Contracts for large equipments of machinery, furniture, and other articles are too common to be condemned for such reason.

The United States treats the question of the leases rather as an abstract or verbal question than as a practical question, or a question of substance. The grouping of machines, each protected by one or more distinct patents, is treated as a mere artifice for making one machine aid another in a trade for machinery.

The assumption that it is highly desirable that the shoe manufacturer should be at liberty to group the defendants' machines with such other machines, taken from other manufacturers, as he may see fit, ignores the fact that, though machines may be treated in the Patent Office as separate, in a shoe factory the machines have a very definite mechanical relation to each other, and to the particular method of making a shoe. The grouping of machines in order that some may aid others in turning out a product affords a sufficient mechanical reason for installing them as groups, and a sufficient business reason for dealing with them as groups.

That there are sound mechanical and business reasons for grouping together machinery as it is grouped by a series of prohibitive leases is abundantly established. The United States fails to show that the grouping of the machines is in fact made merely as an unlawful artifice, and not because of sound mechanical and business reasons. It has referred to certain leases in which there appears to be no necessary mechanical relation between some of the machines grouped. Thus to a limited extent it may be true that the grouping is for the purpose of trade or of contract, rather than because of the close relation of the

machines in process of manufacture; but this is insufficient to show that the principal purpose was not, as is contended by the defendants, to secure by efficient co-operation of machines a larger production of shoes.

A contract for a group of related machinery, or for a supply of machines, not immediately related, but used only in separate mechanical steps of a manufacturing business, is an entirely proper and normal contract. The matter cannot be better stated than by Judge Putnam in United States v. Winslow (D. C.) 195 Fed. 578, 592:

"It seems to be impossible to deny that the combination of various elements of machinery, all relating to the same art and the same school of manufactures, for the purpose of constructing economically and systematically, and of furnishing any customer, the whole or any part of an entire system, is in strict and normal compliance with modern trade progress; as also it might be in strict compliance with modern progress to limit the manufacture and supply to certain details, as, for example, steam gauges, wheels for railroads cars, or axles for steam locomotives, without furnishing anything else, although by so doing, the manufacturer of details becomes able to command the entire market. It is absolutely normal, and in accordance with the rightful demand of the market, for any dealer to supply mere details or an entire system of machinery, according as his customers may desire."

It may be admitted that the inducements offered by the United Company in the complete or partial installation of a machine equipment on terms which relieve the manufacturer from the expense of an initial payment and from the loss by deterioration, make it a very formidable competitor. It may be assumed that the difficulty of introducing competing machines into factories so supplied is very great; but that this difficulty arises from the insertion of clauses in the leases which were directed at competitors, and were not inserted for the purpose of defining and securing a reasonable compensation to the defendants for the use of their patents and machinery, has not been made to appear.

The main purpose, to insure such permanency of the relation between lessor and lessees as has been agreed upon, being legitimate, and the judgment of a large number of practical men who have separately, and without concurrent action, accepted what was offered them by the United Company upon the terms offered, being the best proof of the reasonableness of these terms, we must hold that the difficulty of a competitor arises from the fact that customers are already supplied rather than from any provisions designed to hold these customers to what they have agreed to, or which provide for the termination of the leases and the freeing of the manufacturer from his contracts with the United Company.

The free field in competition to which a new manufacturer of shoe machinery is at this date entitled is not a field where there is no prior art, nor where the shoe manufacturers are unsupplied with machinery, nor where there is an unsatisfied demand for machinery in every factory. One who goes into a field of manufacture already occupied must expect to find factories so fully equipped that they are no longer customers.

Counsel for the United States do not, however, sufficiently recognize the difference between the commercial situation relating to pat-

ented articles and that relating to articles of general production. The inventor seeks to displace by invention inferior methods, and such displacement is encouraged by giving to the patentee a free field for his invention, and by giving him the right to offer it upon such terms as he may induce the public to accept. During the period of monopoly he may establish a good will which will give him after the expiration of his patents a formidable advantage in competition over imitative manufacturers. Frequently this good will and the development of his business may be such as to practically and lawfully exclude competition after the expiration of his patents. When a thing is so successfully accomplished and perfected as to satisfy all requirements, further invention in that field is often discouraged. The manufacture of complicated machines, in order to be profitable, must be on a large scale and by an organization having mechanical skill.

The defendants saw before them a large field for the business of supplying labor-saving machines to shoe manufacturers. They saw, as was expressed in a circular of the Goodyear Shoe Machinery Company, dated February 8, 1889:

"The great advantages to be secured by the control in one corporation, both in the United States and in foreign countries, of the most efficient types of shoe machinery."

This circular, instead of affording evidence of an improper purpose, shows a plan whose development has been of great advantage to the industry of shoe making, and which has been determined to be lawful by the Supreme Court in United States v. Winslow, 227 U. S. 202, 217, 33 Sup. Ct. 253, 57 L. Ed. 481.

It was but natural that a company dealing with shoe manufacturers, in respect to a device for labor saving upon one operation of shoe manufacture, should extend its business so as to be able to supply labor-saving devices for other distinct operations. As the operations in making a shoe are said to be 150, more or less, it was a natural development, after effecting a saving in one operation, to invent mechanical means for saving in other operations. Instead of closing the door to invention, invention in the art of shoe machinery was thus greatly developed and greatly encouraged.

A company of sufficient capital to furnish a large line of labor-saving devices for different operations in shoe making, which devices must necessarily be more or less related to each other, would properly strive to furnish, not only single machines, but groups of machines, or an entire machine equipment. The enterprise of the defendants in developing and occupying a field in this way rendered it impossible, of course, for any subsequent organization to have the advantages of an unoccupied field. It is impossible to believe that the defendants' equipment is in so many shoe factories for any other substantial reason than the merits of what they have had to offer. To say that this is due, in any substantial degree, to the fact that its leases run beyond the terms of patents, or because of the exclusive use, prohibitive, or cancellation clauses, rests largely, if not entirely, upon assumption. But that the business of these defendants rests upon the lease provisions objected

to in such a substantial amount as to constitute any factor of independent force in securing or maintaining a monopoly does not appear.

The clauses objected to are all subordinate and auxiliary to maintaining rights, which unquestionably belong to the defendants, to charge their own prices and to choose as customers those who will pay those prices.

The attack of the United States is not upon these rights, but upon the particular mode in which they have sought to exercise them. Other modes, such as the requirement of arbitrary payment for the full period of the patents, would escape all such attacks. The attack arises from the attempt to adjust the payments to the amount of use which particular manufacturers may have for the patented inventions.

The defendants very forcibly contend that no decree for the United States can be based upon the leases alone, as an independent ground for relief, for the reason that the leases were presented merely as parts of a general plan of monopoly. They in turn rely upon United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; but to show that the petition cannot be sustained under the first section of the Anti-Trust Act, and insist also that the question whether the leases are contracts in restraint of trade cannot be determined because the lessees have not been joined as parties, and are not before the court.

They further insist that the subject-matter of the leases is substantially different from the subject-matter of the petition, and requires that the defendants be given an opportunity to introduce specific evidence as to the different patents and different machines.

The defendants during the trial have waived no rights in respect to these contentions.

In view of the fact that my conclusions upon the merits of the lease question are favorable to the defendants, I pass these objections without a decision upon their validity.

In view of the full discussion of the other portions of the case by my Associates, I need only state my general concurrence in their conclusions, and that I concur in all respects in the opinion of Judge DODGE upon the lease question, as well as upon all other questions in the case.

In re INTERNATIONAL MINERAL CO.

(District Court, D. Connecticut. April 19, 1915.)

No. 2033.

1. BANKRUPTCY ⇐269—SALES BY TRUSTEE—RESCISSION.

A trustee in bankruptcy entered into an option agreement with T. for the sale of the bankrupt's interest in certain talc quarries to the A. Co., to be organized by T., which company was to execute a mortgage to secure bonds which, with the exception of bonds in the sum of $15,000, were to be sold and the proceeds paid to the trustee. Such option having lapsed, a new option agreement, with the approval of the referee and a committee of the creditors, was made for the sale of the property to the A. Co. for $70,000, $7,500 to be paid by a specified date, and the balance to be se-

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

cured by bonds secured by a mortgage, the trustee to convey only such title as he had. The petitioners, acting for a syndicate, agreed to furnish T. the $7,500, for which they were to be repaid $15,000, and as security were to receive bonds in the sum of $250,000 and stock of the A. Co. The trustee had no knowledge of this agreement. The trustee, T., one of the petitioners, and others met for the purpose of paying the $7,500, and it was then agreed that bonds in the amount of $25,000 were to be retained from those delivered to secure the trustee. Certified checks for the $7,500 were given the trustee, and he signed a receipt agreeing to hold them in escrow until delivery of the deed, and to have the option contract amended to permit the retention of bonds in the sum of $25,000. There was no agreement between him and the petitioners, and he intended to deal solely with T. and the officers of the A. Co. The trustee deposited the checks in his account as trustee, and they were paid. The change in the option agreement was not approved by the referee or the creditors' committee, and a new agreement, providing for the retention by T. of bonds in the sum of only $15,000, was executed, under which a conveyance to the A. Co. was made and delivered to a trust company as required by the option. The petitioners knew of the new option agreement, but never demanded the return of the $7,500 until nearly three years after the conveyance, and the property in the meantime had become subject to attachments in suits by creditors of the A. Co. *Held*, that the petitioners were not entitled to the return of such money, as the trustee took the checks burdened with no trust, especially as they were certified checks, and the equivalent of cash, and the provision that they were to be held in escrow was ineffective, as they were delivered to the payee therein named, and the delivery could not be conditional, but was either absolute or void, and, there being no agreement that they should be returned if the agreement evidenced by the receipt was not carried out, the failure to secure the approval of such agreement by the referee and creditors left the old option in force.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 370; Dec. Dig. ⊂⊃269.]

2. BANKRUPTCY ⊂⊃269—SALES BY TRUSTEE—RESCISSION.

There was no fraud on the part of the trustee in transferring the checks to his account as trustee, as he did no more than he had a right to do, and was under a duty to the creditors of the estate to do, especially in view of Gen. St. Conn. 1902, § 4356, which is declaratory of the common law, and which provides that a check must be presented for payment within a reasonable time after its issue, or that the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 370; Dec. Dig. ⊂⊃269.]

3. BANKRUPTCY ⊂⊃269—SALES BY TRUSTEE—RESCISSION—"LACHES"—"EQUITABLE ESTOPPEL."

It being impossible, by rescinding the transaction and returning the consideration received by each party, to place both parties in the same situation as when the contract was made, the failure of the petitioners to rescind promptly, unconditionally, and unevasively, whether regarded as "laches," which consists in inexcusable delay in asserting a right, inexcusable negligence, and inattention to one's interests, or "equitable estoppel," involving conduct inducing another to believe and act to his prejudice, defeated a rescission, especially as the contract was made with T., and not with the petitioners, who merely loaned money to T.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 370; Dec. Dig. ⊂⊃269.

For other definitions, see Words and Phrases, First and Second Series, Estoppel in Pais; Laches.]

4. EQUITY ⟸158—ESTOPPEL ⟸110—LACHES—NECESSITY OF PLEADING.
A court of equity, in its discretion, may deny relief on the ground of laches or equitable estoppel, though neither is pleaded as a defense.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 395; Dec. Dig. ⟸158; Estoppel, Cent. Dig. § 300; Dec. Dig. ⟸110.]

In Bankruptcy. In the matter of the International Mineral Company, bankrupt. On petition for review of an order of the referee denying the application of Frank W. Cavanaugh and another for the payment to them of money in the trustee's possession. Order affirmed.

Marvin M. Taylor, of Worcester, Mass., for petitioners.
Ralph H. Clark, Arnon A. Alling, and John Q. Tilson, all of New Haven, Conn., for respondents.

THOMAS, District Judge. This is a petition to review an order of the referee in bankruptcy denying the right of Frank W. Cavanaugh and Paul Potter, members of the Massachusetts bar, to $7,500 held by the trustee of the International Mineral Company, a bankrupt corporation, in a petition filed by them under subdivision 7 of section 2 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 546 (Comp. St. 1913, § 9586).

The order sought to be reviewed was entered on December 15, 1913, and contemporaneously with the filing of this order the referee filed a written memorandum in the form of a letter to the counsel for Cavanaugh and Potter and the trustee, respectively, setting out the reasons for the order, but made no detailed finding of facts or summary of the evidence. Hence a detailed statement of the facts found by the court is set out at length and is as follows:

This corporation was organized under the laws of the state of Maine, but its affairs and principal business were conducted in this district. On June 15, 1908, it was adjudicated a bankrupt by the District Court for this district, and on July 14, 1908, proceedings were had in which Felix Chillingworth was appointed and qualified as its trustee. Mr. Chillingworth continued to act as trustee until his death in February, 1914, and his successor was thereupon appointed, who accepted said trust and qualified and continued the duties of administering the estate until some time in July, 1914, when he resigned. Thereupon the present trustee was appointed and qualified, and is now such trustee. The funds in controversy are now on deposit in the name of the trustee in an approved depository.

Cavanaugh and Potter, who resided in Worcester, began proceedings of review, and to that end filed this petition; but before the referee had filed any finding, other than the memorandum referred to, he died. His successor, acting under an order of the District Judge, entered upon the stipulation of counsel for the respective parties, thereupon transmitted all of the proceedings had before the referee, including a stenographic report of all the evidence and the documents produced in evidence, or copies thereof. No question is made as to the finality of the referee's order denying the original petition, excepting as it may be reviewed.

The bankrupt corporation, at the time of said adjudication and for a considerable time previously, conducted talc quarries located at Moretown, Vt., and Ticonderoga, N. Y., and in connection with its business owned quarry properties made up of real estate and sundry interests therein and personal property at the places named. Following the adjudication, to wit, on October 12, 1908, Mr. Chillingworth entered into an option contract with one John W. Taylor for the sale of the interest of the bankrupt estate in said properties for a cash payment of $7,500, to be made on or before December 15, 1908. The terms of said option included a conveyance by said trustee, to be approved by the referee and a committee of the creditors, to a corporation which Taylor was to organize, and which, as soon as its organization was completed, was, in consideration of the conveyance to it, to execute a trust mortgage to secure an issue of bonds which were to be held by the New Haven Trust Company—with the exception of bonds of the par value of $15,000—to be sold from time to time under certain conditions expressed in said option until a sum should be realized sufficient to satisfy all of the allowed claims presented against the bankrupt. Subsequently this option was extended by the agreement of the parties and expired unexecuted on May 1, 1909.

In the meantime Mr. Taylor had effected the organization of this corporation, the American Quarries Company, under the laws of the state of Maine, with a capital stock of $2,000,000, and after such corporation was completed, on March 24, 1909, Mr. Taylor appeared at a special meeting of the board of directors of the American Quarries Company held at Boston, and stated that he had facilities for acquiring all of said bankrupt estate upon the payment to him or his representatives on or before July 1, 1909, of $8,000, and of $62,000 on or before December 14, 1909, and the issuing and turning over to him of 2,000 fully paid shares of the capital stock of the American Quarries Company and the delivery to him of $350,000 of first mortgage 6 per cent. coupon bonds of said company, secured by a trust mortgage upon the said quarry properties of the bankrupt corporation.

Some six weeks later, on May 4, 1909, Mr. Chillingworth and Mr. Taylor executed an agreement whereby the latter released all right under the option of October 12, 1908, and which had then expired, for the purchase of said bankrupt's estate from Mr. Chillingworth, as trustee, and on said May 4, 1909, with the approval of the referee and the committee of the creditors of the International Mineral Company, Mr. Chillingworth entered into an option agreement with one Guy C. Holliday, who was acting in behalf of Mr. Taylor, for the sale of said property of said bankrupt estate to the American Quarries Company for the sum of $70,000, $500 of which was paid by said Holliday at the time of the execution of said option, and $7,500 of which was to be paid on or before the 1st day of July, 1909, the balance of said purchase price, amounting to $62,000, to be secured by $985,000 worth of bonds of the American Quarries Company, these bonds to be secured by a trust mortgage of said properties deposited with the New Haven Trust Company. One of the terms of the option provided that Mr. Chillingworth was to convey to the American Quarries Company such title only as he might have as trustee to the

property described. On June 23, 1909, Cavanaugh and Potter, acting as trustees for certain subscribers to a syndicate agreement of that date, and for the purpose of raising the sum of $7,500 to be furnished Mr. Taylor, and to be paid by the latter to Mr. Chillingworth upon said conditions, entered into an agreement with Mr. Taylor and with the subscribers to the syndicate, pursuant to which the sum of $7,500 subscribed was to be paid to Mr. Chillingworth by Cavanaugh and Potter upon receipt from the American Quarries Company of a binding and valid agreement, guaranteed by Mr. Taylor, for the payment to Cavanaugh and Potter on or before July 1, 1910, for said sum of $7,500, the sum of $15,000, to secure which Cavanaugh and Potter should receive a bill of sale of 5,000 tons of marketable talc then lying in piles at Moretown, Vt., and which was to be sold under certain conditions and the proceeds applied to the payment of the loan made by Cavanaugh and Potter. Mr. Chillingworth had no knowledge of this agreement or these facts until June 21, 1912, when Cavanaugh and Potter filed their petition demanding the turning over to them by Mr. Chillingworth of $7,500.

Contemporaneously with this agreement, Cavanaugh and Potter, as individuals, made another agreement with Mr. Taylor, and of which Mr. Chillingworth was ignorant until June, 1912, pursuant to which Mr. Taylor agreed, among other things, to cause $250,000 of bonds or interim receipts therefor, and $125,000 of the stock of the American Quarries Company, to be issued to Cavanaugh and Potter in order to enable them to better secure the subscribers to said syndicate agreement, Cavanaugh and Potter retaining absolutely for their services $150,000 of the bonds and $7,500 of the stock. A week later, on June 30, 1909, Cavanaugh and Potter, as individuals, made another agreement with Mr. Taylor, whereby the latter agreed that he would cause either Cavanaugh or Potter to be elected as a director of the American Quarries Company, and guaranteed that the salaries of the officers of said American Quarries Company should not exceed certain sums therein specified until Cavanaugh and Potter, as trustees, had been paid $15,000, as specified in the syndicate agreement above referred to. Mr. Chillingworth had no knowledge of either of these agreements until June 21, 1912.

On June 30, 1909, at the request of Mr. Taylor, Mr. Chillingworth went to Boston to receive the sum of $7,500 to be paid under the terms of the option agreement with Holliday, and which had been executed on May 4, 1909. It is clear, from the evidence, that at this time there was a definite understanding and agreement between all of the parties concerned that Mr. Chillingworth's title as trustee to the property of the bankrupt should be conveyed to the American Quarries Company in execution and performance of the option contract of May 4, 1909, entered into between Mr. Chillingworth and Mr. Holliday; and it was also known at that time, and for a considerable time prior thereto had been understood by all the parties interested, Mr. Taylor, Mr. Chillingworth, and Mr. Holliday, that Mr. Chillingworth could not give a good title to a certain portion of the real estate in New York by reason of the pendency of a suit brought to foreclose a mortgage thereon, and which was then pending in the Supreme Court of New York. Cavanaugh and

Potter as early as September, 1909, had actual knowledge of this defect in title. It was believed, however, by all the parties, that upon appropriate proceedings in the New York courts the cloud upon the title could be removed, and the understanding of Mr. Chillingworth, Mr. Holliday, Mr. Taylor, and the American Quarries Company was definite that Mr. Chillingworth's deed of conveyance should include only such title or equitable interest as he had in said property.

When Mr. Chillingworth arrived in Boston on June 30, 1909, Mr. Taylor informed him that the sum of $7,500 to be paid was to be furnished by certain parties from Worcester, who were to be interested in the American Quarries Company; that they would not arrive in Boston until that afternoon, and that he (Taylor) desired to retain bonds to the amount of $250,000. Up to that time Mr. Chillingworth had no knowledge from whom Mr. Taylor was to get this $7,500. On the afternoon of that day, June 30, 1909, Mr. Chillingworth and Mr. Hutchinson, the latter an employé of the New Haven Trust Company, went to the office of Louis A. Chandler, who was the secretary of the American Quarries Company and Mr. Taylor's attorney, where they were joined by Mr. Taylor, Mr. Potter, and certain officers of the American Quarries Company. A discussion then took place as to the retention of a larger amount of bonds than the amount of $15,000, which, under the terms of the later option of May 4, 1909, it was stipulated should be retained, and the representation was made to Mr. Chillingworth that it was necessary that bonds should be retained to the amount of $250,000. There was also at this time a discussion as to changes in the deeds of conveyance of the Moretown and Ticonderoga properties by Mr. Chillingworth, as trustee, to the American Quarries Company (drafts of which had previously been prepared), with respect to certain boundaries, and a further discussion as to what kind of title Mr. Chillingworth, as trustee, would convey to the American Quarries Company. Mr. Chillingworth then repeated the statement that he would and could convey only such title as he then had as trustee in bankruptcy, and the evidence justifies the finding that no representations were made by him that he then had as trustee a good and clear title to all the Ticonderoga property. No claim was made by Cavanaugh and Potter, or by any one, that the $7,500 to be paid in cash was a trust fund, or that said Potter was acting as trustee of said fund. Mr. Potter had with him at that time both the syndicate agreement and his contract with Taylor, of June 23, 1909; but he did not disclose that fact to Mr. Chillingworth, nor did he state or make known to him in any manner the terms or conditions thereof. No disclosure was made to Mr. Chillingworth how the money was raised, nor who the parties were who furnished the money, nor the terms or conditions under which said money had been raised, nor that Mr. Potter and the interests represented by him were separate and distinct from those of the American Quarries Company. A discussion as to the form of receipt to be given for the sum of $7,500 followed. Mr. Chillingworth dictated a draft of a receipt to a stenographer who was present, and after some discussion it was changed, and was finally signed by Mr. Chillingworth upon his stating that the conditions thereof as to the amount of bonds to be retained was subject in all respects to the approval of said referee and

the committee of creditors, and that, unless so sanctioned, the Holliday agreement of May 4, 1909, would remain in full force and effect.

As a vital point of this controversy centers very largely about this receipt, which was satisfactory to all parties, it is set out in full as follows:

"Boston, Mass., June 30, 1909.

"To the President and Officers of the American Quarries Company—Gentlemen: I hereby acknowledge receipt of certified checks for seventy-five hundred dollars ($7,500), payable to my order as trustee in bankruptcy of the International Mineral Company, which checks I will hold in escrow until I have delivered to the American Quarries Company proper deeds and conveyances of the property of said International Mineral Company, which are to be amended to conform to the present conditions. It being understood that the said property shall be conveyed to the American Quarries Company under the same terms as set forth in the option contract of May 4, 1909, with Felix Chillingworth, trustee, except that said option shall be so amended as to permit the party of the second part to retain two hundred and fifty thousand dollars ($250,000) par value of the first mortgage bonds of said company, but which two hundred and fifty thousand dollars ($250,000) of bonds are not to be sold prior to July 1, 1911.

"Yours very truly, Felix Chillingworth,
"Trustee of the International Mineral Company."

No objection was made by Mr. Taylor, or any officer or representative of the American Quarries Company, or by Mr. Potter, or indeed by any one, as to the form or substance of this receipt. Immediately thereafter Mr. Potter delivered to Mr. Chillingworth his individual certified check for $5,140. Mr. Cavanaugh's certified check for $2,000, and an uncertified check of Guy C. Holliday for $360. Mr. Chillingworth then handed these checks to Mr. Hutchinson, who took them, and Mr. Hutchinson, with these checks in his possession, then left the conference and immediately returned to New Haven and delivered them to the New Haven Trust Company.

After the checks had been delivered, Mr. Chillingworth asked Mr. Potter if he should notify him when the deal went through, and Mr. Potter replied: "No; Mr. Chandler will notify me." There was no agreement or contract entered into between Mr. Chillingworth and either Mr. Potter or Mr. Cavanaugh, or any one else, at this afternoon conference, and there was no agreement or contract between Mr. Chillingworth and either Mr. Potter or Mr. Cavanaugh at any other time, and Mr. Chillingworth at this time intended to deal with, and supposed he was dealing solely with, the officers of the American Quarries Company and with Mr. Taylor as its representative. Mr. Chillingworth immediately returned to New Haven, and on his return deposited the checks referred to in his account as trustee in the Merchants' National Bank of New Haven, where the checks were paid in due course and remain on deposit to the credit of the trustee.

On the day of Mr. Chillingworth's return to New Haven, or the day thereafter, he received a telegram from Mr. Taylor, confirmed by a letter, informing him that $250,000 worth of bonds must be retained, and which also contained the first information received by Mr. Chillingworth of any agreement or arrangement between Mr. Taylor and the petitioners with reference thereto. About a week later, some time about July 10, 1909, Mr. Chillingworth again visited Boston, where he

had a conference at the office of Mr. Chandler and Mr. Taylor, and a draft of an option was prepared by Mr. Chandler conceding to Mr. Taylor the retention of $250,000 worth of bonds. On July 14, 1909, Mr. Chillingworth signed with Mr. Taylor, at Waterbury, Vt., another and amended draft of said option, which was prepared by Mr. Chandler, or under his direction, but which bore date of July 10, 1909, in which there was a provision for the retention of $250,000 worth of bonds by said Taylor.

None of these last-mentioned papers of June 30, 1909, or subsequent thereto, were ever approved by the referee or the creditors' committee of the bankrupt. Mr. Holliday had prior to June 30, 1909, executed a release to Mr. Taylor of whatever interest he had in the option of May 4, 1909, and had also in writing authorized and requested Mr. Chillingworth to place to the credit of Taylor, or his assigns, the $500 given by Mr. Holliday to Mr. Chillingworth on May 1, 1909, to secure the option.

Mr. Chillingworth then proceeded to attempt to secure the consent of the referee and creditors' committee to the retention of $250,000 worth of the bonds which each refused. Mr. Chillingworth immediately notified Mr. Taylor and Mr. Chandler that the referee and creditors' committee had refused their consent; Mr. Chandler taking upon himself to notify Mr. Potter of the refusal of the referee and creditors' committee. On August 12, 1909, after the referee had finally and definitely refused to approve the change, Mr. Chillingworth immediately notified Mr. Chandler that the referee and creditors' committee had refused their consent. No objection or protest ever came to Mr. Chillingworth from either the American Quarries Company or Cavanaugh and Potter against the refusal of the referee to approve the proposed change in the contract, and as a consequence of the refusal of the referee and creditors' committee to consent to the retention by Taylor of $250,000 worth of bonds a final draft of an option was prepared, conceding to Taylor the retention of only $15,000 worth of bonds, and was executed by them on August 17, 1909, and on August 26, 1909, was approved by the referee and creditors' committee. Mr. Taylor had full authority to enter into said option, and it was confirmed and ratified, including all the terms and conditions thereof, by the American Quarries Company and its officers, and Mr. Chillingworth believed and was warranted in believing that Taylor had such authority, and that the American Quarries Company and its officers had approved and ratified, or would approve and ratify, all the provisions thereof.

About two weeks later, Mr. Chillingworth and Mr. Taylor entered into a written agreement extending the time on which the option of August 17 should expire from September 1 to September 11, 1909. This agreement contained the further provision that no title to the Ticonderoga real estate should be conveyed by Mr. Chillingworth. The evidence furthermore justifies the finding that Mr. Taylor and Mr. Chandler well knew of the defect in the title to the Ticonderoga property for some time prior to June 30, 1909, and that Mr. Chillingworth, as trustee, would be unable to convey a clear title thereto, and

as early as September, 1909, both Cavanaugh and Taylor had actual knowledge of such defect.

Early in September, 1909, with the full approval of the American Quarries Company and its officers, Mr. Chillingworth executed, with the approval of the referee, a valid deed of conveyance and bill of sale to the American Quarries Company of all of his title as trustee of the Moretown property in Vermont, including the personal property at Ticonderoga. This conveyance and bill of sale were then delivered to the New Haven Trust Company, pursuant to the terms and conditions of the option contract of June 23, 1909. After this conveyance and bill of sale had been delivered to the American Quarries Company, the latter, by an indenture executed and bearing date of September 8, 1909, conveyed to the Dorchester Trust Company all the real and personal property at Moretown, Vt., excepting and excluding therefrom 5,000 tons of crude mined talc on the dump, or in piles at Moretown, and excepting, further, the product to be mined or quarried at the plant, which indenture was for the security of an issue of bonds of the American Quarries Company to the amount of $1,000,000.

Mr. Chillingworth, before making the conveyance to the American Quarries Company, paid off certain liens and attachments upon the Vermont property, and the American Quarries Company, upon the delivery to it of said conveyance and bill of sale, entered into possession thereof and have ever since remained in possession thereof. It also appears that on July 10, 1909, following the conference in Boston, the American Quarries Company agreed with Cavanaugh and Potter to pay the latter $15,000 on or before August 1, 1910, and also agreed with Cavanaugh and Potter for the shipment and sale of the talc under certain conditions, which included a bill of sale from the American Quarries Company to Cavanaugh and Potter for 5,000 tons of talc at Moretown, and the employment of a man acceptable to Cavanaugh and Potter for conducting the business in Moretown, which bill of sale and conveyance to Cavanaugh and Potter were subsequently executed on September 20, 1909, and which invested them with full power and authority to sell the same and to appropriate the proceeds thereof on account of the sum of $15,000 which Mr. Taylor and the American Quarries Company had agreed should be paid to them. Cavanaugh and Potter had full knowledge of the option contract between Mr. Chillingworth as trustee, and Mr. Taylor, of August 17, 1909, and its subsequent extension and modification on August 31, 1909.

The first demand made by Cavanaugh and Potter, and the first action taken by them, was on June 21, 1912, when they instituted their petition demanding the return to them of $7,500, although there had been two conferences between Potter and Mr. Chillingworth and the latter's attorney, one in January, and another in April, 1910, at neither of which, nor, indeed, at any other time prior to the filing of their petition, did either Cavanaugh or Potter ever demand or request the return to them of the sum of $7,500, or make known to Mr. Chillingworth that they had furnished the same for Mr. Taylor. In fact, Mr. Chillingworth was ignorant of any of the terms or conditions set forth in the petition of Cavanaugh and Potter until it was filed, and at no

time up to the filing of this petition did either Cavanaugh or Potter ever charge Mr. Chillingworth with having violated any condition under which said sum of $7,500 was paid to him, although there was an attempt made by Mr. Potter at a conference between him and Mr. Chillingworth at Worcester early in 1910, to negotiate for the purchase of all of his interest in the assets of the International Mineral Company, excepting and especially excluding said sum of $25,000. The Vermont property is now subject to several attachments in suits against the American Quarries Company by its creditors, and which suits are now pending.

These facts justify the conclusion arrived at by the referee in denying the petitioners' right to a recovery of the $7,500. There are several reasons for this:

[1] I. Mr. Chillingworth took these checks burdened with no trust. He was entirely ignorant of the alleged trust relation until June, 1912, when Cavanaugh and Potter commenced their proceedings against him. Moreover, these checks, with the exception of the one for $360, were certified, the effect of which was to make them—i. e., the certified checks—the equivalent of so much cash in bank, payable whenever demanded to the holder, discharging the drawer, and making the certifying bank the principal and only debtor. Metropolitan National Bank v. Jones, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492, 31 Am. St. Rep. 403; First National Bank v. Currie, 147 Mich. 72, 110 N. W. 499, 9 L. R. A. (N. S.) 698, 118 Am. St. Rep. 537, 11 Ann. Cas. 241; Merchants' Bank v. State Bank, 10 Wall. 604, 648, 19 L. Ed. 1008; St. Regis Paper Co. v. Tonawanda Board & Paper Co., 107 App. Div. 90, 94 N. Y. Supp. 946, affirmed on appeal 186 N. Y. 563, 79 N. E. 1115; First National Bank v. Leach, 52 N. Y. 350, 11 Am. Rep. 708; White v. Eiseman, 134 N. Y. 101, 108, 31 N. E. 276.

The fact that the receipt provided that the checks were to be held in escrow must be regarded as meaningless, for this condition ex vi termini implied delivery to some third person, and not to the grantee, obligee, or payee directly. Raymond v. Smith, 5 Conn. 555, 559. A delivery directly to the grantee, or to the agent or attorney of the grantee, cannot be treated as escrow. Stevenson v. Crapnell, 114 Ill. 19, 28 N. E. 379; Hubbard v. Greeley, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511; Day v. Lacasse, 85 Me. 242, 27 Atl. 124.

There is no claim of any agreement that the checks should be returned if the terms of the agreement of June 30, 1909, were not carried out; the only result of the failure to secure the approval of the agreement being obviously that the Holliday option of May, 1909, which had been sanctioned by the referee, should stand. Surely, if the payment by Cavanaugh and Potter had been in cash, they could not be heard to ask for its recovery, excepting as they might be entitled to a rescission of the contract. As was said by Wallace, J., in Darling v. Butler (C. C.) 45 Fed. 332, 335, 10 L. R. A. 469:

"When there is a valid delivery of a deed by the grantor to the grantee, it is impossible to annex a condition to such delivery; and the delivery vests the title in the grantee, although it may be contrary to the intention of the parties. 'When the words are contrary to the act, which is the delivery, the words are of none effect.'"

Either the delivery takes effect as absolute, or it is void, and parol evidence of conditional delivery is inadmissible; such evidence being admissible only for the purpose of proving nondelivery. Braman v. Bingham, 26 N. Y. 483. And this rule is extended to and includes any kind of contract. Pickett v. Green, 120 Ind. 584, 588, 22 N. E. 737; Ordinary of New Jersey v. Thatcher, 41 N. J. Law, 403, 32 Am. Rep. 225; State v. Peck, 53 Me. 284. It also includes bills and checks. Massmann v. Holscher, 49 Mo. 87; Jones v. Shaw, 67 Mo. 667; Henshaw v. Dutton, 59 Mo. 139; Badcock v. Steadman, 1 Root (Conn.) 87; Scott v. State Bank, 9 Ark. 36.

[2] II. There was no fraud, either actual or constructive, upon the part of Mr. Chillingworth in transferring these checks to his account as trustee of the bankrupt estate, and in this Mr. Chillingworth did no more than he had a right to do, and indeed was bound to do. Had he not done so, and any loss had developed thereby, creditors of the estate might well have charged him with a breach of his duty. The General Statutes of Connecticut, Revision of 1902, which is declaratory of the common law, provides that:

"A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." Section 4356.

In fact, the delivery of these checks, especially the ones that were certified, was equivalent to the payment to Mr. Chillingworth of so much cash which he had a right to bank and treat as cash (authorities supra), either under the agreement of June 30, 1909, when ratified, or under the agreement of the preceding May, which manifestly remained in force until the later tentative agreement of June was properly ratified.

[3] III. The vital point of the controversy is that Cavanaugh and Potter have never offered to release their title to the talc and their claims under the numerous agreements entered into between them and the American Quarries Company and Taylor, or to restore to the bankrupt estate the property in the same condition in which it was prior to June 30, 1909. Such an offer was tendered orally by petitioners' counsel at argument, but it was not accompanied by any documents, and, even if it had been, it is apparently impossible for them to do so now, particularly as the Vermont property is subject to various attachments in suits brought by the creditors of the American Quarries Company, which the petitioners do not and manifestly cannot offer to discharge, to say nothing of the trust mortgage to the Dorchester Trust Company. As counsel for the trustee comprehensively say, it is impossible to do equity by rescinding the transaction and making a mutual exchange and return of the consideration received by each party, respectively. A contract cannot be rescinded by one party, unless both parties can be placed in the same situation and stand upon the same terms as existed when the contract was made. Neblett v. MacFarland, 92 U. S. 101, 103, 23 L. Ed. 471. Especially must this be so in the case of a bankrupt estate, where the rights of the creditors are involved.

Moreover, the real party to the actual contract which was made with Mr. Chillingworth was Taylor, and not Cavanaugh and Potter. The

latter merely loaned money to Taylor, who turned it over to Mr. Chillingworth. Cavanaugh and Potter had full knowledge of and were acquainted with all the terms of the transactions and agreements subsequent to June 30, 1909, and as a matter of fact they relied exclusively upon Taylor—for Taylor, Chandler, and the American Quarries Company were all the same person, and that person was Taylor—and it was not until after their failure to receive the bonds which they had contracted for that they made any complaint to Mr. Chillingworth. This delay involved a period of practically three years, during which time Cavanaugh and Potter remained silent, without asserting or attempting to assert their claims, listening to the promises of Chandler and Taylor, and leaving the $7,500 with Mr. Chillingworth, to whom it had been paid by them, in the constant hope that affairs would so develop that eventually they would get out all right. The law is well settled that the party seeking to rescind must announce his purpose to do so promptly, unconditionally, and unevasively upon the discovery of the fraud. Grymes v. Sanders, 93 U. S. 55, 62, 23 L. Ed. 798; Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419.

It is immaterial whether this be called laches or equitable estoppel. Laches consists in inexcusable delay in asserting a right. Byrne v. Schuyler Electric Manufacturing Co., 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304. It involves negligence, and arises from a failure in duty, without which there can be no laches. It is inexcusable negligence and inattention to one's interests. Smith v. Duncan, 16 N. J. Eq. 240; Allis v. Hall, 76 Conn. 322, 334, 56 Atl. 637. Equitable estoppel involves conduct inducing another to believe and act to his prejudice. Allis v. Hall, supra, 76 Conn. 334, 56 Atl. 637. And whatever may be the proper nomenclature the result in this case is the same, for it manifestly falls within the well-settled principle that, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, it will not assert its equitable powers in order to save one from the consequences of his own neglect. This rule is enforced independently of any statute of limitations for the reason, stated by Lord Camden, that:

"That nothing can call forth this [Chancery] Court into activity but conscience, good faith, and reasonable diligence; where these are wanting the court is passive and does nothing." Smith v. Clay, 3 Bro. Ch. 640, note.

This doctrine has been repeatedly recognized and acted upon. In Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718, it was held that a bill in equity against persons holding a fund in trust for the benefit of a voluntary association living together as a community and subject to its regulations could not, whether the trust was lawful or unlawful, be maintained by one who had left the community and had for a considerable period taken no steps to claim an interest in the fund. In Galliher v. Cadwell, 145 U. S. 368, 372, 12 Sup. Ct. 873, 874 (36 L. Ed. 738) the Supreme Court, speaking of this defense, said:

"The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principal pervades

them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

The same ruling was made in Penn. Mutual Life Insurance Co. v. Austin, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626, where, in an exhaustive opinion delivered by Mr. Justice White, the authorities were reviewed at great length. So, too, in Ward v. Sherman, 192 U. S. 168, 24 Sup. Ct. 227, 48 L. Ed. 391, an action in equity to obtain the rescission of a contract, where it was held (page 175), citing Pollock's Principles of Contracts, page 515, that a contract must be rescinded within a reasonable time; that is, before the lapse of a time after the true state of things is known so long that, under the circumstances of the particular case, the other party may fairly infer that the right of rescission is waived. In the opinion of the court, delivered by Mr. Justice Brewer, the court restated its position in Penn. Mutual Life Insurance Co. v. Austin, supra, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626, that where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, it will not assert its equitable powers in order to save one from the consequence of his own neglect.

Other cases directly in point are Harwood v. Railroad Co., 17 Wall. 78, 21 L. Ed. 558; Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Brown v. County of Buena Vista, 95 U. S. 157, 24 L. Ed. 422; Hayward v. National Bank, 96 U. S. 611, 24 L. Ed. 855; Holgate v. Eaton, 116 U. S. 33, 6 Sup. Ct. 224, 29 L. Ed. 538; Davison v. Davis, 125 U. S. 90, 8 Sup. Ct. 825, 31 L. Ed. 635; Société Fonciere v. Milliken, 135 U. S. 304, 10 Sup. Ct. 823, 34 L. Ed. 208. Indeed, the principle upon which a court of equity declines to assert its powers to relieve one who has been guilty of neglect or delay has been applied to such an extent as to render the doctrine elementary. Penn. Mutual Life Insurance Co. v. Austin, supra, 168 U. S. 697, 18 Sup. Ct. 223, 42 L. Ed. 626.

[4] IV. The petitioners' contention that this defense must be pleaded by an answer or raised by a demurrer is not well taken. In Willard v. Wood, 164 U. S. 502, 524, 17 Sup. Ct. 176, 181 (41 L. Ed. 531), the Supreme Court said:

"But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded or the bill demurred to. Sullivan v. Portland & Kennebec Railroad, 94 U. S. 806, 811 [24 L. Ed. 324]; Lansdale v. Smith, 106 U. S. 391, 394 [1 Sup. Ct. 350, 27 L. Ed. 219]; Badger v. Badger, 2 Wall. 87, 95 [17 L. Ed. 836]."

The same rule applies where the defense is an estoppel in pais. Such a defense need not be pleaded. Plumb v. Curtis, 66 Conn. 154, 33 Atl. 998; Hawley v. Middlebrook, 28 Conn. 527, 536. Bigelow on

Estoppel (6th Ed.) 763, states this to be the rule and supports it with numerous citations.

The order of the referee should be affirmed. Let an order to that effect be entered.

UNITED STATES v. ELTON et al.

(District Court, S. D. New York. April 29, 1915.)

1. CRIMINAL LAW ⟸322—PRESUMPTIONS—INTERSTATE COMMERCE COMMISSION.

In a prosecution for attempting to create a monopoly of transportation facilities in violation of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209), where defendant pleaded immunity under Act Feb. 11, 1893, c. 83, 27 Stat. 443 (Comp. St. 1913, § 8577), on account of having given testimony before the Interstate Commerce Commission during an investigation of the affairs of certain railroad corporations, it would be presumed that the Commission had power to carry on the hearing as one relating to the regulation of commerce between the states, and that it was therefore acting within its power in examining defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 728; Dec. Dig. ⟸322.]

2. CRIMINAL LAW ⟸42—IMMUNITY TO WITNESS.

Under Act Feb. 11, 1893, conferring immunity as to matters testified to before the Interstate Commerce Commission, such immunity is only conferred where the witness would have been privileged under Const. U. S. Amend. 5, and where such evidence is given under compulsion; but where the evidence is given without assertion of the constitutional privilege, or is declined to be given on any ground other than because of its incriminating tendency, immunity is not conferred, the statute having been passed with regard to the prior construction of the fifth amendment, under which an assertion of privilege is necessary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45–48; Dec. Dig. ⟸42.]

3. CRIMINAL LAW ⟸42—IMMUNITY TO WITNESS.

Act Feb. 11, 1893, provides that no person shall be excused from testifying before the Interstate Commerce Commission on the ground that his testimony may incriminate him and that he shall not be prosecuted on account of such testimony. Defendant was subpœnaed, and testified under oath before the Interstate Commerce Commission as to an attempt to create a monopoly of transportation facilities in violation of the Sherman Act, after being led to believe that immunity would be given, and under threats that the Commission would proceed criminally against any person testifying under a subpœna who refused to give his evidence. The Commission had expressly refused immunity to others not sworn, and defendant had not conferred with counsel as to a possible waiver of immunity before testifying. He was subsequently indicted upon grounds as to which he had testified before the Commission. *Held*, that defendant was within the protection of the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45–48; Dec. Dig. ⟸42.]

James S. Elton was indicted for conspiring with others to create a monopoly of transportation facilities. On demurrer to special plea in bar. Demurrer overruled.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

H. Snowden Marshall, U. S. Atty., of New York City, R. L. Batts and Frank M. Swacker, Sp. Asst. Attys. Gen. (Robert P. Stephenson and James W. Osborne, Asst. U. S. Attys., both of New York City, of counsel).

Sullivan & Cromwell, of New York City (Royall Victor and Edward H. Green, both of New York City, of counsel), for defendant Elton.

HUNT, Circuit Judge. The plea alleges these facts:

The Interstate Commerce Commission, on May 6, 1912, on a complaint made, duly inquired into the prices and rate matters and other affairs of the New Haven Railroad Company and other New England corporations. The carriers were represented by counsel. Thereafter, about June 20, 1913, the Commission filed its report. New England Investigation, 27 Interst. Com. Com'n R. 560.

The findings of the Commission, filed June 20, 1913, among other things, were to the effect that the then present management of the New Haven Company started out with the purpose of controlling the transportation facilities of New England, and that, in addition to the matter of high rates, the Commission had considered the purchase by the New Haven of a preponderating influence of stock in the Boston & Maine Railroad. The Commission advised no advance in rates until the management of the New Haven and Boston & Maine was more prudent.

The Commission stated that originally they intended to subpœna Mr. Mellen, but that, the whole subject being under investigation by the Department of Justice, examination of Mr. Mellen, who was then president of the New Haven Company, would have given him immunity, wherefore the Commission decided not to call Mr. Mellen as a witness, but to give him an opportunity to make any explanation he desired not under oath. 27 Interst. Com. Com'n R. 587.

During the investigation and taking of testimony, the then chairman of the Interstate Commerce Commission, about April 21, 1913, stated that it had been his intention to ask the officials of the New Haven Company to appear and testify in relation to figures which the Commission had obtained. The statement of the chairman of the Commission was to the further effect that the witnesses were not produced and the Commission was asked to subpœna them, but thereafter it occurred to the chairman that, if the witnesses were brought before him under subpœna, it might interfere with some proceedings which the Department of Justice might have on hand; that it was intimated to the Commission that the Department of Justice then had the whole New England railroad situation under consideration, with a view of possibly asking indictment of the officials of the New Haven for having conspired to monopolize the transportation facilities of New England; that no such attempt to indict might be made, but that it was evident that examination concerning the matters under consideration would give the particular persons referred to immunity from prosecution; and that, inasmuch as the Commission did not wish to interfere with the Department of Justice administering the Sherman Act, the chairman believed the Commission could not properly subpœna or swear the witnesses, nor, indeed, allow them to testify under oath if they came voluntarily.

Further allegations of the plea are that about August 24, 1912, the Panama Canal Act (Act Aug. 24, 1912, c. 390, 37 Stat. 560), giving to the Commission jurisdiction for the determination of facts as to competition between carriers, was passed, and that about March 1, 1913, the amendatory act pertaining to the valuation of railroad property and securing information concerning railroad stocks, bonds, and other securities, was enacted. It is recited that the latter act gave authority to examine witnesses and to investigate and report on the history and organization of any railroad corporation, and conferred power to inquire into its financial arrangements, reorganization schemes, and matters of like character; that on February 9, 1914, the Commission, after reciting a resolution of the Senate of the United States authorizing reopening the examination of the affairs of the New Haven Company and the making of further investigation of its financial transactions, ordered such reopening and further examination as might be proper; that thereafter the Commission proceeded to investigate and to hear testimony pertaining to the New Haven road and other carriers, and during the course of such investigation heard witnesses and took testimony; that while the investigation was going on the first two witnesses called were H. P. Whipple and Samuel Hemingway. These two declined to testify or to answer most of the questions asked of them by counsel for the Commission. It appears then that the Commission notified the witnesses that their refusal to answer would be laid before the grand jury and indictments would be sought against them on account of such refusals, unless they promptly withdrew their refusals and agreed to testify. The plea of Elton sets forth that the refusal of the witness Hemingway to answer was laid before the grand jury of the District of Columbia at the instance of the Interstate Commerce Commission, and counsel for Hemingway was advised by counsel for the Interstate Commerce Commission of this fact, and thereupon Hemingway agreed to testify and the Commission proceeded; that about May 1, 1914, when Hemingway was testifying, the following occurred between Mr. Cummings, counsel for the witnesses, and Mr. Folk, counsel for the Interstate Commerce Commission:

"Mr. Cummings: I am perfectly willing, in view of transactions that have taken place, threats that have been made, and various collateral suggestions, to have the witness go on the stand and tell all that he knows, frankly, fully, and completely, concerning the relations of the Billard Company with the New Haven Company, or any of its subsidiaries—

"Mr. Folk: Let me state right here: Mr. Cummings has had something to say regarding threats. I think it would be well for the record, in view of his statement, to show that this witness, at a former hearing, refused to testify—declined to answer questions on the advice of counsel; that his refusal was taken up before the federal grand jury under the act known as the Compulsory Testimony Act, with the result that the witness was given the option of testifying or standing trial by reason of the proceedings mentioned."

Page 341 of Senate Document 543 of the 63d Congress, Second Session.

It is set forth that Mr. Folk, as counsel for the Commission, on the same day, but at a later time, stated publicly as follows:

"Mr. Folk: I merely wish to state this for the benefit of the record: Mr. Cummings says he advised the witness that the contemplated criminal pro-

ceedings could not be serious and could not be maintained. These proceedings were undertaken in good faith, and if the witness had not appeared to testify in good faith he would have been placed upon trial, and I disagree with Mr. Cummings as to the result of that trial. I believe, under the statute, he would have been convicted, and the Commission, in every instance hereafter, where the witness refuses to testify, without good reason, will proceed under the criminal section of the law mentioned."

Page 433 of Senate Document 543.

Elton sets forth that by letter dated May 26, 1914, defendant Ledyard was notified that the Commission withdrew the subpœna which had been issued for him and canceled the same and relieved him of all compulsion to appear before the Commission as a witness, but advised him that, if he desired to appear voluntarily, "waiving all immunity by the testimony," he might so advise the Commission, and the question of his being a witness would then be determined. It appears then that about June 4, 1914, the defendant Ledyard appeared, but was not allowed to be sworn as a witness, and was notified that whatever he might say would be used against him, but he expressed his readiness to testify and did testify. Defendant Cuyler made a statement, not under oath; counsel for the Interstate Commerce Commission expressly having it put on the record that Mr. Cuyler was called in behalf of the New Haven Company, and not on behalf of the Commission, and was not sworn.

Elton then says that he testified in obedience to a subpœna, after having been duly sworn as a witness, and without any exaction by the Commission, or any giving to him of any express waiver of immunity or express declaration of voluntariness of his testimony. He says that during the investigation the representatives of certain other defendants named in the indictment who were not subpœnaed and sworn were not permitted to testify, the Commission having publicly stated that they were not sworn, because the Commission did not desire to give to such other defendants immunity from criminal prosecution, or to interfere with the plans or desires of the Department of Justice to any further extent than the Commission should feel necessary in the performance of its duties.

It is then alleged that the Commission made its report about July 11, 1914, and that in this report the Commission used the following language:

"The purpose of the immunity statute, as the Commission understands it, was to aid in the search for facts by removing the obstacle of witnesses refusing to testify on the ground of self-incrimination, and under the statute the Commission has always endeavored to exercise a sound discretion in this regard. In carrying out the instructions of the Senate in this case the Commission has therefore kept in mind the warning of the Department of Justice to carefully consider before placing a witness upon the stand the effect his testimony might have in the way of immunizing him from criminal prosecution. The Commission has only used such witnesses as seemed necessary to fully answer the Senate's inquiry, and has refrained from calling those witnesses whose evidence, while interesting, might be merely cumulative."

Defendant says that it was believed throughout the investigation that if he testified in obedience to the subpœna, he should and would receive immunity from prosecution on account of the transactions, matters, or things concerning which he would testify to, and he says

that the Commission caused him to believe this way, and that he did believe that he would be protected against any such prosecution and would receive immunity from and against the same; that he testified unwillingly, and in the light and knowledge of the experiences of Hemingway and others, and with a knowledge of the Compulsory Testimony Act of February 11, 1893, and with a knowledge of the threats of the counsel of the Commission of criminal prosecution, if he failed or refused to testify, and with an understanding of the fact that the Commission had exacted from defendants Ledyard and Cuyler express waivers of immunity and express declarations of voluntariness of their testimony.

His plea also sets forth that about April 9, 1914, before testimony was heard upon the reopened investigation, the Attorney General of the United States wrote to the Interstate Commerce Commission and cautioned them of the effect of an examination of persons connected with the New Haven road where subpœnas were issued, and that thereafter, about May 12, 1914, the Attorney General again communicated with the Commission, cautioning them to consider the effect of the examination of certain witnesses upon any criminal prosecution which the government might desire to institute against certain persons for matters connected with the affairs of the New Haven Company. It appears that the letters which passed between the Attorney General and the Commission and the history of the "threat" of counsel for the Commission to Hemingway were reported in the public press and read by the defendant, and that the letters of the Attorney General warned the Commission and advised them that witnesses testifying under oath and in obedience to the subpœna of the Commission, including this defendant, might claim that they thereby became immune from and against prosecution.

Elton says that a number of days before defendant testified before the Commission he had a long personal conference with the counsel for the Commission, and told him of the nature of the testimony which he would give, and that he made the statements to the counsel at the request of counsel for the Commission, and at conferences arranged for and solicited by counsel for the Commission.

Defendant says he went from his home in response to subpœna about May 13, 1914, had conferences with counsel for the Commission, and testified before the Commission under oath concerning the substantial transactions and things alleged in the indictment, charged to constitute a combination to monopolize part of the commerce among the several states of the United States, and that when he testified before the Commission he was fully advised of the declarations made by counsel for the Commission already referred to, to the effect that criminal prosecution would be instituted by the Commission against any person under subpœna from the Commission in the proceeding who should refuse or decline to give testimony.

It is also pleaded that J. W. H. Crim, an attorney at law, acted as counsel for C. S. Mellen, formerly president of the New Haven Company; that Crim was under advice from Mellen to advise all officers and directors of the New Haven Company on matters concerning the

investigation of the affairs of their company, and that defendant relied to a great extent upon Crim protecting the personal rights he (defendant) might have in, or derive from, the investigation; that during the weeks prior to the defendant's testimony Crim held conferences with counsel for the Commission to discuss whether a natural person who should testify before the Commission under oath, in obedience to a subpœna, would receive immunity from criminal prosecution under the acts of Congress on account of the matters and things concerning which such persons should testify, and that Crim and counsel for the Commission conferred and discussed the question of immunity, and that counsel for the Commission often stated to Crim in substance that any person so testifying would secure immunity from criminal prosecution, and that any witnesses who refused to so testify would be indicted by the grand jury for the District of Columbia, and that counsel for the Commission stated to Crim in substance that all persons who might testify under oath and in response to subpœnas would secure immunity from prosecution; that certain persons would be examined, but not under oath, for the reason that the Commission did not desire to grant immunity to such persons, and that the Commission, therefore, called defendant as its witness without requesting him to waive immunity or warning him that anything to which he might testify would be used against him in any other proceeding; that Crim was present when defendant was sworn and testified, and counsel for the Commission was present, and they had in mind the conferences which had been had, and defendant says the Commission believed then that any natural person testifying under oath would thereby secure immunity, and that said Crim believed that it was intended by counsel for the Commission that immunity should be given.

The plea then concludes with the statement that, in view of the facts set forth, none of the testimony given by defendant upon the investigation referred to was given voluntarily, but was given entirely and wholly under compulsion, and under the threats of the Interstate Commerce Commission of criminal prosecution in the event of his refusal to give such testimony, and that his testimony was in pursuance of an understanding by the Commission and defendant that his testimony would be and was given only under compulsion, and that defendant would be immune from any prosecution for the testimony he gave. Defendant says that he testified fully concerning the things for and on account of which he is now under indictment and being prosecuted. He quotes part of the testimony which he gave, and which shows that at a meeting of the board of directors of the New Haven Company the question of violation of the Sherman Law in consolidation of concerns was considered and discussed. He says that he testified concerning the ownership and operation and participation in matters involved in the offenses charged in the indictment; that when he testified counsel for the Commission knew substantially all of the testimony which he could give; that he is a business man 76 years old, and that he never conferred with counsel or received any advice of counsel during his testimony with respect to any of the matters set forth in the plea.

The government has filed a demurrer, and so raises the broad question of the sufficiency of the plea. It appears that, upon a former indictment against this defendant for the same offense herein charged, defendant set up, as he does here, in bar of the prosecution, immunity which he claimed to have received because of evidence given by him before the Interstate Commerce Commission relating to the transactions which formed the basis of the indictment to which defendant then pleaded. That indictment, however, has been abandoned, and the government is proceeding under a new indictment charging the same offense. Many more facts are set forth in the present plea, but the legal questions which were presented to Judge Grubb are, in the main, the same as those now before the court. The government then, as now, demurred upon these grounds:

(1) That the plea fails to show that the testimony was given pursuant to the requirement by the Interstate Commerce Commission in a proceeding in which the Commission had the power to compel the attendance and testimony of witnesses and the production of documents and for that reason was not given under legal compulsion within the meaning of the immunity statute; and (2) that the witness did not assert his constitutional privilege of declining to answer when sworn before the Interstate Commerce Commission, upon the ground that his answer would tend to incriminate him, and that his answers were not compulsory in the absence of such an assertion of his privilege, and did not earn him the immunity conferred by the statute. The learned judge gave no decision upon the first ground, but did upon the second.

[1] Argument made on behalf of the government is that the inquiry by the Interstate Commerce Commission at which this defendant testified, and which was carried on under an order made pursuant to the Senate resolution heretofore referred to, was beyond the limit of the judicial functions of the Interstate Commerce Commission, and that, notwithstanding the appearance of this defendant under a subpœna before the Commission and the direct inquiry of him into the matters about which he did testify, as set forth in his plea, the proceeding wherein he testified was not one to which the immunity statute applies. The position thus assumed by counsel for the government presents a far-reaching question. The suggestion of it seems irreconcilable with the attitude taken by counsel for the Interstate Commerce Commission, a most important administrative body of the government, when, in May and June, 1914, acting in good faith, the Commission subpœnaed this defendant and had him testify before it concerning attempts to monopolize part of the commerce of the United States, and when counsel for the Commission made the declarations which he did in relation to the position of the Commission toward witnesses there attending or to attend with respect to the affairs of the New Haven Railroad. The Commission, however, is not before the court by its counsel to support the position which it assumed when the proceedings involved were had, and until I have had an opportunity to hear counsel for the Commission I shall harmonize my views with the presumption that the Commission had the power to carry on the hearing as one related to the regulation of commerce between the states, over which

the Commission had general jurisdiction, and I shall hold that the Commission kept within its power in examining this defendant, and that in its investigation it did not go outside of the limits of its authority.

[2] Upon the second ground Judge Grubb decided positively that, by the act of Congress conferring immunity in certain cases (Act Feb. 11, 1893), testimony which had been unavailable under the privilege of silence was made available. The learned judge reasoned that testimony was unavailable under the amendment where the witness showed to the tribunal calling for the testimony that giving it might reasonably tend to incriminate him, and that, inasmuch as such testimony could not be compelled because of the constitutional amendment, Congress was impelled to act, and that the act of Congress referred to could only have been intended to cover testimony which the government was unable to obtain because of a witness declining to answer based upon the incriminating tendency of the testimony and under the protection of the fifth amendment. He ruled that no purpose existed in the mind of Congress to bestow immunity in cases where doing so was not necessary to obtain testimony which could otherwise be refused, and his conclusion was that the Immunity Act was intended only to make available testimony compulsorily given and only to reward the unwilling giver of such evidence, but that evidence given without the assertion of the constitutional privilege, or declined to be given upon any ground other than because of its incriminating tendency, is not compulsory testimony under the fifth amendment and has always been available. Therefore, he reasoned, necessity for conferring immunity on the giver of such testimony not having existed, Congress should not be regarded as having given such immunity, if the language of the statute may be reasonably otherwise construed.

With ability counsel for Elton and other defendants have earnestly urged that it is fundamentally erroneous to say that the fifth amendment to the Constitution applies only to witnesses who may be characterized as unwilling or involuntary ones. They argue that the fifth amendment applies to everybody, and confers the option or privilege of refusing to answer any incriminating question in any court or investigation, and that it is the duty of every court and investigating body to uphold the witness in his assertion of such option or privilege, which is purely personal to the witness. Counsel say that under the immunity statute the promise held out to the witness is one of the things which the witness considers before he answers the question put, and that he waives nothing and makes no election, as he does when he exercises his option or privilege under the fifth amendment. They would distinguish between the fifth amendment, which they say operates the moment that the witness testified, by saying to him that he can refuse to answer if he so desires, and the immunity statute, which refers to the time when the witness is prosecuted for the transaction or thing concerning which he has already testified. No violation, so it is argued, of the immunity statute is made by the government in exacting the answers of the witness, and not until criminal action is brought against the witness for or on account of the transaction concerning which he has testified does the government invade his rights.

The argument along these lines leads them to say that an assertion of the constitutional privilege is an unnecessary condition to the enjoyment of immunity under the immunity statutes referred to, and that, under the statutes in question, an assertion of privilege would be useless. There is a practical view in the question: What does it avail one who asserts the privilege if the statute says he shall answer the question or accept the alternative of being indicted for crime under the provisions of the statute which grants him the immunity he seeks? And, inasmuch as the statute says that he shall be compelled to answer the question, why should he claim his privilege as a condition necessary for the preservation of his constitutional right under the fifth amendment?

We all agree, of course, that a proper construction of the statute demands that it be read as coterminous with the fifth amendment to the Constitution. It may well be that broad construction of the fifth amendment is warrant for sustaining the contentions of the defendant to the effect that the statutory specification of those who shall receive immunity include this defendant and others similarly situated. But, on the other hand, as well pointed out by Judge Grubb, the immunity statute was passed with regard for the construction already put upon the fifth amendment, and in the knowledge that the assertion of the privilege before examination is in itself important, and that, unless the privilege is asserted, the witness will be given no immunity, and, should he testify only after the denial of the privilege, then only can he say that his evidence has been compulsorily furnished, and that, therefore, he is entitled to immunity. Thus, option may rest with the government, and may not be exercised until after the witness has asserted privilege.

Discussion, however, need not here be carried farther. The whole question was argued before Judge Grubb. He had the aid of learned counsel for the defendant and for the government. He gave to the matter full deliberation, has construed the statute in the light of certain expressions of the Supreme Court, and until his decision is reversed or modified by a higher court I shall regard it as a just declaration of the law.

[3] There is, therefore, but this question left: Were the facts and circumstances set forth in the plea in bar as surrounding and connected with the giving of the testimony such that the defendant can now claim that he testified unwillingly and compulsorily, and is therefore fairly entitled to immunity? Without repeating them, it is fairly apparent that the defendant, who was obeying a subpœna, was given to believe that he would be immune if he testified before the Commission, and that, acting under such belief, he gave the vitally important evidence which related to the very transactions upon which the indictment herein is based. The testimony of defendant even went to the extent of positive statements concerning what had been the intention of himself and other directors of the New Haven Company in and about the formation of a transportation monopoly which would violate the provisions of the monopoly statutes of the United States. Defendant had heard the statements of counsel for the Commission warning

persons situated as he was that the Commission intended to proceed criminally against any person testifying under a subpœna and who refused to give his evidence. It is true, as quoted hereinbefore, counsel for the Commission said that procedure under the criminal section of the immunity statutes would be had where the witness refused to testify "without good reason"; but it is fairly to be inferred that in the mind of counsel for the Commission refusal to testify upon the ground of self-incrimination was not considered a good reason, because the statute provided that such a reason, if advanced, would not excuse the witness from testifying.

The plea shows that defendant did not confer with counsel prior to the giving of his testimony. He knew that the Commission had deliberately declined to permit certain other witnesses to be sworn, and that there had been an express requirement that such other witnesses should waive immunity and should make acknowledgment that their statements were being voluntarily given. No advice appears to have been given to this defendant before he was put under oath, nor was he told of his possible waiver of immunity. He was under the actual belief that the Commission intended to give him immunity and that he would receive it.

These and the other things set forth, when considered with due regard to the rights of both the government and of the defendant, show that the purpose of the Commission was to secure the important testimony which this defendant furnished, and was to give immunity to him for giving it. And when the Commission expressly refused such immunity to others, not sworn, they made a whole situation where, by contrast, the belief that this defendant should and would be immune was emphasized; hence, in justice, he may now insist that the power of the government should be stayed as against this prosecution of him for and on account of the transactions concerning which he testified.

The demurrer to the plea is overruled.

INDUSTRIAL TRUST CO. v. WALSH, Internal Revenue Collector.

(District Court, D. Connecticut. March 6, 1915.)

No. 1854.

INTERNAL REVENUE ⇐9—EXCISE TAX ON CORPORATIONS—"NET INCOME."

A net increase in the book value of securities held by a banking and trust company as an investment for surplus funds, as shown by an adjustment of such values entered on its books, such increase in some instances extending over a number of years, does not constitute "net income" received by the corporation during the year in which the adjustment was made, within the meaning of Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300–6307), and is not subject to the excise tax thereby imposed.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⇐9.

For other definitions, see Words and Phrases, First and Second Series, Net Income.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

At Law. Action by the Industrial Trust Company against James J. Walsh, Collector of Internal Revenue for the District of Connecticut. Trial to court. Judgment for plaintiff.

This case having been heard by the court without the intervention of a jury, pursuant to the provisions of sections 649 and 700 of the Revised Statutes of the United States (Comp. St. 1913, §§ 1587, 1668), the following special finding of facts is made by the court and filed as part of the record:

Special Finding of Facts.

The plaintiff is a Rhode Island corporation, with its principal place of business located in the city of Providence, and is now and for many years has been engaged in carrying on business as a bank and trust company.

During the latter part of June, 1912, plaintiff caused an adjustment to be made on its books of the value of the securities which it then owned, with the result that a net increase in the value of such securities was shown. None of these securities, however, were sold by the plaintiff during that year, except $43,000 in par value of the Bristol & Warren Water Company's bonds; $6,000 in par value having been sold prior to the said book adjustment, and the remaining $37,000 in par value having been sold subsequent thereto.

By the book adjustment, as made, the value of that portion of the bonds representing $37,000 in par value was increased $2,804, and the gain thus made by the sale, over and above the adjusted book value, was accounted for as a profit and carried on the plaintiff's books to the profit and loss account, thereby increasing the capital worth of the corporation's assets, but having no effect on its surplus.

All of the Bristol & Warren Water Company's bonds were purchased in 1911, and the book adjustment value, made in June, 1912, was the same as the cost of the bonds in 1911, and the plaintiff included the amount realized from the sale of these bonds in its return of gross income for the year 1912.

On or about February 18, 1913, for the purpose of complying with the requirements of section 38 of the act of Congress approved August 5, 1909, entitled "An act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," the plaintiff made out and sent a return of income for the year ending December 31, 1912, to the Commissioner of Internal Revenue on the usual form furnished for such purposes.

In the return thus filed plaintiff reported that its gross income amounted to $3,340,631.02, and that all deductions allowed by the act amounted to $3,094,558.50, so that its net income was $246,072.52, from which the specific statutory deduction of $5,000 was taken, thus leaving, as the amount on which the tax of 1 per centum was to be calculated for assessment, the sum of $241,072.52. The tax amounted to $2,410.73, and the plaintiff paid it.

Subsequently the Commissioner of Internal Revenue amended this return in two particulars. He first increased the return of net income by adding to the return as filed by the plaintiff the sum of $180,307.90, thus showing an amended gross income of $3,520,938.92. The addition of $180,307.90 to the gross income represented what the Commissioner termed a prorated increase in the value of certain securities owned by plaintiff, after deducting a prorated decrease in the value of certain other securities, both of which were computed in consequence of the adjustment plaintiff made of book values in June, 1912. The tax on this addition to gross income amounted to $1,803.07, and is the subject of this suit.

After increasing the gross income, the Commissioner then disallowed a certain deduction made by the plaintiff in its original return. The total claimed deductions in the original return filed by plaintiff amounted to $3,094,558.50. In the amended return the Commissioner disallowed the sum of $22,270.47, so that the total deductions allowed amounted to $3,072,288.03. The sum disallowed represented the cost of certain improvements made by the plaintiff on its real property. Of this action of the Commissioner the plaintiff does not complain, and for the additional tax imposed as the result of disallowing this deduction, amounting to $222.71, the plaintiff brings no suit, the amount having been paid when it paid the total additional tax assessed, which, as

stated, amounted to $2,025.78. The sum of that amount, to wit, $222.71 and $1,803.07, for which suit was brought, represents the total additional tax paid on September 26, 1913. Due notice was given by the Commissioner to the plaintiff of these changes.

On September 17, 1913, defendant gave plaintiff written notice of this change, and made demand for the payment of the additional tax thus assessed, at the same time advising plaintiff that, unless said additional tax was paid within 10 days thereafter, suit would be brought for the recovery of the amount and the penalties imposed as provided in the act.

The Commissioner estimated that the total increase in the value of certain securities owned by the plaintiff and applicable to plaintiff's 1912 income was $283,762.29, and that the decrease deductible in the same year for the decrease in value of certain other securities was $103,454.39, leaving a net prorated increase of $180,307.90, and added this amount to the gross income as originally filed by the plaintiff. The Commissioner claimed that these respective amounts represented a prorating of the amount of net increase and net decrease in the value of the securities thus entered on the company's books.

The Commissioner claimed that the amount added by him to plaintiff's gross income was properly chargeable because the plaintiff had entered the increase in value on its books during that year, notwithstanding that the increase in value represented a continuous increase extending over the years 1909, 1910, 1911, and 1912, during which time the act in question was in force.

Had plaintiff not adjusted the value of its securities on its books during 1912, the additional tax would not have been assessed against it by the Commissioner on plaintiff's income for 1912.

In ascertaining the amount of the increased value of each security the Commissioner laid down the following rule: He first ascertained the difference between the cost price of the security and the adjusted book value made in 1912, and then divided the increase thus shown by the number of years intervening since the last book adjustment, including the year the adjustment was made and the year 1912; no notice having been taken of fractional parts of a year. This, he claimed, gave the proportionate increase for one year. He then multiplied that amount by 4, which was the number of years the act had been in force at that time; the figures resulting therefrom being, as he termed it, "the proportion of increase applicable to gross income for 1912." Where a security was purchased since the last book adjustment, the Commissioner in that case first ascertained the number of years the plaintiff had owned the security (including both the year of purchase and the year of 1912, no notice having been taken of fractional parts of a year) and used the number of such years as the denominator of the fraction, and the number of years the act had been in force at that time, which was 4, as the numerator of the fraction, and divided the increase so shown by the denominator and multiplied the result by the numerator, and the answer represented a sum which he called "the proportion of increase applicable to gross income for 1912."

On September 26, 1913, in consequence of the defendant's demand and threat of suit for collection of the tax and penalties, plaintiff paid under protest to defendant, as collector of internal revenue, the sum of $2,025.78, in payment of the extra tax so assessed.

On the 29th day of December, 1913, plaintiff took an appeal in writing to the Commissioner of Internal Revenue, demanding repayment of the sum of $1,803.07 of the $2,025.78 so paid, on the ground that so much of the tax thus paid resulted from the illegal assessment of 1 per centum on the net increase in the book value of the securities in question.

On or about January 5, 1914, the Commissioner of Internal Revenue rejected said appeal and refused to order the return of any part of the additional tax, and no part of said sum has ever been returned.

Plaintiff does not, as a business, buy and sell securities as commodities, but purchases securities as an investment for surplus funds, and sells the same when, in the opinion of its proper officers, such sale will prove conducive to the best interest of its business as a bank and trust company.

In finding the foregoing facts the court has excluded from consideration

two letters marked Exhibits H and I, which were letters written by the Commissioner of Internal Revenue, addressed to the collectors of internal revenue and revenue agents. At the time of trial they were admitted in evidence over the objection of counsel for defendant. I have since concluded that these exhibits were not properly admitted.

William Waldo Hyde, of Hartford, Conn., and C. M. Van Slyck, of Providence, R. I., for plaintiff.

Frederick A. Scott, U. S. Dist. Atty., of Hartford, Conn., for defendant.

THOMAS, District Judge (after stating the facts as above). This is an action brought by the plaintiff against the defendant to recover the sum of $1,803.07, which amount is the greater portion of an additional tax assessed against the defendant, and is claimed by the Commissioner of Internal Revenue to have been assessed in accordance with the provisions of section 38 of an act of Congress approved August 5, 1909, entitled "An act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes."

The assessment of the additional tax is based upon the net increase of book values of the securities which plaintiff owned, as shown by an adjustment of such values made by the plaintiff and entered on its books in the latter part of June, 1912. The plaintiff claims that the tax was illegally assessed. The defendant contends that any increase in the value of the capital assets of a corporation, as determined by a physical revaluation thereof and taken cognizance of by the corporation in book entries, is "income," as defined and measured by the Corporation Tax Law of 1909.

The case was tried to the court without the intervention of a jury, in accordance with a stipulation of counsel in writing filed on September 28, 1914, and as provided by sections 649 and 700 of the Revised Statutes of the United States.

Pursuant to the provisions of the statute a special finding of facts has been made by the court and filed with the clerk.

The plaintiff is a Rhode Island corporation, and at the time of hearing this case was, and for many years had been, engaged in carrying on business as a bank and trust company, with its banking house and principal place of business located in the city of Providence.

In June, 1912, plaintiff made an adjustment on its books of the values of the securities it then owned, which resulted in a net increase in the value of such securities amounting to $180,307.90.

None of these securities, however, were sold by plaintiff during that year, excepting $43,000, par value, of the Bristol & Warren Water Company's bonds, of which $6,000, par value, was sold prior to said book adjustment, and the remaining $37,000, par value, subsequent thereto. By the book adjustment, the value of the securities representing $37,000, par value, was increased $2,804, and the gain thereon by the sale, over and above the adjusted book value, was accounted for as profit and carried to the profit and loss account on plaintiff's books, thereafter showing an increase in the capital worth of the corporation's assets, but having no effect on plaintiff's surplus.

The securities thus sold were purchased during the year 1911, and

the book value adjustment made in June, 1912, was the same as the 1911 cost of the securities. Plaintiff included the amount realized from the sale of these securities in the return which it originally made to the Commissioner of Internal Revenue of gross income for the year 1912, which was filed with the defendant, as collector of internal revenue, on or about February 18, 1913, for the purpose of complying with the provisions of the act of Congress now under consideration. In the return thus filed plaintiff reported that its gross income amounted to $3,340,631.02, and that all deductions allowed by the act amounted to $3,094,558.50, so that its net income was $246,072.52, from which the specific statutory deduction of $5,000 was taken, thus leaving, as the amount on which the tax of 1 per centum was to be calculated for assessment, the sum of $241,072.52. The tax amounted to $2,410.73, and the plaintiff paid it.

Subsequently the Commissioner of Internal Revenue amended this return in two particulars. He first increased the return of net income, by adding to the return as filed by the plaintiff the sum of $180,307.90, thus showing an amended gross income of $3,520,938.92. The addition of $180,307.90 to the gross income represented what the Commissioner termed a prorated increase in the value of certain securities owned by plaintiff after deducting a prorated decrease in the value of certain other securities, both of which were computed in consequence of the adjustment plaintiff made of book values in June, 1912. The tax on this addition to gross income amounted to $1,803.07, and is the subject of this suit.

After increasing the gross income, the Commissioner then disallowed a certain deduction made by the plaintiff in its original return. The total claimed deductions in the original return by plaintiff amounted to $3,094,558.50. In the amended return the Commissioner disallowed the sum of $22,270.47, so that the total deductions allowed amounted to $3,072,288.03. The sum thus disallowed represented the cost of certain improvements made by the plaintiff on its real property. With this action of the Commissioner the plaintiff does not complain, and for the additional tax imposed as the result of disallowing this deduction, amounting to $222.71, the plaintiff brings no suit; the amount having been paid when it paid the total additional tax assessed, which, as stated, amounted to $2,025.78. The sum of that amount, to wit, $222.71, and $1,803.07, for which suit was brought, represents the total additional tax paid on September 26, 1913. Due notice was given by the Commissioner to the plaintiff of these changes.

On September 17, 1913, defendant thereupon made demand for the payment of the additional tax thus assessed, and notified the plaintiff in writing that, unless such tax was paid within 10 days thereafter, suit would be brought to recover the additional tax and such penalties imposed as were stated in the act, in case the plaintiff failed to make such payment.

In consequence of defendant's demand and threat of suit the plaintiff did on the 26th day of September, 1913, pay under protest to the defendant, as collector, the sum of $2.025.78, in payment of the additional tax assessed. On December 29, 1913, the plaintiff took an ap-

peal, in writing, to the Commissioner of Internal Revenue, and demanded repayment of $1,803.07 thereof, on the ground that so much of the tax, so paid, resulted from the illegal assessment of 1 per cent. upon the net increase in the book value of plaintiff's securities, as shown by the adjustment made on its books in June, 1912.

The Commissioner claimed that the amount added by him to plaintiff's gross income return was properly chargeable thereto, notwithstanding the fact that the increase in values which plaintiff thus entered upon its books in June, 1912, represented a continuous increase in values extending over the years 1909, 1910, 1911, and 1912, during which time the act in question was in force. It was also admitted by defendant that, had plaintiff not adjusted the value of its securities on its books during 1912, the additional tax would not have been assessed against it by the Commissioner on its income for that year.

In ascertaining the amount of the increased value of each security the Commissioner laid down the following rule: He first ascertained the difference between the cost price of the security and the adjusted book value made in 1912, and then divided the increase thus shown by the number of years intervening since the last book adjustment, including the year the adjustment was made and the year 1912; no notice having been taken of fractional parts of a year. This, he claimed, gave the proportionate increase for one year. He then multiplied that amount by 4, which was the number of years the act had been in force at that time, the figures resulting therefrom being, as he termed it, "the proportion of increase applicable to gross income for 1912." Where a security was purchased since the last book adjustment, the Commissioner in that case first ascertained the number of years the plaintiff had owned the security (including both the year of purchase and the year of 1912, no notice having been taken of fractional parts of a year), and used the number of such years as the denominator of the fraction, and the number of years the act had been in force at that time, which was 4, as the numerator of the fraction, and divided the increase so shown by the denominator, and multiplied the result by the numerator, and the answer represented a sum which he called "the proportion of increase applicable to gross income for 1912."

On or about January 5, 1914, the Commissioner of Internal Revenue rejected plaintiff's appeal and refused to order the repayment of any portion of said tax, and no portion thereof was ever returned to the plaintiff.

Plaintiff is not engaged in the business of buying and selling securities as commodities, but as an investment for surplus funds, and makes sales of the same only when in the opinion of its proper officers, such sales will prove conducive to the best interests of its business as a bank and trust company.

Therefore the sole question in this case is whether the Commissioner was legally justified in assessing the tax of 1 per cent. provided for in the act, on the net increase in value of the securities as shown by the book adjustment made by the plaintiff in June, 1912, and, as bearing upon that question, whether the increase in book value of such securities should be considered as "income received by plaintiff during the year."

As a guide in answering this question reference is made to the Act of March 2, 1867, c. 169, 14 Stat. 477, and the decisions following its passage. That act provided that:

"There shall be levied, collected and paid annually upon the gains, profits, and income of every person, * * * whether derived from any kind of property, rents, interest, dividends, or salaries, or from any other source whatever, a tax of five per centum on the amount so derived over $1,000, * * * and the tax herein provided for shall be assessed, collected, and paid upon the gains, profits, and income for the year ending the 31st of December next preceding the time for levying, collecting, and paying said tax."

And further that:

"In estimating the gains, profits, and income of any person, there shall be included all incomes derived from interest upon notes, bonds, and other securities of the United States, profits realized within the year from sales of real estate purchased within the year, or within two years previous to the year for which income is estimated, * * * and all other gains, profits, and income derived from any source whatever."

Subsequent to the enactment of 1867, Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45, was decided by the Supreme Court and must, in my opinion, be decisive of this case. There the plaintiff was assessed, and paid under protest, the tax levied on an advance in the value of securities, and then brought suit to recover the amount paid.

In that case the plaintiff, in 1865, was the owner of certain United States treasury notes which he exchanged for United States bonds. In 1869 he sold the bonds at an advance of $20,000 over the cost of the treasury notes, and the government levied on this advance the tax provided by the act as a "gain," "profit," or "income" for the year in which the plaintiff sold the bonds.

At this point it should be noted that in the act of 1867 Congress made use of the terms "gains," "profits," and "income," while in the act now under consideration the term "net income" alone has been used upon which to assess the tax, and that further wording of the present act restricts the levy thereof to "the entire net income, over and above five thousand dollars, received * * * from all sources during such year. * * *" Therefore the act of 1867 would appear, upon its face, to be much broader in its scope, so far as it concerns the taxing of what may be considered "income," than the act of 1909.

Nevertheless, the Supreme Court of the United States, speaking by Justice Field, in Gray v. Darlington, supra, said on page 66 of 15 Wall. (21 L. Ed. 45):

"The mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of the tax on the amount of the advance. Mere advance in value in no sense constitutes the gains, profits, or income specified by the statute. It constitutes and can be treated merely as increase of capital."

And on page 65 of 15 Wall. (21 L. Ed. 45), that:

"The advance in the value of property during a series of years can, in no just sense, be considered the gains, profits, or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property."

After careful consideration of the facts in this case and the close analogy they bear to the facts in Gray v. Darlington, supra, I must conclude that the same interpretation given to the statute of 1867 by the Supreme Court, with reference to what was taxable as income under that statute, must be given to the act of 1909.

In arriving at this conclusion, I have not taken into consideration Exhibits H and I, which were allowed in evidence over the objection of counsel for defendant. After due reflection I have concluded that both exhibits were inadmissible and had no bearing upon the controversy.

Judgment is rendered for the plaintiff to recover of the defendant $1,803.07, with interest from September 26, 1913, and its costs of suit.

Decree accordingly.

UNITED STATES v. ERIE R. CO. et al.

(District Court, D. New Jersey. March 27, 1915.)

1. CARRIERS ⟸38—OFFENSES—INDICTMENT—CONCESSIONS.
The Hepburn amendment by Act June 29, 1906, c. 3591, § 2, 34 Stat. 587, to Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (Comp. St. 1913, § 8597), so as to make a carrier punishable thereunder only in case it knowingly violated the act, does not require an indictment against a corporation for knowingly granting a shipper a concession in rates, by applying the import rate to a shipment which was not entitled thereto under the published tariffs, to allege the name of the agent by whom the concession was granted, since the company's knowledge is the sum of the knowledge of all its agents, though the transaction be executed by only one of them.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ⟸38.]

2. CARRIERS ⟸38—OFFENSES—INDICTMENT—CONCESSIONS.
The fact that an agent of a carrier was indicted jointly with it for granting an unlawful concession to a shipper, contrary to Hepburn Act June 29, 1906, § 2, and charged with doing the act as the agent of the carrier, does not in itself charge the carrier with doing the act through that agent, so that it cannot be convicted if the agent is acquitted.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ⟸38.]

3. CRIMINAL LAW ⟸972—MOTION IN ARREST OF JUDGMENT—DETERMINATION.
A motion in arrest of judgment can be made only on the record proper, of which the evidence forms no part.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2423; Dec. Dig. ⟸972.]

4. CARRIERS ⟸38—OFFENSES—UNLAWFUL CONCESSIONS—"KNOWINGLY."
A carrier is guilty of "knowingly" granting an unlawful concession in rates, contrary to Hepburn Act June 29, 1906, § 2, though neither it nor its agents had actual knowledge of the facts which made the rate unlawful, if they willfully or intentionally remained in ignorance of such facts, but not if they were negligent only in not ascertaining the facts.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ⟸38.
For other definitions, see Words and Phrases, First and Second Series, Knowingly.]

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5. CARRIERS ⟸38—OFFENSES—SUFFICIENCY OF EVIDENCE—UNLAWFUL CONCESSION—KNOWLEDGE.

In a prosecution against a carrier for knowingly granting an unlawful concession in rates, evidence *held* not to show that the carrier knew, or willfully and intentionally remained in ignorance of, the facts which made the rate unlawful.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ⟸38.]

The Erie Railroad Company and another were jointly indicted for granting an unlawful concession in rates to a shipper, and the Railroad Company alone was convicted. On motions in arrest of judgment and for new trial. Motion in arrest of judgment denied, and motion for new trial granted.

J. Warren Davis, U. S. Atty., of Trenton, N. J., Alexander H. Elder, Asst. Atty. Gen., of Washington, D. C., and Walter H. Bacon, Asst. U. S. Atty., of Bridgeton, N. J., for the United States.

Collins & Corbin, of Jersey City, N. J., for defendant Erie R. Co.

HAIGHT, District Judge. The Erie Railroad Company and William S. Cowie, an agent of the company, were jointly indicted for a violation of section 1 of the act of February 19, 1903 (32 Stat. 847), commonly known as the "Elkins Act," as the same was amended by Act June 29, 1906 (34 Stat. 587), commonly known as the "Hepburn Act." The specific charge was that they had applied to an interstate shipment an "import rate," when a "domestic rate" was the lawful one, and had thereby granted a concession—the import rate being the lower. The "import rate," according to the filed and published tariffs of the company, was applicable "only on property received direct from the ship's side or dock of steamer upon which imported or from customs bonded warehouses or appraisers' stores (not internal revenue stores)." They were tried before a jury, and the defendant company was convicted, but Mr. Cowie was acquitted. The company now moves in arrest of judgment, upon the ground that the acquittal of Mr. Cowie required that it be also acquitted. It also moves for a new trial: (1) Because of alleged errors in the charge to the jury; and (2) because the evidence was insufficient to warrant a conviction. These will be considered in the order stated. Although I have reached the conclusion that the verdict must be set aside and a new trial granted upon the second of the above reasons advanced on behalf of the defendant company for a new trial, I have deemed it proper to determine the other questions presented, as they are important and will certainly arise upon another trial.

[1] 1. The argument in support of the motion in arrest of judgment proceeds on the theory that the indictment charges that the act for which the company was convicted was done *through* Mr. Cowie, as agent, and that as the corporation can act only through its agents, and as the indictment purported to name the agent through whom the company acted, one cannot be convicted and the other acquitted. This argument would unquestionably be sound, and probably the defendant

company could avail itself of it, on a motion in arrest of judgment, if the indictment were construed as the defendant contends that it should be. The determination of the question presented, therefore, necessitates an interpretation of the indictment. Primarily the defendant contends, in support of its construction, that an indictment against the carrier under the Hepburn Act must name or describe the agent or agents through whom the illegal act was done, and that consequently this indictment is demurrable unless it is construed as alleging that the unlawful acts, with which the company is charged, were done through Mr. Cowie. Manifestly, if the defendant's position in this respect is correct, great weight should be given to its main contention regarding the meaning of the indictment. The allegations essential to a valid indictment have thus been stated by Mr. Justice Day, in Armour Packing Co. v. United States, 209 U. S. 56, at page 83, 28 Sup. Ct. 428, at page 436 (52 L. Ed. 681):

"This court has frequently had occasion to hold that the accused is entitled to know the nature and cause of the accusation against him, and that a charge must be sufficiently definite to enable him to make his defense and avail himself of the record of conviction or acquittal for his protection against further prosecutions, and to inform the court of the facts charged, so that it may decide as to their sufficiency in law to support a conviction, if one be had, and the elements of the offense must be set forth in the indictment with reasonable particularity of time, place, and circumstances. And it is true it is not always sufficient to charge statutory offenses in the language of the statutes, and where the offense includes generic terms it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars."

In Chicago, St. P., M. & O. Ry. Co. et al. v. United States, 162 Fed. 835, at page 838, 90 C. C. A. 211, at page 214 (C. C. A. 8th Circuit), Judge Adams, after stating the above rule, said:

"There are found in the indictment clear and definite allegations showing the kind of property shipped, the time and place when shipped, the consignee to whom shipped, the existing legal tariff or rate for such shipment, the payment thereof by the shipper to the carrier, the subsequent payment of the rebate or concession by the carrier to the shipper, the time when it was paid, and the amount thereof. These details afforded all the required certainty, and the indictment was clearly sufficient."

The indictments in both of these cases were framed under section 1 of the Elkins Act, before it was amended, and it was held to be unnecessary to set forth the particular device by which the concession or rebate had been granted. Reference to the indictment in the case at bar shows that all of the allegations which were considered, in the case last cited, as sufficient to sustain the indictment there under consideration, are present here, except the subsequent payment of the rebate; but in lieu of that, and in conformance with the facts, it alleges the charging and payment of a lower rate than that provided in the filed schedules or tariffs. The Elkins Act originally made a carrier who should offer, grant, or give a rebate, concession, or discrimination criminally responsible. This was amended by the Hepburn Act, so that the carrier, to be criminally liable, must *knowingly* offer, grant, or give a rebate or concession or discrimination.

The defendant company contends that the insertion of the word

"knowingly," in the statute, entitled it to be informed, in the indictment, of the name or description of the agent or agents whose knowledge the company is to be charged with, and that therefore the allegations which were considered as sufficient in the cases above cited (which arose before the Elkins Act was amended) are no longer sufficient. Mr. Justice Day, however, laid down a general well-settled rule, applicable to all indictments. After setting forth all of the essential details, I cannot conceive that it was necessary, in order to comply with the above-mentioned rule, to allege the name of, or describe, the agent or agents who granted the illegal rate. Having been informed of all the essential facts, it was within the power of the defendant company to ascertain from its own agents which of them, if any, had done the unlawful acts. In addition it has recently been held by the Circuit Court of Appeals of the Sixth Circuit, in Grand Rapids & I. Ry. Co. v. United States, 212 Fed. 577, 129 C. C. A. 113, where an indictment framed under the Elkins Act, as amended, was before the court, that it was not necessary to set forth the method or device used to avoid the law, and that the carrier is responsible for the acts of all of its agents; their combined knowledge and conduct being that of the carrier, even though the transaction is executed by only some of its agents.

Surely it was not incumbent upon the government to name or describe in the indictment all of such agents. Their identity was peculiarly within the knowledge of the defendant carrier. If the government were required to name or describe all of them in an indictment, it is quite safe to assume that, on the trial of a great majority of such cases, there would be material variances. In construing the indictment, therefore, it has been considered that it was unnecessary to name or describe the agent or agents in the indictment.

[2, 3] The statute on which the indictment is based makes the carrier's agents and officers, who come within its provisions, criminally responsible, as well as the carrier. An agent or officer can therefore properly be jointly indicted with his principal. That is precisely what was done in this case. On the face of the indictment it is not charged that the unlawful acts were done by the defendant corporation through Mr. Cowie, but he was jointly indicted with the company. The description of Cowie as an agent was an essential allegation, so far as he was concerned, because, by the terms of the statute, it was only as an agent, officer, or person acting for or employed by the company, acting within the scope of his employment, that he was liable. As it was not essential to the validity of the indictment that the agent or agents for whose act the company was to be charged should be named or described, and as the indictment does not, on its face, charge that the unlawful acts were done through a particular agent, and as the designation of Mr. Cowie as an agent was essential to the validity of the indictment, so far as he is concerned, I can see no good reason for giving to the indictment a meaning different from that which appears on its face. Therefore, as the indictment did not limit the crime with which the company was charged to Mr. Cowie's acts and knowledge alone, his acquittal is not inconsistent with the company's conviction; and as the motion in arrest of judgment can be made only on the record,

of which the evidence forms no part, it follows that such motion must be denied.

This also disposes of defendant's contention, on the motion for a new trial, that it was error to charge the jury that under the indictment the company could be convicted and Cowie acquitted.

[4] 2. The principal question of fact in the case, was whether the defendant company *knowingly* granted a concession. The determination of this depended upon whether the company, through its agents, had knowledge of facts which would have made the import rate, under the published tariffs, unlawful. On this point the jury were instructed, in substance, that before the company could be convicted they must find that the agents of the company, who were instrumental in fixing the rate, had knowledge of the facts which made the import rate unlawful, or that they willfully or intentionally remained in ignorance of them, in which latter case they would be charged in law with knowledge of such facts as reasonable inquiry or investigation would have revealed. They were specifically cautioned that negligence was not sufficient to constitute willful ignorance, in the following words:

"I do not mean to be understood by this as stating that negligence is sufficient to charge one with knowledge, but his failure to make further inquiry must indicate a willful and perverse intention to remain ignorant. Nor can any finding of such willful ignorance be based on mere conjecture or speculation, but must be based solely on the evidence in the case."

It was urged by the defendant at the trial, and is urged here, that nothing short of actual knowledge, on the part of its agents, of the facts which made the import rate unlawful, could render it liable for *knowingly* granting a concession, and that it was error to hold that the defendant could be charged in law with knowledge if its agents willfully remained ignorant. This contention was considered during the trial as fully as the limited time at my disposal would permit. It has since been carefully considered in the light of the authorities brought to my attention by the able counsel for the defendant; but I see no reason to change the opinion which I entertained at the time of the trial, and which was expressed in the charge to the jury. The defendant company, under the terms of the act, must be held to know the tariffs which it had filed and published. Under familiar principles it will also be presumed to know that a departure from such tariffs constituted a violation of law and subjected it to punishment. But manifestly, if through its agents it honestly believed, at the time the rate was given, that this particular shipment was to be taken from the dock where it had been landed by the steamer on which it was imported (a fact which would have made the import rate lawful), but it later developed that the goods were not originally unloaded from the steamer on the dock from which they were taken by the defendant, it could not be held to have *knowingly granted* a concession, because it did not know of the facts essential to make the import rate inapplicable and the granting of it unlawful.

If, however, the carrier willfully and intentionally remained in ignorance of the facts necessary to determine whether the import rate was lawful, must it not be charged in law with the knowledge of the

facts which reasonable inquiry and investigation would have revealed? It seems to me, both upon reason and authority that this must be so. It has been authoritatively decided that it was not necessary under the Elkins Act that there should be an intentional violation of the law, but that purposely doing a thing prohibited by the statute amounted to an offense, although the act did not involve turpitude or moral wrong or an intent to violate the law. Armour Packing Co. v. U. S., 209 U. S. 85, 28 Sup. Ct. 428, 52 L. Ed. 681; Chicago, St. P., M. & O. Ry. Co. v. United States, 162 Fed. 835, 90 C. C. A. 211. In the latter case it was assumed (without deciding) that the adjective "willful," found in the earlier part of section 1 of the Elkins Act, was carried forward and made to qualify the misdemeanor denounced in the granting or giving of rebates or concessions, so that the giving or granting of them would be criminal only in the event that it was done "willfully." If, under the Elkins Act, a carrier is liable for having "willfully" granted a concession, when it in fact had no intention of disobeying the law, a fortiori should one who willfully remains ignorant be charged with knowledge of what would have been learned, had inquiry or investigation been made. In Nichols & Cox Lumber Co. v. United States, 212 Fed. 588, 129 C. C. A. 124 (C. C. A. 6th Cir.), where the indictment was framed under the Elkins Act, as amended by the Hepburn Act, the defendant, who was a shipper, urged that it could not be rightfully convicted, because its agents who had solicited the unlawful rates acted under a good-faith misapprehension as to the interpretation to be given to the tariffs. As to this contention Judge Warrington said (212 Fed. at page 593, 129 C. C. A. at page 129):

"As to the second reason, the only question involved concerned a choice between the local and the transit rates, and, aside from their obvious knowledge that the latter was the lower rate, the agents, and consequently the defendant, must be presumed to have known which was applicable."

It thus appears that, even under the amended act, knowledge may be presumed, although actual knowledge was not shown.

In Spurr v. United States, 174 U. S. 728, at page 735, 19 Sup. Ct. 812, at page 815 (43 L. Ed. 1150) the statute on which the prosecution was based imposed criminal responsibility upon one who should willfully do certain prohibited acts. The question for determination was stated, in the opinion, to be the defendant's *knowledge* of the state of a depositor's account when certain checks were certified, and his intent in the certification. It was said by Chief Justice Fuller:

"Wrongful intent is the essence of the crime. If an officer certifies a check with the intent that the drawer shall obtain so much money out of the bank when he has none there, such officer not only certifies unlawfully, but the specific intent to violate the statute may be imputed. *And so evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact.*"

The errors dealt with were the remarks of the trial judge to the jury when asked for further instructions. These remarks were specifically stated by the trial judge to be in addition to the instructions which he had given them in the original charge. The Supreme Court held that, under the circumstances, the omission in the later remarks could not

properly be held to have been supplied by a reference to the prior instructions. A part of the latter are quoted in the opinion of the Supreme Court, and apparently received its approval. After stating that if the defendant, at the time he certified the checks, believed that the account of the drawer of the checks was sufficient to cover them, he should be acquitted, the trial judge said:

"Unless such ignorance of the overdraft was willful as elsewhere explained in the court's instructions. * * * Unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly, and in bad faith—these words mean substantially the same thing—shut his eyes to the fact and purposely refrained from inquiry or investigation for the purpose of avoiding knowledge."

It thus appears that the Supreme Court has given its sanction to the proposition that one may be held criminally responsible for purposely keeping himself in ignorance of facts, when the crime with which he is charged required *knowledge* of those facts. I can perceive no difference in principle between that case and the one at bar. I think, also, that the same rule may be properly gathered from that part of the decision of the Circuit Court of Appeals of the Sixth Circuit, in Grand Rapids & I. Ry. Co. v. United States, supra, which deals with the question as to whether the refunds or concessions were given *knowingly*. It is true that this question was not directly passed upon in that case, but I think the remarks of the court lend support to the view here entertained. See, also, 12 Cyc. 157; Wharton's Crim. Law, vol. 1, § 89. The defendant corporation was under a duty to apply the lawful rate. It cannot be presumed that Congress, in framing an act so comprehensive as this, intended that a carrier, upon whom such a duty was cast, could willfully and intentionally remain ignorant of the facts necessary to determine which was the proper rate, and then shield itself from prosecution on the plea of lack of knowledge.

Counsel for the defendant have cited a great many authorities as to the meaning of the word "knowingly," when used in a criminal statute. Giving due effect to them, and to the general rule that a penal statute must be construed strictly, I cannot see that the charge to the jury was erroneous. The word "knowingly" was not construed in any other than its accepted legal meaning, but there was applied, not by way of statutory construction, a principle of law, namely, that where one upon whom a duty to know is cast intentionally or willfully keeps himself in ignorance, he will be estopped to deny knowledge of what he could have learned by reasonable inquiry and investigation. In none of the cases cited by counsel for the defendant is this proposition denied; in fact, it seems not to have been considered or presented. It seems unnecessary to review these cases, because I do not consider that the proposition expounded to the jury in any way conflicts with them. What was held by the Circuit Court of Appeals of this Circuit, in United States v. Lehigh Valley R. R. Co., 204 Fed. 706, 123 C. C. A. 9, was that the words "knowingly and willfully" in the so-called "Twenty-Eight Hour" Law were not synonymous with "negligently," and that it was not possible to commit an act "knowingly and willfully" unless the act be consciously in the mind. But this is quite different from holding that one who intentionally remains ignorant may not be charg-

ed in law with knowledge. The jury in the case at bar were instructed that mistake or negligence was not equivalent to knowledge.

[4] 3. I have read and considered very carefully all of the testimony and exhibits in the case, and I cannot escape the conclusion that there was not sufficient evidence to permit the jury to legitimately infer either actual knowledge on the part of any of the agents of the defendant company that the shipment in question had not been originally landed at the American docks from the ship on which it had been imported, or that any such agents willfully remained ignorant of this fact. In reaching this conclusion, I have given due weight to the verdict of the jury and to the general rules which should govern courts in setting aside verdicts as contrary to the evidence. I have also considered that it is the combined knowledge and conduct of all of the agents of the company which constitutes the knowledge and conduct of the carrier (Grand Rapids & I. Ry. Co. v. United States, supra), and also that Mr. Cowie's acquittal could be entirely consistent with a conviction of the defendant.

A more careful examination of the evidence than was possible at the time of the trial leads me to believe that, under the rule prevailing in this circuit (Zilbersher v. Penn. R. Co., 208 Fed. 280, 125 C. C. A. 480; United States v. Erie, 212 Fed. 853, 129 C. C. A. 307) the defendant's motion for a direction of verdict upon the ground of lack of evidence should have prevailed, and that the verdict would be reversed for this reason on appeal. There was practically no conflict in the evidence. A lengthy review of the evidence would serve no useful purpose here; but a brief statement of my conclusions should, I think, be made. As before stated, the import rate could lawfully be applied, under the filed and published tariffs, only in the event that the property which was transported was to be taken by the defendant, for purposes of shipment, direct from the ship's side or the dock of the steamer upon which it had been imported into this country, or from a customs bonded warehouse or appraisers' store. The evidence demonstrates that none of these conditions were present. The import rate was therefore illegal, and under the statute the granting of it constituted a concession. There is no doubt that the agents of the defendant knew that the property was not to be taken for shipment by the defendant from either the steamer upon which it had been imported or from a bonded warehouse or appraisers' store; but there is no evidence that any of them knew that it was not to be taken from the dock, or a warehouse connected with the dock, upon which it had been originally landed in this country. The evidence is quite overwhelming to the effect that all of the agents of the company in New York who had anything to do with the decision of whether the import rate should be applied proceeded on the assumption that the property was to be taken from the dock, or a warehouse connected therewith, on which it had been originally landed. The question which was the subject of discussion among these agents was whether the import rate should be applied, if the property had been stored in a free warehouse connected with the dock on which it had been originally landed.

As a matter of fact, the property had been landed at an entirely dif-

ferent dock, and later transported to the dock and warehouse from which the defendant company took it. The application to quote the rate was made to the New York office by an agent in Boston. Considerable correspondence, and several telegrams and telephone messages, regarding the rate, passed between this agent and those in New York. It is uncontradicted that Mr. Cowie, after consulting with some of the other agents of the defendant as to the proper interpretation of the tariffs, communicated to the Boston agents the conditions prescribed in the tariffs, under which the import rate could be given. The latter testified that he repeated these conditions to the shipper. If this is so (and there is no evidence to the contrary), the fault would seem to lie with the shipper in not advising the Boston agent that the property to be shipped had not been originally landed on the dock from which the railroad company was to take it. In view of the length of time which had transpired since the property was landed in this country, and some of the other circumstances in the case (of all of which the company, through its agents, had notice), it would seem that there was negligence on the part of the agents of the company in not making further inquiries as to whether the property had been originally landed at the American docks.

But negligence is not sufficient, in a case such as this, to charge knowledge. It may also be that the agent in Boston was negligent in not asking, if he did not (the evidence does not disclose whether he did or not), of the shipper, the specific question whether the property had been originally landed at the American docks. There are, I am free to admit, some suspicious circumstances, yet these are as consistent with the theory of negligence as of a willful intent to remain ignorant. There are some facts, undoubtedly, in the possession of some of the witnesses who testified, which were not revealed at the trial, and which, if revealed, would materially assist in settling the question of knowledge or willful ignorance. For instance, it was not shown who stamped on the shipping order the words "Import Freight," and if this was done by an agent of the defendant company, what information he had as to where the property had been originally landed, and if he had any information, from whom he received it, and why the import certificate was not filled in. But it would not be proper to convict the defendant upon bare suspicion, or assumption of facts, which the evidence did not disclose. My conclusion, therefore, is that the defendant's motion for a new trial on this ground must prevail.

The verdict will therefore be set aside, and a new trial granted.

CARPENTER v. BEAL-McDONNELL & CO. et al.

(District Court, E. D. Arkansas, W. D. March 4, 1915.)

1. GAMING ⊂=19—OBLIGATIONS OR SECURITIES GIVEN FOR GAMBLING CONSIDERATIONS—VALIDITY.

In an action to enforce a note or security given in settlement of a gambling debt, which by statute is absolutely void, the illegality of the consideration may be shown as a defense.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 39–43; Dec. Dig. ⊂=19.]

2. GAMING ⊂=14—"GAMBLING CONTRACT"—"WAGERING CONTRACT"—DEALING IN FUTURES.

Dealing in futures, when both parties intend that there shall be no deliveries, but only a settlement of differences between the contract and the market price, are "wagering" or "gambling contracts" and illegal and void by the common law.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 25, 26; Dec. Dig. ⊂=14.

For other definitions, see Words and Phrases, First and Second Series, Gambling Contract; Wager.]

3. GAMING ⊂=46—GAMBLING CONTRACT—PERSONS WHO MAY PLEAD INVALIDITY.

A contract or conveyance based on a gambling transaction, which is absolutely void by statute or by the common law, may be attacked, not only by a party to it, but by any one privy to him in blood or estate.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 93, 94; Dec. Dig. ⊂=46.]

4. JUDGMENT ⊂=817—FOREIGN JUDGMENT—COLLATERAL ATTACK.

Pen. Laws N. Y. (Consol. Laws, c. 40) § 933, declaring void judgments the consideration for which is "money or any other valuable thing won by the playing at any game whatsoever or won by the betting on the hands or sides of such as do play at any game," does not apply to judgments based on other gambling transactions, such as dealing in futures, and, in the absence of any such statute, a judgment of a New York court obtained in a suit in rem by default on substituted service, the res being within the jurisdiction of the court, although the res consisted of securities pledged in such a deal must be presumed valid in that state, and under the full faith and credit clause of the federal Constitution cannot be collaterally attacked in a court in another state.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1456, 1457; Dec. Dig. ⊂=817.]

In Equity. Suit by Nathaniel L. Carpenter against Beal-McDonnell & Co. and another. On motion to strike out part of answer. Motion sustained.

This is a bill in equity against the defendants, composing the copartnership of Beal-McDonnell & Co., to compel them and their officers to make a transfer to the plaintiff of certain certificates of membership in said firm.

The facts as set out in the bill are: That the defendants are members of the joint-stock company or copartnership engaged in the wholesale dry goods business in the city of Little Rock. That it was organized by written agreement providing that the interests of each member or partner should be represented and evidenced by certificates showing the number of shares owned by such partner of a total of 3,000 shares of the par value of $100 each. That the business should be conducted under the firm name of the defendants, and that there should be issued by the president of the firm, attested by the secre-

tary, certificates to each member or partner showing the number of shares he is entitled to, which certificates and the interest they represent shall be transferable by assignment in writing upon the certificates and surrender of the same to the secretary of the firm, whereupon new certificates shall be executed to the transferees in the same manner as the original certificate, and that such transferee shall be entitled to all the rights and privileges of an original holder, and subject to all the liabilities of the firm that shall accrue after such transfer, and that the secretary shall keep a certificate book and register the issuance and transfer of such certificates, and none but those appearing by said records as being holders of certificates shall be entitled to dividends or to vote on the officers of such partnership. The articles also provide for a certain form of certificate to be issued, with a blank certificate of assignment on the back thereof. The agreement further provides that the owner of such assignment shall have the right to transfer, sell, or hypothecate the same without the consent of the other owners of certificates or the officers, but that no person shall be entitled to exercise the rights of a partner or share in the dividends, unless his certificate has been recorded in the registry book of the firm. It further provides that such certificates may be levied on by writs of execution or other legal process in the same manner as shares of stock in a corporation may be levied upon, and that the purchaser at such sale of the shares of a partner in such business, or at any sale by virtue of any contract made by the partner, shall be entitled to have issued to him, upon producing proper authority of such purchase, the certificate or certificates of such shares. Provision is made for the management of the business of the copartnership by an executive committee, and for the election of certain officers, and that the profits of the business shall be divided annually among the certificate holders according to their several interests. That upon the organization of the firm J. S. McDonnell became the owner and holder of certificates Nos. 15 and 16, each representing 100 shares; the whole being of the par value of $20,000. That this plaintiff and certain other persons mentioned in the bill were partners doing business as brokers in the city of New York under the firm name of N. L. Carpenter & Co. That the said McDonnell, being indebted to them in a large sum of money, over $23,000, had pledged these certificates with said firm, having properly indorsed them as required by the articles of copartnership; that on October 20, 1913, N. L. Carpenter & Co. instituted an action in the Supreme Court of the State of New York, for the county of New York, which is a court of general jurisdiction of said state, against J. S. McDonnell, the pledgor, asking for a foreclosure of the certificates which they had in their possession in the city of New York. That the said McDonnell being a nonresident of the state of New York, no personal service could be had on him in that state, an order was made by that court for substituted service to be made in the city of Little Rock, Ark., in accordance with the laws of the state of New York. That such personal service was made on the said McDonnell in the city of Little Rock, state of Arkansas, and due proof thereof made in conformity with the laws of the state of New York. That on the return day said McDonnell failed to appear or plead to said complaint, and thereupon, on the 14th day of April, 1914, the case being duly reached, a judgment by default was rendered in said cause, decreeing that the pledged certificates be sold at public auction in the city of New York by a referee appointed for that purpose, in conformity with the laws of the state of New York, and that the said referee execute to the purchaser of such certificates a transfer and conveyance thereof and all the right, title, and interest of the defendant J. S. McDonnell in and to the same and in and to the share of the capital of Beal-McDonnell & Co., and that his equity of redemption be forever foreclosed. That out of the proceeds the costs of the action be paid, and the sum of $23,315, with interest be paid to the plaintiffs; that being the amount found due them on the transaction for which the certificates were pledged. That on May 8, 1914, the referee, in pursuance of said judgment, sold said certificates at public sale, and Nathaniel L. Carpenter, the plaintiff in this action, became the purchaser thereof. That on the 21st day of May, 1914, the referee having reported to the court his action and sale in pursuance of the decree, the sale was confirmed by the court, and

thereupon the said referee made the transfers of the certificates to this plaintiff in conformity with the decree of the court.

Exemplified copies of all the proceedings in the Supreme Court of the state of New York are filed as exhibits with the bill.

The complaint then charges that plaintiff caused said certificates, with said transfers, assignments, and conveyances to him, to be presented to the president and secretary of said Beal-McDonnell & Co. at their office in the city of Little Rock, Ark., together with a properly exemplified copy of the record of proceedings had in the Supreme Court of the state of New York, and requested cancellation of said certificates and the issuance to him of new certificates representing the said transfer, and also the payment to him of all dividends which had been earned and declared on said shares of J. S. McDonnell, which they refused to do.

The defendants filed an answer to this complaint, admitting the organization of the firm of Beal-McDonnell & Co., as set out in the complaint, and alleged that since then the name had been changed to Beal-Burrow & Co., but denied all other allegations in the complaint, and denied the jurisdiction of the New York court to enter the decree mentioned in the complaint on substituted service. They also pleaded that, prior to the institution of this suit, the said J. S. McDonnell had sold his interest in the firm of Beal-McDonnell & Co. to the defendant James L. Dibrell, who requested the officers of said firm to transfer to him the certificates issued to the said McDonnell, including those set out in the complaint; that he was unable to surrender said certificates Nos. 15 and 16, and said firm declined to issue him new certificates, but made entries of said sale and transfer of the interests of the said J. S. McDonnell to James L. Dibrell upon the proper books of the firm.

The defendant James L. Dibrell, in addition to the answer which was filed by him and all the other defendants as aforestated, filed a separate answer, in which he sets up a purchase of the certificates in controversy from McDonnell, and further charges that if the proceedings in the Supreme Court of the state of New York, as alleged in the complaint, were had, they were founded on a demand which grew out of agreements for the sale of cotton on margin, commonly called "dealings in futures," which were made and to be performed wholly or in part in the state of Arkansas, in which dealings it was never intended by the parties thereto, or either of them, that an actual delivery of cotton should be made, but, on the contrary, it was the intention of one or both of the parties to said transaction to receive or pay the difference between the agreed price and the market price at the time fixed for settlement, and that the said dealings were gambling contracts and are expressly prohibited and made illegal and void under the laws of the states of Arkansas and New York, and any judgment thereon is void under the laws of Arkansas and New York.

The plaintiff has filed a motion to strike out that part of the additional answer of the defendant Dibrell which pleads that the consideration of the transaction between McDonnell and N. L. Carpenter & Co. arose out of a gambling transaction.

Cockrill & Armistead, of Little Rock, Ark., for plaintiff.

Mehaffy, Reid & Mehaffy and Moore, Smith & Moore, all of Little Rock, Ark., for defendant.

TRIEBER, District Judge (after stating the facts as above). [1] There are two contentions made by counsel for plaintiff which can be disposed of without incumbering this opinion with a large number of citations: (1) That the contract alleged to have been a mere wager, having been fully executed by the delivery of the certificates, cannot be disturbed; (2) that if the plaintiff does not require the aid of an illegal transaction to establish his claim he may recover, although the consideration of his claim was unlawful.

These rules are no doubt correct in a certain class of cases, but are clearly inapplicable when the action is to enforce a note or security given in payment of a debt which, either by statute or the common law, are absolutely void. That gambling debts belong to that class cannot be denied. The note or security can, in the nature of things, only be given after the contract therefor had been made or the debt incurred, and, in an action to enforce them, the plaintiff establishes his claim prima facie by the mere production of the instruments without further proof. If the defendant's mouth is closed, as claimed by counsel, because the contract had been executed by the execution and delivery of the note or securities, and the plaintiff makes out his prima facie case by the mere production of them, without any necessity of showing the consideration, the law declaring all such instruments void is no better than a piece of waste paper. That such a plea is good, see Embrey v. Jemison, 131 U. S. 336, 348, 9 Sup. Ct. 776, 33 L. Ed. 172; Mackin v. Shannon (C. C.) 165 Fed. 98, and authorities there cited. As stated in Wooden v. Shotwell, 24 N. J. Law, 789:

> Statutes declaring such contracts void can only be enforced by permitting the party, though he is in pari delicto, to claim the invalidity of the transaction.

The same rule has been applied in cases involving usury statutes. Houghton v. Burden, 228 U. S. 161, 169, 33 Sup. Ct. 491, 57 L. Ed. 780; Ringer v. Virgin Timber Co. (D. C.) 213 Fed. 1001.

The two more serious propositions raised are:

(1) Can a third person, privy in estate to the original maker of the contract, set up the defense that the pledge was delivered by his grantor to secure a gambling transaction?

(2) Can the judgment of a court of New York in an action in rem, the res being within the court's jurisdiction, obtained on substituted service, without the defendant's appearance, be collaterally attacked in a foreign court upon the ground that the consideration of the contract was a gaming transaction?

[2] I. That dealings in futures, when both parties intend, as alleged in that part of the answer sought to be stricken out, that there should be no deliveries, but only a settlement of the differences between the contract and the market price at a time fixed for executing the contract, are nothing but wagering or gambling contracts, which are illegal and void as being against public policy, even without the aid of the statute, is as well settled as any proposition of law. Irwin v. Williar, 110 U. S. 499, 510, 4 Sup. Ct. 160, 28 L. Ed. 225; Embrey v. Jemison, supra; Clews v. Jamieson, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183; Metropolitan National Bank v. Jansen, 108 Fed. 572, 47 C. C. A. 497; Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284; Ware v. Pearsons, 173 Fed. 878, 98 C. C. A. 364.

[3] The contract or conveyance being absolutely void, any party privy in estate or blood may attack it, for the simple reason that, the conveyance being void, nothing passed by it. The question has been frequently before the courts in cases where a statute declares bonds, bills, and conveyances void if in violation of the usury statutes, and the great weight of authority is to the effect that the invalidity may be

pleaded by any party privy in blood or estate to the vendor, mortgagor, or assignor. Lloyd v. Scott, 4 Pet. 205, 230, 7 L. Ed. 833; Crawford v. Nimmons, 180 Ill. 143, 54 N. E. 209; Lillenthal v. Champion, 58 Ga. 162; Post v. Dart, 8 Paige (N. Y.) 639; Cole v. Savage, 10 Paige (N. Y.) 592; Maloney v. Eaheart, 81 Tex. 284, 16 S. W. 1031; Brooks v. Avery, 4 N. Y. 229; Trusdell v. Dowden, 47 N. J. Eq. 396, 20 Atl. 972; Camden Fire Ins. Co. v. Reed (N. J. Ch.) 38 Atl. 667; Cobe v. Summers, 143 Mich. 117, 106 N. W. 707; Washington Nat. B. & L. Ass'n v. Andrews, 95 Md. 696, 53 Atl. 573.

In Pipkin v. Williams, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241, it was held, citing numerous authorities, that if a statute declares a conveyance of the homestead by the husband, without the wife joining in the deed, as required by statute, void, a third person, privy in estate, may attack such a conveyance. To the same effect is Bank of Harrison v. Gibson, 60 Ark. 269, 277, 30 S. W. 39. In the last case a junior mortgagee filed a bill to cancel a prior mortgage upon the ground that it was upon the homestead of the mortgagor, and the wife had not joined in its execution in the manner prescribed by the laws of the state, and it was held that it was void as against the junior mortgagee, whose mortgage was properly executed.

[4] II. Can the judgment of a New York court, obtained in a proceeding in rem by default on substituted service, be collaterally attacked in a court of another state upon the ground that the consideration of the judgment is a wagering transaction, such as is set out in the answer?

The validity of this judgment on its face was sustained by this court orally on a motion to dismiss the complaint upon the authority of Merritt v. American Steel Barge Co., 79 Fed. 228, 234, 24 C. C. A. 530 (8th Circuit), and Ryan v. Seaboard, etc., R. R. Co. (C. C.) 83 Fed. 889.

Article 4, § 1, of the Constitution of the United States, provides:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

To carry this provision into effect, Congress, by the act of May 26, 1790 (1 Stat. 122, c. 11; Rev. Stat. § 905 [Comp. St. 1913, § 1519]), provided that the records and judicial proceedings of any state or territory, when authenticated as prescribed by the act, "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

That under the laws of the state of Arkansas such a judgment would be absolutely void was, for the purpose of this motion, not controverted.

While it is true that courts of one state will not enforce contracts which are void, when against the public policy of that state, although they are valid under the laws of the state where made and to be executed (Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539), this rule does not apply to judgments which are protected by the constitutional provision above set out.

There are some authorities relied on by counsel for both parties which, in the opinion of the court, when read in the light of the facts to which the principles there announced were applied, are distinguishable, and therefore inapplicable to the issues involved in the instant case.

In Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039, claimed on behalf of plaintiff to be conclusive, the judgment attacked was not based on the original transaction, but on an award of arbitrators made in pursuance of an agreement of the parties. The defendant had been duly served with process within the jurisdiction of the Missouri court, in person, and defended the action in that court by pleading that the award was based on a transaction made in the state of Mississippi for futures to be settled on the difference of prices, without any actual deliveries to be made, and which contracts were void and unenforceable in the courts of that state. Evidence to establish that fact was offered by him on the trial in the Missouri court, but by that court excluded, and a final judgment rendered against him. No appeal was taken from that judgment, and suit was instituted on it in a court of the state of Mississippi, which declined to enforce it. Mr. Justice Holmes, who delivered the opinion of the court reversing the Supreme Court of Mississippi, said on page 237 of 210 U. S., on page 643 of 28 Sup. Ct. (52 L. Ed. 1039):

"Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question but that the judgment was conclusive in Missouri on the validity of the cause of action."

And again, on page 238 of 210 U. S., on page 643 of 28 Sup. Ct. (52 L. Ed. 1039):

"In this case the Missouri court no doubt supposed that the award was binding by the laws of Mississippi. If it was mistaken, it made a natural mistake. The validity of its judgment, even in Mississippi, is, as we believe, the result of the Constitution as it always has been understood."

Nor are Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366, and the other cases involving the validity of decrees in actions for divorce, rendered on constructive service in courts other than where the parties actually resided, and which are relied on by the defendant, in point. What was determined in those cases was that, where the jurisdiction of the foreign court depends upon domicile, that question is open to re-examination in the courts of another state asked to give the judgment full faith and credit, in order to determine whether the court which rendered the decree had jurisdiction—a question always open. Burbank v. Ernst, 232 U. S. 162, 163, 34 Sup. Ct. 299, 58 L. Ed. 551.

Nor is Wisconsin v. Pelican Insurance Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, relied on by the defendant, applicable to the issues involved herein. There the court had to determine its own jurisdiction, which, by the Constitution, is limited to controversies of a "civil nature," and it was held that an action to recover a penalty is not "a controversy of a civil nature," and it was its duty to inquire what the cause of action which it is called on to adjudicate was in order to

determine whether it had jurisdiction of the cause, and to ascertain that fact it could examine the cause upon which the judgment was based. This is fully explained in Fauntleroy v. Lum, supra, 210 U. S. 236, 28 Sup. Ct. 641, 52 L. Ed. 1039.

The full-faith and credit clause of the Constitution has been construed so many times, and so uniformly, by the Supreme Court, that there is no room for doubt as to what effect is to be given to it at this day. The leading cases on that subject were determined over 100 years ago (Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411; Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378), and followed ever since; the latest reported case being Roller v. Murray, 234 U. S. 738, 745, 34 Sup. Ct. 902, 58 L. Ed. 1570. The rule thus established is that a "judgment of a state court should have the same credit, validity, and faith in every other state in the United States which it has in the state where pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States."

It is equally well settled that the Constitution does not require that any greater force be given to a judgment of another state than the law of the state, where pronounced, gives it. Board of Public Works v. Columbia College, 17 Wall. 521, 529, 21 L. Ed. 687; Tilt v. Kelsey, 207 U. S. 43, 57, 28 Sup. Ct. 1, 52 L. Ed. 95; Converse v. Hamilton, 224 U. S. 243, 253, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292.

As stated in the Columbia College Case:

"Any other rule would contravene the policy of the Constitution of the United States on that subject."

The important question, therefore, to be determined, is: What is the effect of this judgment in the courts of the state of New York? Is it conclusive, or can it be avoided in a collateral proceeding upon the ground set up in the answer of the defendant Dibrell, sought to be stricken out.

The statutes of New York on the subject of wagers, bets, and stakes are as follows:

"Sec. 991. All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful.

"Sec. 992. Contracts on account of money or property wagered, bet or staked are void. All contracts for or on account of any money or property, or thing in action wagered, bet or staked, as provided in the preceding section, shall be void.

"Sec. 993. Securities for money lost at gaming void. All things in action, judgments, mortgages, conveyances, and every other security whatsoever, given or executed, by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever, or won by betting on the hands or sides of such as do play at any game, or where the same shall be made for the repaying any money knowingly lent or advanced for the purpose of such gaming or betting aforesaid, or lent or advanced at the time and place of such play, to any person so gaming or betting aforesaid, or to any person who, during such play, shall play or bet, shall be utterly void, except where such securities, conveyances or mortgages shall affect any real estate, when the same shall be void as to the grantee therein, so far only as hereinafter declared."

The act of April 9, 1913 (Laws of New York 1913, c. 236), amending the penal laws of the state in relation to bucket shops, is a penal act entirely, and contains nothing in reference to civil actions. It makes it a felony to do any of the acts forbidden by that statute; but it does not declare judgments and conveyances based on such transactions void, as does section 993 of the Code. Hence the question is: Does section 993 apply to transactions of the nature set out in the answer?

Neither counsel nor the court have been able to find any authoritative ruling by the New York courts on this question (i. e., the validity of a judgment founded on such a cause of action); hence it must be determined on elementary principles of law, aided by the precedents established by courts of other states, which have similar statutes.

In the absence of a statute invalidating certain judgments, a judgment by a court having jurisdiction of the parties and subject-matter is, when collaterally attacked, conclusive as to all media concludendi, including a judgment based on a gaming or other illegal consideration. With some exceptions, which are immaterial in this case, it is equally well settled that the original cause of action is merged in the judgment. Permitting a judgment to be attacked for causes other than that of jurisdiction or fraud is an exception in the law, in the nature of a proviso, and must be strictly construed. Nor can a person, in the absence of a statute to that effect, recover money lost at gaming, as the courts will aid neither party to an illegal transaction. The authorities on the question of recovering money lost on wagers of this nature, under statutes similar to those of New York (section 993), uniformly hold that such statutes do not apply to ordinary wagers or dealings in futures, where neither party intends that there shall be a delivery, which are treated as wagers, but apply only to money lost by betting at gaming or a gambling device. Connor v. Black, 132 Mo. 150, 33 S. W. 783; Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; Boyce v. O'Dell Comm. Co. (C. C.) 109 Fed. 758 (under the Indiana statute); Dows v. Glaspel, 4 N. D. 251, 60 N. W. 60; Shaw v. Clark, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474.

In Connor v. Black it was said:

"It will be observed that the statute only permits money or property to be recovered which has been lost 'at any gaming or gambling device.' While this transaction was a wager, and the law will not, in the absence of an express statute, aid either party in enforcing it, it is not a 'gaming or gambling device,' within the meaning of section 5209. The words 'gaming' and 'gambling device' by common use and interpretation had acquired a certain signification long prior to the enactment declaring transactions like this to be gambling."

In Shaw v. Clark, Judge Cooley, delivering the opinion of the court, said:

"In common speech 'gambling' is applied to play with stakes at cards, dice, or other contrivance, to see which shall be the winner and which the loser. A contract for the purchase of options is not gaming, within the meaning of this term. In form it is the purchase of a commodity to be delivered at a future date, and it only resembles gaming in that the parties take a chance of gain or loss without intending that the sale which they nominally make shall ever become a legitimate business transaction. 'Betting,' in common speech, means the putting of a certain sum of money or other valuable thing at stake on the happening or nonhappening of some uncertain event. A purchase of options

is not betting in this sense, though it resembles it in the fact that risks are taken on uncertain events, and that the tendency to those engaged in it is demoralizing. * * * We have no idea that the purchase of options was in the mind of the Legislature when passing the statute against betting or gaming."

In Lester v. Buel, 49 Ohio St. 240, 30 N. E. 821, 34 Am. St. Rep. 556, and Farless v. Morehead, 201 Fed. 310, 119 C. C. A. 548 (also under the Ohio statute), a different conclusion was reached, but it was based on the statutes of that state, which are similar to those of Arkansas, and include all wagers, as will be seen by reference to sections 4270 and 6934a, Revised Statutes of Ohio, set out in the opinion of the court in Lester v. Buel.

While none of the cases cited involved a judgment, they were actions to recover money lost on wagers of this nature under statutes similar to section 993 of the New York Code. By reference to the New York statutes, it will be noticed that while section 992 declares "contracts on account of money or property wagered, bet or staked" void, section 993, which is the section including judgments and conveyances, limits the invalidity to cases where the consideration was "money or other valuable thing won by playing at any game whatever," etc., but does not include ordinary bets or wagers. The maxim, "Expressio unius est exclusio alterius," applies.

As the judgment herein relied on was not on a transaction based on any of the acts mentioned in section 993 of the New York Code, which is the only statute of that state affecting the validity of judgments based on gambling transactions, it is not void under the laws of that state, and being entitled, under the Constitution of the United States, to the same faith and credit it would receive in the courts of the state of New York, is not subject to attack in this collateral proceeding.

The court has not overlooked the fact that in Minzesheimer v. Doolittle, 60 N. J. Eq. 394, 45 Atl. 611, and Campbell v. New Orleans National Bank, 74 Miss. 526, 21 South. 400, 23 South. 25, the courts refused to enforce judgments of courts of other states based on such transactions upon the ground that they contravened the public policy of their respective states. But, with the highest respect for those courts, this court feels unable to follow them, in view of the uniform rulings of the Supreme Court of the United States hereinbefore cited.

The motion to strike out that part of the answer is sustained.

PALMER v. DELAWARE, L. & W. R. CO.

(District Court, N. D. New York. May 3, 1915.)

1. REMOVAL OF CAUSES ⇐108—PROCEEDINGS AFTER REMOVAL—DISCONTINUANCE.

Plaintiff, in an action for personal injuries against a citizen of another state, in which he claimed $5,000 damages, will not be granted leave to discontinue the action after it has been removed to the federal court, and after he has been enjoined from proceeding in another suit in the state court against the same defendant for the same cause of action instituted

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

after the removal of the former suit, in which he claimed only $2,950 damages for the purpose of preventing a removal of that cause to the federal court, unless he will stipulate to discontinue the action in the state court, and not to bring another action against the defendant in any court for the same cause of action.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 217; Dec. Dig. ⊂⊃108.]

2. DISMISSAL AND NONSUIT ⊂⊃18—VOLUNTARY DISMISSAL—DISCRETION OF COURT.

It is within the discretion of the court to grant or refuse leave to plaintiff to discontinue his action, and such leave will be denied or granted only conditionally, where the defendant has acquired some interest or incurred some expense in the action, the benefit of which would be lost by a discontinuance and the institution of another action.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 32; Dec. Dig. ⊂⊃18.]

3. REMOVAL OF CAUSES ⊂⊃97—EFFECT OF REMOVAL—PROCEEDINGS IN STATE COURT—INJUNCTION.

Where a case has been lawfully removed to a federal court under the acts of Congress enacted under its constitutional powers, providing for such removal, the state court has no jurisdiction over the same cause of action between the same parties while the cause is pending in the federal courts; and while the state court cannot be directly enjoined from proceeding with the action for the same cause, the parties thereto may be so enjoined.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 206, 208–211; Dec. Dig. ⊂⊃97.]

At Law. Action by Edwin F. Palmer against the Delaware, Lackawanna & Western Railroad Company. On motion by plaintiff for leave to discontinue the action. Motion denied.

Motion by plaintiff for leave to discontinue this action after removal of this cause from the state court into the United States court; the plaintiff having thereafter instituted another suit in the Supreme Court of the state of New York for precisely the same cause against the same defendant, except that he reduces his demand for judgment and his allegation of damages from $5,000 to $2,950.

Piper & Pendergast, of Fulton, N. Y., for the motion.
Chas. V. Byrne, of Syracuse, N. Y., opposed.

RAY, District Judge. [1] On or about the 26th day of October, 1914, the above-named plaintiff, Edwin F. Palmer, commenced an action in the Supreme Court of the state of New York against the above-named defendant to recover damages for personal injuries by reason of the alleged negligence of defendant, and he alleged and laid his damages at the sum of $5,000 and demanded judgment therefor. Thereupon the defendant, which is a foreign corporation organized under the laws of the state of Pennsylvania, the plaintiff being a citizen and resident of the state of New York, took due and lawful proceeding in due time for the removal of this cause into the United States District Court of the Northern District of New York, in which district said action was pending in the state court, and presented its papers to and filed same with the judge of said Supreme Court at a regu-

lar term being held, and at the same time presented for approval and procured the approval of the bond required and filed same. After being served with notice that at the said time and place the said papers for removal would be presented, etc., the plaintiff, by moving at the same time and place for a discontinuance of the action, sought to discontinue the action, and thus prevent removal and defeat the jurisdiction of this court; that is, the plaintiff, when he discovered that the defendant had availed itself of the right of removal, sought to defeat removal by discontinuing the action, his purpose being to commence another action in the same court against the same defendant for precisely the same cause, except that he purposed to reduce his claim of damages from $5,000 to $2,950, so as to deprive the United States court of jurisdiction of the second action and thus defeat removal.

That this was the purpose is clearly demonstrated by the course pursued and acts done by the plaintiff immediately following the filing of the papers with the judge of the Supreme Court on the application for removal and the order which it was the duty of said court to make. Both applications were presented and heard at the same time, and both were decided at the same time. The judge of the Supreme Court, however, made an order discontinuing the action at the same time that the bond was pronounced sufficient and the papers on removal were filed. Immediately thereafter the plaintiff in the action referred to, and sought to be removed, who had laid his damages at the sum of $5,000 for the acts of negligence complained of, brought another action in the Supreme Court of the state of New York against the same defendant for precisely the same cause of action and on the same allegations, but laid his damages at the sum of $2,950, $50 less than the jurisdictional amount to enable defendant to remove the case. This attempt of the plaintiff in this action removed as above stated, and also plaintiff in the second action brought in the Supreme Court and in the same county, to discontinue this action in favor of the action commenced in the state court after such removal for the same cause, if successful, will operate to deprive the defendant of a substantial right, to wit, the right to remove the trial of the action for the negligence alleged from the Supreme Court of the state of New York to the United States District Court of the Northern District of New York, in which district the alleged cause of action arose, and in which district the plaintiff himself resides.

The question is: Will this court lend itself to practices and evasions of the law of this kind? It is useless for the plaintiff to contend that there was any error or mistake in demanding judgment, or in alleging the amount of damages sustained. The time and circumstances under which this reduction of the claim was made forbids any such conclusion. It is, of course, true that this court cannot compel a plaintiff to demand a greater judgment than he deems himself entitled to. The cause having been removed, if the plaintiff on the trial should stipulate that he is not entitled to more than $2,950 damages, or before trial should move to remand, and stipulate, for the purpose of securing a remand to the state court, that the damages were only $2,950, the court in the last case would refuse to remand, as the right of removal depends upon the pleadings as framed when removal is made, but in

the first case mentioned would, of course, limit the plaintiff on the trial to the damages he voluntarily stipulated as the limit of his right of recovery.

If, on the trial of this action, the plaintiff should see fit to submit to a voluntary nonsuit, the defendant would be powerless to prevent. However, when a plaintiff has brought suit in the state court for a given cause of action, removable to the United States court, and such cause has been removed according to law, jurisdiction vests in the United States court, and this court ought not to lend itself in any way to aid a proceeding or a course of procedure adopted by the plaintiff for the express purpose of ousting this court of jurisdiction, and in effect remanding the cause to the state court for trial through the guise of another action for the same cause between the same parties in the same state court, the only difference being a reduction in the amount of damages claimed. Such a subterfuge for bringing about a remand of the cause, otherwise impossible, ought not to be encouraged or sanctioned. Ordinarily a plaintiff should have the right to discontinue his action; but when it is done, not for the purpose of promoting justice, but for the purpose of defeating justice, and prolonging litigation, and depriving the defendant of a substantial right, the court ought to put its face against it.

[2] The right of the plaintiff to discontinue is not absolute; it is discretionary with the court to allow a discontinuance, or allow it on terms, or refuse it altogether. In Matter, etc., of Waverly Waterworks Co., 85 N. Y. 478, 481, 482. In this case the Court of Appeals held:

"The court, having the right in its discretion to refuse leave to discontinue an action or special proceeding, can determine upon what terms it may grant leave. Its discretion in this respect is not limited to the payment of costs."

In its opinion the court held:

"The court in which an action is pending may impose terms beyond taxable costs as a condition of the discontinuance of the action. It may require the plaintiff to stipulate that he will not sue again for the same cause of action, or that, if he does sue again, the defendant may use the evidence already taken, or that he will not interpose the statute of limitations as a defense to a counterclaim which the defendant has set up in case he should sue the plaintiff thereon, or even that he will pay the counterclaim. The right to impose such conditions grows out of and is included in the right to refuse the discontinuance altogether. * * * When an action or special proceeding has been commenced, the defendant may have an interest that it shall be conducted to its termination, and in such case the court can protect such interest by refusing to permit the action or proceeding to be discontinued, or it may impose such reasonable terms as a condition of discontinuance as will fully protect or indemnify the defendant."

This is, of course, in accord with common sense and the due administration of justice. The rule thus declared applies here in all its force, where the defendant has not only an interest, but a statutory right arising under an act of Congress, to have this alleged cause of action tried out in the District Court of the United States, to which the action was removed for trial. The case above cited has been frequently referred to, and cited and approved. See Winans v. Winans, 124 N. Y. 140, 144, 26 N. E. 393. In this case the court said:

"An application for leave to discontinue an action is addressed to the legal, not the arbitrary, discretion of the court, and it may not be denied capriciously, but may be refused whenever circumstances exist which afford a basis for the exercise of legal discretion; in such a case the court has but to consider whether anything has occurred since the commencement of the action which would so far prejudice defendant's interest, in the event of a discontinuance, as to require a denial of the application."

See, also, to same effect, In Matter of Probate of Will of Lasak, 131 N. Y. 624, 30 N. E. 112; Carleton v. Darcy, 75 N. Y. 375; Young v. Bush, 36 How. Prac. (N. Y.) 240.

In Matter of Petition of Butler, 101 N. Y. 309, 4 N. E. 518, Judge Finch said:

"A party should no more be compelled to continue a litigation than to commence one, except where substantial rights of other parties have accrued, and injustice will be done to them by permitting the discontinuance."

In this case now before this court, it is not sought to compel the plaintiff to "continue a litigation," but, *if he insists on continuing it,* that it be carried on in that tribunal to which it was removed for trial, and to which the defendant had the legal and the equitable right to remove it for trial, and which tribunal the plaintiff is now seeking to avoid by bringing a second action for precisely the same cause against the same defendant in another court, but reducing the damages claimed in his second action, plainly for the purpose of avoiding and preventing a removal of such second action to this court, where the first action is now pending. The plaintiff is insisting on continuing the litigation for this precise cause between the same parties, but seeks to compel the defendant, who brought the action lawfully into this court for trial, to go into the state court again, and where, should this action be discontinued, the plaintiff on the trial of the second action might (as has been done many times) ask to amend by increasing his demand for judgment.

The same rule above stated prevails in the federal court. In American Steel & Wire Co. v. Mayer & Englund Co. (C. C.) 123 Fed. 204, it was held that, where the defendant had expended time and effort in gathering testimony, the condition, on discontinuance, might be imposed, and should be imposed, that the plaintiff should consent to the perpetuation of such testimony and an arrangement for its use in any subsequent litigation between the same parties involving the same subject-matter.

[3] The constitutional right of Congress to provide for the removal of causes from the state to the federal courts is settled (Tennessee v. Davis, 100 U. S. 257, 265, 25 L. Ed. 648, 651); and "the Legislature or the judiciary of a state can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the state into the Circuit [now District] Court of the United States, *nor limit the effect of such removal*" (Goldey v. Morning News, 156 U. S. 518, 523, 15 Sup. Ct. 559, 39 L. Ed. 517, 519; Madison Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. Ed. 462). And the state court cannot do that indirectly which it cannot do and is forbidden to do directly. While the state court itself may not be enjoined from proceeding in the state court on the same cause

of action, the parties to the action may be. Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. Ed. 462. In this case the Supreme Court of the United States held:

"After the presentation of a sufficient petition and bond to the state court in a removable case, it is competent for the Circuit Court, by a proceeding ancillary in its nature—without violating section 720, Rev. St., forbidding a court of the United States from enjoining proceedings in a state court—to restrain the party against whom a cause has been legally removed from taking further steps in the state court."

See the many cases cited in the opinion.

In this case this ancillary proceeding has been taken, and this court has duly enjoined this plaintiff from taking further proceedings in the state courts of the state. Hence this motion to discontinue. And while the action is pending in the federal court the state court cannot obtain and exercise jurisdiction over the same cause of action between the same parties through a second action in the same state court, commenced after such removal to the federal court. The plaintiff in the action may be enjoined from prosecuting such second action in the state court. Madisonville Traction Co. v. St. Bernard Mining Co., supra. However, "*after* a case properly removable and removed into the federal court has been voluntarily dismissed *without action on the merits*, the case is again at large, and plaintiff may begin it again in any court of competent jurisdiction, including the state court from which the first case was removed into the Circuit Court." Southern Railway Co. v. Miller, 217 U. S. 209, 213, 216, 217, 30 Sup. Ct. 450, 452 (54 L. Ed. 732). In this last-cited case the Supreme Court of the United States decided that:

"While it is true that a compliance with the act of Congress entitling the party to remove the case may operate to end the jurisdiction of the state court, notwithstanding it refuses to allow such removal, it by no means follows that the state court may not acquire jurisdiction *in some proper way* of the *same cause of action after the case has been dismissed* without final judgment in a federal court. By complying with the removal act the state court lost its jurisdiction, and upon the filing of the record in the federal court that court acquired jurisdiction. It thereby had the authority to hear, determine, and render a judgment *in that case to the exclusion of every other court*. But where the court permitted a dismissal of the action by the plaintiff, it thereby lost the jurisdiction which it had thus acquired."

It is apparent from these decisions of the highest courts of the United States and of the state of New York that:

1. This case, involving directly this cause of action between these parties and nothing else, was commenced in the state court of the state of New York and duly and properly removed into the District Court of the United States, Northern District of New York, for trial, and that thereupon this court acquired jurisdiction of the case and of the cause of action.

2. That this court now has such jurisdiction and control over it and the parties, and had same when the second action for the same cause was commenced in the state court.

3. That defendant having properly availed itself of the removal statute, and moved the case, and this cause of action, into the federal court for trial, it thereby exercised a statutory right and gained the right,

a substantial one, to have the case for this cause of action tried and determined in the federal court. This right the defendant asserts and interposes as a defense to this motion, whereby it is plainly sought by the plaintiff to deprive the defendant of such substantial right, deprive this court of jurisdiction, and *in effect* bring about a remand, which cannot be done directly.

4. To grant this motion would operate as a fraud upon the rights of the defendant, as there is no reason for the second action in the state court between the same parties on precisely the same cause of action, except to secure a trial in the state court; and plainly the discontinuance of this action in the federal court is sought in order that the same cause of action between the same parties may be tried in the same state court from which this action was removed, the damages *claimed* being reduced, so as to prevent removal of such second action.

5. The defendant has availed itself of the right to enjoin the plaintiff from proceeding further in the state court, and he is now under such injunction.

6. This court is of the opinion that in the exercise of its discretion this motion to discontinue in this court should be denied, and that to grant the motion, under the circumstances and in view of the facts disclosed, would be an abuse of discretion.

This action in the federal court can be as speedily tried as the case in the state court. It is now on the calendar, and court is in session in Syracuse, and another term of the court will be held in Syracuse during June, and that city is but a few miles distant from Fulton, where the alleged cause of action arose.

The motion to discontinue is denied, unless plaintiff will stipulate to discontinue the second action brought in the state court, and not again bring action against the defendant in any court on this cause of action. If such stipulation is executed and filed, the motion to dismiss is granted.

WILLIAMS v. WILSON FRUIT CO.

(District Court, D. Idaho, S. D. May 6, 1915.)

1. REMOVAL OF CAUSES ⊜79—TIME FOR REMOVAL—EXTENSION OF TIME TO PLEAD.

Assuming that under Judicial Code (Act March 3, 1911, c. 231) § 29, 36 Stat. 1095 (Comp. St. 1913, § 1011), requiring petitions for removal to be filed before defendant is required to answer or plead to the declaration or complaint, an order of the state court extending the time to plead operates to extend the time for removal, where an order extending the time to plead recited that it was made on condition that the action might be placed on the calendar for a term commencing within a few days, and set for trial on such day as the court might be able to try it, though no answer or note of issue was filed, and at the foot of such order defendant's attorney agreed to such condition, and accepted the extension of time on such condition, with no suggestion of any understanding that the cause might be removed, notwithstanding such consent, the time for removal was not thereby extended; it being apparent that the court

⊜For other cases see same topic & KEY-NUMPER in all Key-Numbered Digests & Indexes

would not have extended the time, except upon the agreement that such extension should not operate to delay the trial.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 135, 136, 139–160; Dec. Dig. ⊂⊃79.]

2. REMOVAL OF CAUSES ⊂⊃79—TIME FOR REMOVAL—EXTENSION OF TIME TO PLEAD.

In the absence of a standing rule upon the subject in the state court, a stipulation by plaintiff extending defendant's time to plead or answer does not extend the time to remove the cause to the federal court, unless plaintiff's consent to such extension is expressed therein.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 135, 136, 139–160; Dec. Dig. ⊂⊃79.]

3. REMOVAL OF CAUSES ⊂⊃81—TIME FOR REMOVAL—WAIVER.

The time for removing a cause to the federal court does not pertain to the jurisdiction, and the statutory limitation of the time for removal may be waived by plaintiff.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 137, 138; Dec. Dig. ⊂⊃81.]

4. REMOVAL OF CAUSES ⊂⊃79—TIME FOR REMOVAL—EXTENSION OF TIME TO PLEAD.

A state court cannot, without plaintiff's consent, by an order extending defendant's time to answer or plead, enlarge the time for filing the petition to remove a cause to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 135, 136, 139–160; Dec. Dig. ⊂⊃79.]

At Law. Action by Kate L. Williams against the Wilson Fruit Company. On motion to remand to the state court. Motion granted.

J. J. McCue and J. C. Johnston, both of Boise, Idaho, for plaintiff.
McCready Sykes, of Boise, Idaho, for defendant.

DIETRICH, District Judge. [1] This cause was originally commenced in the district court of the Third judicial district of the state of Idaho, in and for Ada county. Summons was served on January 18, 1915, and thereby the defendant was required to appear and plead on or before February 17th. Thereafter this time was extended by stipulation until April 2d. In the meantime a motion for a receiver had been made by the defendant, with authority to issue receiver's certificates for certain purposes, which it is unnecessary here to explain. This motion had been submitted prior to, and was under advisement on, April 2d. Upon that day, without the consent or participation of counsel for the plaintiff, so far as the record shows, the court made the following order:

"Upon condition that the above-entitled action may be placed on the trial calendar for April, 1915, called on April 5, 1915, and set for trial on such day as the court may be able to try the same, although no answer is filed, or note of issue filed, by said April 5, 1915, the time of defendant to answer herein is hereby extended to and including four days after the date of the order of this court decisive of said defendant's motion herein for the appointment of a receiver, and the authorization of receiver's certificates."

At the foot of the order there is the following:

"As counsel for defendant, I hereby agree to the express conditions of the above order, and accept the extension of time above granted upon such conditions. McCready Sykes, Attorney for Defendant."

Thereafter, on April 5th, the case was set down for trial for April 21st. The court being otherwise engaged, however, no trial was had upon the date fixed, and on April 24th, and within the time allowed by the order to answer, the defendant, in the form provided by law, filed its petition and bond for removal. The transcript of the record has been brought into this court by the plaintiff, who moves to remand, upon the ground that the removal proceedings were not taken within the time allowed by law. Section 29 of the Judicial Code provides that:

> Whenever any party entitled so to do desires to remove a suit from the state court to a federal court, "he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of * * * plaintiff, for the removal of such suit," etc.

The contention of the defendant is that, by virtue of the stipulations extending its time to appear and plead, the time within which it had the right to petition for removal was extended to April 2d, and that the order of April 2d enlarging the time to answer correspondingly enlarged the time for removal.

Upon the general question of the efficacy of a stipulation or order extending the time for pleading in the state court, to enlarge the time for removal proceedings, great diversity of opinion is disclosed in the decided cases. There is an apparent want of harmony even in this circuit. See Tevis v. Palatine, etc. (C. C.) 149 Fed. 560 (decided by Judge Wolverton); Heller v. Ilwaco, etc. (C. C.) 178 Fed. 111 (decided by Judge Bean); Hansford v. Stone-Ordean, etc. (D. C.) 201 Fed. 186 (decided by Judge Bourquin); Adams v. Puget Sound, etc. (D. C.) 207 Fed. 205 (decided by Judge Neterer). Many cases both pro and con are cited in 34 Cyc. 1276. Illustrative of the view that the period for removal proceedings cannot thus be enlarged are Ruby Canyon Gold Mining Co. v. Hunter (C. C.) 60 Fed. 305, and Wayt v. Standard, etc. (C. C.) 189 Fed. 231.

If we assume that a stipulation for time to plead in the state court operates to extend the time to remove, the defendant's time for such removal was thus extended only to and including the 2d day of April. If we further assume that a special order made by the state court granting further time to plead enlarges the time for removal, it is to be noted that the order of April 2d was upon the condition, expressly assented to by the defendant, that the cause should be placed upon the trial calendar for April, and called on April 5th, and set for trial at some date thereafter to suit the court's convenience. This was equivalent to a consent that the cause be tried upon its merits in the state court. It is suggested in the argument that it was known by the state court that the defendant did not intend to waive its right to remove; but there is nothing in the record to support that view, and the record facts must control. If there was any understanding that the defendant might at any time, notwithstandng its consent to a setting of the case for trial, remove the cause to the federal court, that understanding should in some way have been expressed in, or at least suggested by, the order; but the order and the consent thereto attached un-

equivocally convey the idea that the court would not have extended the time to answer, except upon the agreement that such extension should not operate to delay the trial of the cause, and, if removal can now be had, delay beyond what was contemplated will necessarily ensue. Defendant is bound by the conditions upon which the extension was made, one of which was that a trial should be had at such time as the state court should designate. Manifestly, if it can now bring the cause here, it will wholly escape the performance of this condition. Even among those cases in which it is held that stipulations and orders extending the time to plead operate to extend the time for removal proceedings, none is found supporting a removal under similar circumstances.

[2, 3] For these considerations alone, the motion to remand must be allowed. But, lest there be a misunderstanding as to the rule in this jurisdiction, it is appropriate that it be stated in more general terms. In the absence of a standing rule upon the subject in the state court, it is thought that a mere stipulation in, or order of, such court, extending the time to plead, does not operate to enlarge the time for filing a petition on removal. In some jurisdictions at least, where such stipulations are held to extend the time, the doctrine is predicated on the principle of estoppel. But it is difficult to see how a plaintiff can be estopped by his stipulation, unless it expressly or inferentially discloses an intention on his part to extend the time, not only for pleading, but for removal. His mere consent that the defendant may have additional time to plead in the state court does not imply an intent to enlarge the time for removing the cause to another court. It not infrequently happens that the plaintiff is very willing, under the conditions existing in the state court, to extend the defendant's time to plead, especially where such extension will not materially delay the final disposition of the cause. But if such extension ipso facto operates to enlarge the time to remove, the plaintiff may thus by inadvertence be doing the very thing which he is anxious to avoid, and a defendant may thus be enabled, by waiting until after the expiration of the term in the federal court, and then removing the cause from the state court, to very greatly delay the progress of the litigation. It is plainly the intent of the removal statutes that removals shall not be resorted to as dilatory measures. Moreover, if, as seems to be the view in some jurisdictions, such a stipulation ipso facto extends the time to remove, it is manifestly quite impossible to stipulate for an extension of time to plead without extending the time to remove. An express reservation in the stipulation, or any other unequivocal act, by which the plaintiff may attempt to guard against extending the time for removal, will be futile. I see no reason why it should be held that the plaintiff is without the power to waive the limitation of the time for removal. Time does not pertain to the jurisdiction; it is formal and modal, and for that reason may be waived by the party for whose benefit it is intended. Powers v Chesapeake, etc., Ry. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. But such waiver is not effected by a stipulation which purports only to extend the time to plead. If the defendant desires further time to remove, the consent of the plaintiff to an extension should be expressed, as well as his consent to enlarge the time to plead.

[4] I am further of the opinion that without the consent of the plaintiff the state court cannot, by order, enlarge the time for filing the petition on removal. The limitation can be waived or set aside only with the consent of the party for whose benefit it is provided.

Let an order be entered remanding the cause to the state court.

DULL v. LE FEVRE et al.

(District Court, E. D. Washington, N. D. June 26, 1914.)

No. 1736.

1. TAXATION ⟸335—ASSESSMENT—NATURE OF PROPERTY—ESTOPPEL.

Where the character of the title of a smelting company, authorized by Act April 28, 1904, c. 1820, 33 Stat. 567, to construct a smelter and flume on land within an Indian reservation, to the improvements placed on such lands, was fully considered between the taxing officers of the county and the proper officers of the smelting company, and by direction of the company itself the property was listed and assessed as personal property, the assessment and a sale for taxes was valid, notwithstanding the claim that title to the land passed to the smelting company and that the improvements were therefore a part of the realty, as a taxpayer is bound and estopped by his own statements as to the nature, title, and value of his property in a list which he returns for taxation, though he can prejudice no one else by listing property which he does not own, nor can he make such a list a covenant for a title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 562; Dec. Dig. ⟸335.]

2. CORPORATIONS ⟸560—RECEIVERS' SALES—TIME AND NOTICE OF SALE.

Where the receiver of a corporation, ordered by the court which appointed him to sell the property of the corporation on a specified date, was enjoined from making the sale on that date, a subsequent sale by him several months later, without any further order from the court by which he was appointed, and without any other or further notice of sale, was a nullity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253–2260, 2262; Dec. Dig. ⟸560.]

3. PUBLIC LANDS ⟸39—GRANTS FOR TOWN SITE—TITLE.

Under Act March 3, 1905, c. 1479, 33 Stat. 1064, directing the Secretary of the Interior to set apart a tract of land not exceeding 120 acres in extent, adjacent to lands owned by a smelting company in an Indian reservation, suitable in its location for a town site, and to convey such land to such person as might be designated by such company to receive title, upon payment by the company of such price as might be fixed by him, the person designated by the corporation to receive title to the town site became a mere naked trustee, and took no beneficial interest in the grant from the government.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 83–90, 92–99; Dec. Dig. ⟸39.]

In Equity. Bill by A. J. Dull against A. J. Le Fevre and others. Decree rendered.

O. C. Moore, of Spokane, Wash., for plaintiff.

McCarthy & Edge, of Spokane, Wash., for defendants.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

RUDKIN, District Judge. The Act of Congress of April 28, 1904 (33 Stat. 567), provides as follows:

"That the Secretary of the Interior be, and he is hereby, authorized and directed to permit the Kellar & Indiana Consolidated Smelting Company, a corporation organized under the laws of the state of Washington, to construct a smelter in the immediate vicinity of the San Poil river, in the south half of the Colville Indian reservation; that the smelter shall be located on the San Poil river, and that permission be granted to construct a flume from the site of the smelter to a point on the San Poil river where a water supply can be made available; that six acres of land be set aside for the site of the smelter, and a strip of land of sufficient width allowed for the erection * * * of the flume; that permission shall be given to the Kellar & Indiana Consolidated Smelting Company to purchase timber and stone necessary for the work of construction; that the Secretary of the Interior shall permit the work to be done under such rules and regulations as he may prescribe, and he shall also prescribe the prices the said Kellar & Indiana Consolidated Smelting Company shall pay for the land, the stone, and the timber used in the construction works: Provided, that the laws regulating intercourse with Indians shall be applicable to the lands set aside under this act, so long as the south half of the Colville reservation remains as an Indian reservation."

The Act of March 3, 1905 (33 Stat. 1064), provides as follows:

"That the Secretary of the Interior be, and he is hereby, authorized and directed to set apart a tract of land not exceeding one hundred and twenty acres in extent, immediately adjacent to the lands now owned by the Kellar & Indiana Consolidated Smelting Company, in the south half of the Colville Indian Reservation, in the state of Washington, suitable in its location for a town site, and that he cause the same to be conveyed to such person as may be designated by said company to receive title thereto, upon payment by said company of such price as may be fixed by him, and that the money received therefrom shall be deposited in the treasury of the United States to the credit of the Colville Indians."

It appears from the amended bill of complaint that the selection for the smelter site and the flume and power site were approved by the Secretary of the Interior on the 7th day of July, 1906; that prior to the 27th day of September, 1911, the company had, at a cost of more than $200,000, constructed and completed a plant on the sites thus selected, had fully equipped the same with all necessary machinery for the treatment, reduction, and smelting of ores, had constructed a flume from the smelter to the power site, and had equipped a sawmill plant and other expensive improvements necessary for the conduct of its business; that all such improvements were constructed on and attached to the above-described lands, with the intention that the same should become permanently attached thereto, and that the same did in fact become permanently attached thereto and a part thereof; that for the years 1909 and 1910 the county assessor of Ferry county, in which such improvements are situate, assessed the same as personal property for the purposes of taxation, and that on the 27th day of September, 1911, the sheriff of Ferry county sold such improvements to the defendant Le Fevre at tax sale for the sum of $2,175.98 and issued his bill of sale therefor. The regularity of the tax proceedings is not questioned, but the plaintiff contends that the improvements were erroneously assessed as personal property, and that the assessment was therefore void.

It further appears that the Kellar & Indiana Consolidated Smelting Company designated its president, one Robert L. Boyle, as the person to receive title to the town site referred to in the act of March 3, 1905, and that patent issued to him under the provisions of that act. It further appears: That an action was commenced in the superior court of Ferry county by the filing of a complaint on the 17th day of May, 1912, entitled "L. P. Farr, Plaintiff, v. Kellar & Indiana Consolidated Smelting Company, Defendant." That on the same day a receiver was appointed for the property and assets of the corporation. That on the 11th day of June, 1912, the receiver filed his report, and on the 26th day of June, 1912, a petition for an order authorizing the sale of the property and assets of the corporation. That on the 24th day of June, 1912, on the petition to sell, it was ordered:

> That the prayer of the petition be granted; that all the real and personal property of the defendant corporation be sold; "that said receiver is ordered to advertise said real and personal property for sale by public notice thereof for two consecutive weeks in the Republic News Miner, a paper of general circulation, published at Republic, Ferry county, state of Washington; that said sale be conducted by him on the 20th day of July, 1912, at 10 o'clock a. m., at Kellar, Ferry county, state of Washington, at the receiver's residence, at public auction; and that bids be received by him for the property belonging to said company at said time."

Notice of this sale was published as directed by the court, but the sale was thereafter enjoined from time to time until the 9th day of November, 1912, by orders of this court in certain bankruptcy proceedings pending against the corporation. On the 9th day of November the property was offered for sale by the receiver without any further order of the court by which he was appointed, and without any other or further notice of sale, and was bid in by the defendants here, or by those under whom they claimed. The sale was later confirmed over the objections of certain of the stockholders, and conveyances were executed by the receiver.

On the foregoing record the following questions are presented: First, did the purchaser of the improvements on the smelter and flume sites acquire any title at the tax sale? Second, did the defendants or their predecessors in interest acquire any right or title at the receiver's sale? And, third, has the defendant corporation any beneficial interest in the townsite?

[1] 1. Under the original bill of complaint it was claimed that the tax upon the improvements on the smelter site and flume site was void, because the title to the real property was vested in the United States, and by operation of law the title to the improvements was vested in the same manner. On motion to dismiss, the court held that, regardless of whether the title to the smelter site and flume site was vested in the government, there was no intention on the part of the government to claim the improvements made thereon, or to exempt them from taxation, and that the improvements were properly assessed and taxed as personal property. The motion to dismiss was therefore granted. Under the amended bill it is claimed that the title to the smelter site and flume site vested in the smelting company under the act of Congress, and that the improvements were wrongfully as-

sessed as personal property, and that the assessment is therefore void.

The character or extent of the title or interest vested in the company under the act relating to the smelter site and flume site is by no means certain or free from ambiguity. It appears from the record, however, that the character of that title was fully considered between the taxing officers of Ferry county and the proper officers of the smelting company, not only during the years 1909 and 1910, but in prior and subsequent years, that the property was listed and assessed as personal property by direction of the corporation itself, and the rule seems to be well established that a taxpayer is bound and estopped by his own statements as to the nature, title, and value of his property made in the list which he returns for taxation, although, of course, he can prejudice no one else by listing property which he does not own, nor can he make such a list a covenant for a title. 37 Cyc. 994. These improvements having been fairly and honestly assessed as personal property by direction of the corporation, the assessment and sale must stand.

[2] 2. The receiver was directed to sell the assets of the corporation on the 20th day of July, 1912, at a certain place and upon a certain notice. This order was the limit and the measure of his authority, and I am constrained to hold that a sale made several months thereafter, without further notice or further authority from the court, is a nullity, and must be set aside. High on Receivers (4th Ed.) p. 234; Ackerman v. Ackerman, 50 Neb. 54, 69 N. W. 388, 392.

[3] 3. There is no room to doubt that the person designated by the corporation to receive title to the town site became a mere naked trustee and took no beneficial interest in the grant from the government. This disposes of every question in the case, except the question of attorney's fees. Without any evidence as to the value of the property recovered, aside from the evidence on the jurisdictional question, it is extremely difficult to fix a reasonable fee. I will fix the fee, however, at $500, subject to a further hearing when the final decree is presented for signature next Monday morning.

Let an order be prepared accordingly.

UNITED STATES v. AVILES et al.

(District Court, S. D. California, S. D. April 27, 1915.)

1. INDICTMENT AND INFORMATION ⇐86—PLACE OF OFFENSE—SUFFICIENCY.

An indictment for a conspiracy, which alleges the formation of a conspiracy within the jurisdiction of the court, without specifying any particular place therein, and which charges that overt acts occurred at places within the jurisdiction of the court, sufficiently charges the venue, for, in a conspiracy case, it is sufficient to charge that some of the overt acts occurred at a place within the court's jurisdiction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 230–243; Dec. Dig. ⇐86.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. INDICTMENT AND INFORMATION ⊂=71—REQUISITES OF INDICTMENT—CONSTITUTIONAL PROVISIONS.

Under Const. U. S. Amend. 6, providing that defendant shall be informed of the nature of the cause of accusation, an indictment must be sufficiently certain as a pleading to enable defendant to make his defense, and to enable him to plead jeopardy to a subsequent indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. ⊂=71.]

3. INDICTMENT AND INFORMATION ⊂=87—TIME OF OFFENSE—SUFFICIENCY.

An indictment for a conspiracy, which sets forth the formation of the conspiracy and the commission of overt acts on or about a certain day in 1914, sufficiently charges the date of the offense, within Rev. St. § 1025 (Comp. St. 1913, § 1691), providing that an indictment is sufficient in matter of form which shall not tend to prejudice defendant, for a date alleged does not confine the prosecution to the proof of the particular date.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 244–255; Dec. Dig. ⊂=87.]

4. CRIMINAL LAW ⊂=662—RIGHTS OF ACCUSED—CONSTITUTIONAL PROVISIONS.

Const. U. S. Amend. 6, providing that defendant shall be confronted with the witnesses against him, only means that defendant is entitled to attend the trial and to hear the witnesses testify, and does not entitle him to a list of the witnesses examined by the grand jury finding the indictment against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3, 1538–1548; Dec. Dig. ⊂=662.]

5. COURTS ⊂=337—FEDERAL COURTS—STATE STATUTES.

State statutes or practice, requiring that the names of the witnesses shall be indorsed on the indictment, are not controlling in the United States Courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 908; Dec. Dig. ⊂=337.]

6. CRIMINAL LAW ⊂=629—WITNESSES BEFORE GRAND JURY—RIGHT OF ACCUSED TO LIST.

The court will not, in advance of the trial of a criminal case, not a capital offense, on the motion of accused, require the United States attorney to give him a list of witnesses examined by the grand jury finding the indictment; but when the case is set down for trial, and the trial is imminent, an application for continuance on the ground that accused has not had an opportunity to prepare for trial for want of knowledge of witnesses the prosecution intended to produce requires the court, in the exercise of its discretion, to continue the case or require a list of the witnesses to be given on the facts justifying such action.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1420–1429, 1432–1436; Dec. Dig. ⊂=629.]

Baltazar Aviles and others were indicted for a conspiracy. On motion to quash indictment and to require the United States attorney to give defendants a list of witnesses examined before the grand jury. Denied.

Albert Schoonover, U. S. Atty., and M. G. Gallaher, Asst. U. S. Atty., both of Los Angeles, Cal., for the United States.

Oscar Lawler and Hunsaker & Britt, all of Los Angeles, Cal., J. C. Cannon, of San Diego, Cal., and Rufus V. Bowden, William Barnhill, and Gibson, Dunn & Crutcher, all of Los Angeles, Cal., for defendants.

TRIPPET, District Judge. This is an indictment for a conspiracy. Certain defendants have moved the court to quash the indictment, and to require the United States attorney to give them a list of the witnesses examined before the grand jury, when the grand jury had under consideration the question of presenting the indictment.

[1] The motion to quash has raised the question that the indictment does not sufficiently charge the venue. The allegation concerning the formation of the conspiracy is simply that it was formed within the jurisdiction of the court, without specifying any particular place or county therein in which the conspiracy was formed. It is not necessary for the court to pass upon the question as to whether such a charge in the indictment sufficiently alleges the venue, for, in a conspiracy case, it is sufficient to charge that some of the overt acts occurred at a place within the jurisdiction of the court. Brown v. Elliott, 225 U. S. 392, 401, 32 Sup. Ct. 812, 56 L. Ed. 1136. In this case several overt acts are charged to have occurred at places within the jurisdiction of the court.

[2] The second proposition is that the indictment is too uncertain. The sixth amendment to the Constitution provides that the defendant shall be informed of the nature and cause of the accusation. The courts have established two principles by which these questions may be decided. Rosen v. U. S., 161 U. S. 30, 16 Sup. Ct. 434, 480, 40 L. Ed. 606. These principles are that the indictment must be sufficiently certain to enable the defendant to plead jeopardy in a subsequent indictment. There is no argument that this indictment does not comply with that principle, and there is no room for argument in that respect.

[3] The second principle is that the indictment must be sufficiently certain as a pleading, to enable the defendant to make his defense. In this regard it is pointed out that the indictment charges that the date of the formation of the conspiracy and the dates of the overt acts are alleged to have been "on or about" a certain day. It is claimed that this is sufficiently uncertain to make the indictment bad, for two reasons:

First, it is claimed that the indictment does not show that the crime is not barred by the statute of limitations. This, however, cannot be maintained, because the charge in the indictment is certain as to the year. The phrase "on or about" does not qualify the allegation that the conspiracy was formed in 1914. There is an authority that a similar expression does not qualify the month, but only qualifies the particular day of the month. U. S. v. McKinley et al. (C. C.) 127 Fed. 169.

It is well established that an allegation of a date in an indictment does not confine the prosecution to the proof of that particular date; therefore a certain date is not a necessary allegation in an indictment. Section 1025, Rev. St. U. S. (Comp. St. 1913, § 1691), provides that the indictment shall not be held insufficient in matter of form only which shall not tend to the prejudice of the defendant. Under similar statutes, in some states, it has been held that an indictment charging on or before a particular date is sufficient. Many courts have held that the date is a matter of form only. The Supreme Court of the

United States has held that an indictment which alleged the day of the month as follows: "on the ——— day of April, 1906," was a sufficient allegation of the date. Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162. For the reasons stated, therefore, the court thinks that the indictment is sufficient on motion to quash.

[4] As to the motion to require the United States attorney to furnish to the defendants a list of the witnesses examined by the grand jury, I will say the Constitution provides (article 6 of amendments) that the defendant shall be confronted with the witnesses against him. This simply means that the defendant is entitled to attend the trial and to hear the witnesses testify. Section 1033 of the Revised Statutes (Comp. St. 1913, § 1699) provides that, in a charge of treason a list of the witnesses shall be furnished to the defendant at least three entire days before he is tried, and in all other capital offenses a list of the witnesses shall be furnished at least two days before the trial. It seems that by this statute Congress has taken a stand upon this very question, and this statute points out the policy of the government in all cases. The enactment of this statute concerning the subject would seem to exclude the idea that the prosecution was required to give a list of the witnesses in any other cases.

[5] California, Oregon, and some other states have statutes which require that the names of witnesses shall be indorsed upon the indictment. These statutes, however, are not controlling in the United States court. Jones v. United States, 162 Fed. 417, 89 C. C. A. 303. The Supreme Court of the United States has decided that the defendant is not entitled to a list of the witnesses. United States v. Van Duzee, 140 U. S. 169, 172, 11 Sup. Ct. 758, 35 L. Ed. 399. There is an old case decided by a United States District Court in New York, holding that it is in the discretion of the court to require a list of witnesses to be given to the defendant. The reason upon which the court based the decision was that it was the practice in the state courts of New York to indorse witnesses upon the back of the indictment. No other reason is given, and it will be seen, from the authorities already cited, that the practice in the state courts does not control in this matter.

[6] If there is any case where the defendant is entitled to a list of the witnesses who are going to testify against him, it is in the case of a conspiracy, and it seems that, in order for the defendant to prepare properly for trial, he ought to have, not only a list of the witnesses that testified in the hearing before the grand jury, but a list of the witnesses that the prosecution expects to call on the trial of the case, at a time prior to the date of the trial that will enable the defendant to properly prepare his case to meet the testimony of such witnesses. One of the reasons, and it seems there are others, which now occurs to the court, is that this indictment charges that certain named defendants conspired among themselves, and with other persons to the grand jurors unknown. Now let us assume, for the sake of the argument, that one of these unknown conspirators is John Doe. Every defendant is bound by any act of any of the conspirators done in furtherance of the conspiracy. Suppose John Doe induces Phœbe Roe to commit

an overt act. The defendants are entitled to time to investigate the character of John Doe and of Phœbe Roe, and to investigate what opportunities they have had to know anything about the alleged conspiracy. There are other reasons that will readily occur to any lawyer. Now, it is the opinion of the court that the court cannot control the conduct of the United States attorney in this matter, any more than he can control the conduct of any other attorney representing a litigant. Nevertheless there will come a time when the court can control the matter in controversy. When this case is set down for trial, and the trial is imminent, if the defendant should apply for a continuance on the ground that he had not had an opportunity to sufficiently prepare for trial because he did not know what witnesses the prosecution intended to produce, it would be then the duty of the court to decide this question, and exercise his discretion, and continue the case, or require a list of the witnesses to be given, if he thought the facts were sufficient to justify such action. The United States attorney says that the witnesses for the Government may be tampered with. The court does not know how to deal with that matter before it arises, but, if the witnesses are improperly approached or tampered with, there is a remedy in behalf of the government. The United States attorney also says that the witnesses may be spirited away, or leave the jurisdiction of the court. The law deals with that situation, and the remedy as provided by the law in that behalf can be invoked by the United States attorney.

At this time the motion for a list of witnesses will be denied, but, after the case is set for hearing, upon a proper showing made, the matter will be reconsidered.

HIRAM WALKER & SONS v. GRUBMAN et al., and Thirteen Other Cases.

(District Court, S. D. New York. May 7, 1915.)

1. TRADE-MARKS AND TRADE-NAMES ⊂=70—UNFAIR COMPETITION—INJUNCTION.

To prevent the sale of Canadian Type whisky in substitution for Canadian Club whisky, sales at the bar *held* to be enjoined unless the whisky is made sufficiently darker or lighter than Canadian Club to be clearly distinguishable, it appearing that the "body" and flavor need not be affected by changes in shade, but sales in full bottles direct to the consumer, properly labeled with the words "Canadian Type whisky," all plainly appearing of equal size, script, color, and general appearance, will be permitted, as well as sales in bottles properly labeled containing no more than a single drink.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⊂=70.]

2. TRADE-MARKS AND TRADE-NAMES ⊂=98—UNFAIR COMPETITION—DAMAGES AND PROFITS.

In a suit for unfair competition in connection with sales of whiskies, where it appeared that plaintiff's and defendants' whiskies were sold for different prices, and it could not be safely estimated how many sales

plaintiff had lost through substitutions, the accounting would be confined to profits.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. ⊂⊃98.]

3. TRADE-MARKS AND TRADE-NAMES ⊂⊃89—UNFAIR COMPETITION—ACCOUNTING—PARTIES REQUIRED TO ACCOUNT.

In an action for unfair competition in selling another whisky in substitution for plaintiff's whisky, only those actually conducting the business will be required to account, and the clerks or officers of the corporations doing the business will not be required to account.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 99; Dec. Dig. ⊂⊃89.]

In Equity. Fourteen suits by Hiram Walker & Sons against Jacob H. Grubman, doing business as the West Shore Wine & Liquor Company, and others. On settlement of the decree. Settled in accordance with the opinion.

Harcourt Bull and George Gordon Battle, both of New York City, and Alfred Lucking, of Detroit, Mich., for plaintiff.

Joseph M. Proskauer, Arthur L. Strasser, Norman P. S. Schloss, Rose & Paskus, and Riegelman & Bach, all of New York City, for defendant.

LEARNED HAND, District Judge. [1] The decree suggested in the opinion enjoined the defendants from selling Canadian Type whisky in bulk without reasonable assurance that it will not be resold in substitution for Canadian Club. Upon settlement of the decree the plaintiff urges that there is no practical assurance possible, unless it be some mark which will follow the whisky into the hands of the consumer. Having found the bar demand trifling in quantity, they urge that I should disregard the small part which is genuine and enjoin the whole sale. I am not willing to do this, as I said originally; but I think the plaintiff is right in demanding that there should be some mark which will effectively reach the senses of the ultimate consumer. Considering the fact that the commodity is a beverage and that nothing can be affixed to it, it follows that the only way of marking it is by a receptacle that cannot be changed or by some change in the appearance of the substance itself. It will serve no purpose to say that it must be served at bars in a bottle clearly labeled, because a man who means to substitute will not carry out an agreement to use such bottles. On the other hand, it is in evidence in these cases that the color of this whisky is wholly within the control of the distiller and that it is shaded to suit the fancy of the consumer. It is also in evidence that the "body" and flavor need not be affected by changes in shade. In view of this proof it seems to me that the color may be said to be a "non-functional" characteristic, as was said of the color of the beverage in Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164; Id., 211 Fed. 942, 128 C. C. A. 440, by the Circuit Court of Appeals in the Sixth Circuit.

This seems also to fall within the same doctrine, though differently applied of our own circuit in Enterprise Mfg. Co. v. Landers, Frary & Clark, 131 Fed. 240, 65 C. C. A. 587; Yale & Towne Mfg. Co. v. Alder, 154 Fed. 37, 83 C. C. A. 149; Steiff v. Gimbel Bros., 214 Fed.

569, 131 C. C. A. 21. The color need not, of course, be changed so as to make the whisky repellant; it need be made only of a shade enough darker or lighter than Canadian Club to be clearly distinguishable. Color, it is true, is a part of the beverage; but the particular shade, whether dark or light, has certainly no relation to an honest demand. Be that as it may, the precise shade is an imitation, and to that extent the right to make exactly that shade of whisky may justly be curtailed. If the defendants could suggest any effective means of getting such assurance as I have held necessary, I should consider it; but no one has succeeded in bringing forward any alternative, except the following, which I should suppose to be wholly impractical commercially, but which will be open if any use of it can be made. Canadian Type whisky may be sold in its present color in bottles properly labeled, containing no more than a single drink, such as are sold in dining cars. As I have said there will be no limitation of the sale in full bottles properly labeled direct to the consumer. Proper labeling means that the words "Canadian Type Whisky" shall all plainly appear of equal size, script, color, and general appearance. Smythe's label shows how easy it is to suppress a word while keeping the size.

[2] The plaintiff demands damages as well as profits, or at least the alternative. Both it may not have in any event, and I do not think that there is any basis here for damages. The theory that all sales of Canadian Type whisky deprived the plaintiff of an equal number of sales depends impliedly upon the assumption that the price was the same, and that all sales were in substitution for Canadian Club whisky. In fact, the usual price of Canadian Club whisky was 15 cents, and of Canadian Type whisky 10 cents. No safe estimate can be made of the number of sales which the plaintiff lost through the Canadian Type whisky. The accounting is therefore confined to profits.

The plaintiff will have costs, but they properly await final decree.

[3] Only the defendants who actually conducted the business will account, not the clerks or officers of the corporations. In stating the account the defendant will be broadly allowed any means of showing, if they can, that they had reasonable assurance that the saloon keepers were honest.

DENVER & R. G. R. CO. v. MILLS.

(Circuit Court of Appeals, Eighth Circuit. February 22, 1915.)

No. 4141.

1. INJUNCTION ⊜47—SUBJECTS OF PROTECTION—TRESPASS.

One in possession of land claiming title will be granted an injunction to restrain a trespass by one who claims under color of title, where the threatened act tends to the destruction of the inheritance.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 100; Dec. Dig. ⊜47.]

2. COURTS ⊜328—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.

In a suit in a federal court to restrain the taking without authority of right of way for a railroad over a tract of land, the damage to the remainder of the tract, as well as the value of the land taken, is to be considered in determining the amount involved for jurisdictional purposes.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. ⊜328.

Jurisdiction of federal courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent Stribling Shoe Co. v. Roper, 36 C. C. A. 459; J. Lewis Mercantile Co. v. Klepner, 100 C. C. A. 288.]

3. ADVERSE POSSESSION ⊜7—RAILROADS ⊜82—RIGHT OF WAY OVER PUBLIC LANDS—ABANDONMENT.

The title to a railroad right of way, acquired over public lands under a grant by Congress, cannot be acquired against the grantee by limitation; but the right granted may be lost by abandonment in case the land ceases to be used for the special purpose for which the grant was made.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24–42; Dec. Dig. ⊜7; Railroads, Cent. Dig. §§ 213–219; Dec. Dig. ⊜82.]

4. RAILROADS ⊜82—RIGHT OF WAY—ABANDONMENT.

Whether a railroad company has abandoned a right of way acquired by it is to a great extent a question of intent, and the intent to abandon may be established by acts of the company clearly indicating its purpose not to use such right of way and by long nonuser thereof.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213–219; Dec. Dig. ⊜82.]

5. RAILROADS ⊜82—RIGHT OF WAY—ABANDONMENT—REVERTER.

Defendant railroad company built its road over public lands on a right of way granted by Congress. Subsequently a tract of such land was patented to complainant's predecessors in title under homestead entries, subject to defendant's right of way. Some years later defendant relocated its line for a distance of 25 miles, taking up the rails and ties from the old right of way, and complainant took possession of and used so much of the same as was over his land for 13 years, when defendant undertook to construct a spur track 6 miles long over a portion of the same, including complainant's land, to a coal mine. *Held*, that defendant had lost its title to such right of way by abandonment, and that the same reverted to complainant, under Rev. St. Colo. 1908, § 5519, which provides for such reverter in case of a new location of an existing line on repayment of any sum paid therefor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213–219; Dec. Dig. ⊜82.]

6. EMINENT DOMAIN ⊜255—AWARD OF COMPENSATION FOR RIGHT OF WAY—REVIEW ON APPEAL.

An award of compensation for the taking of a railroad right of way cannot be reviewed by an appellate court, where it was made by com-

missioners under instructions by the court, which were not objected to, that they should view the land and base their award on their own observations and judgment, as well as the other evidence.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 666; Dec. Dig. ⟸255.]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit in equity by Ogden Mills against the Denver & Rio Grande Railroad Company. Decree for complainant, and defendant appeals. Affirmed.

See, also, 198 Fed. 137.

R. G. Lucas, of Denver, Colo. (E. N. Clark, of Denver, Colo., on the brief), for appellant.

Harry S. Silverstein, of Denver, Colo., for appellee.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

YOUMANS, District Judge. The appellant is the successor of the Denver & Rio Grande Railway Company, which was incorporated in 1870, under the laws of the territory of Colorado, and which was authorized by charter to construct a railway line from Cuchara, in Huerfano county, Colo., westward to Alamosa, in Conejos county, Colo. By act approved June 8, 1872, Congress granted to said railway company and its successors and assigns "the right of way through the public domain one hundred feet in width on each side of the track," together with certain adjacent lands, and also certain privileges similar to those granted to the Union Pacific Railroad Company. Afterwards the time to build the road was extended by Congress to 1882. The railway company completed a narrow gauge line of railroad from Cuchara westward to La Veta, in Huerfano county, in 1876. It completed its line westward to Alamosa and began running trains thereon July 4, 1878. The land described in the bill is a 320-acre tract, and lies about a mile and a half west of La Veta. The title was originally acquired from the government by homestead entries made in 1882. Notation was made on the receipts issued by the United States land office that the entries were subject to the right of way of the Denver & Rio Grande Railway Company. The patent for each homestead referred to the number of the final certificate, but did not except the right of way.

About May, 1899, the Denver & Rio Grande Railroad Company, the successor of the Denver & Rio Grande Railway Company, acquired a location for a new and different line for a distance of at least 25 miles in Huerfano and Costillo counties from a point a short distance west of La Veta to a point between there and Alamosa. The point of diversion began a short distance east of the lands described in the bill. The railroad company procured from the then owners of such lands the right of way for the new line. The deeds for that purpose were obtained from the adult owners, and the title of certain minors was acquired by condemnation. The company constructed a standard gauge

track over the new line, and on November 12, 1899, removed the rails and ties from the old line between the points at which the new line began and ended. When the rails and ties were removed, all of the original right of way included within the exterior boundaries of the 320-acre tract was fenced as a part of that tract, irrigation ditches were cut across it, and some of it was cultivated. During the years 1905 and 1907, the entire tract was conveyed to one Fred C. Sager, by the heirs of the original entrymen. On April 28, 1911, Sager conveyed the property to J. A. Ownbey, who was the agent of appellee. On May 22, 1911, Ownbey instituted proceedings for registration of title under the so-called Torrens law of Colorado, and prosecuted the same to a final decree. On August 29, 1911, Ownbey conveyed the property to appellee. Since the removal of the ties and rails on November 12, 1899, the entrymen and their successors in title have returned the entire 320 acres for taxation, and have paid the taxes thereon.

In the annual return for taxation for 1899 by appellant to the state board of equalization, that portion of the line from which the rails and ties had been removed was described as "Abandoned Track Veta Pass Line." In subsequent annual returns it was described as "Unused Narrow Gauge Track," "Unused Grade over Veta Pass," "Unused Track and Grade," and "Unused Grade and Track." Assessments were made according to such returns, and taxes paid by appellant. On January 15, 1906, in consideration of the payment of $50 annually, appellant executed an instrument, called a "license," to the board of county commissioners of Huerfano county to use 12.8 miles of the old right of way for the purposes of a free public highway. The term was one year, and thereafter at the option of the railroad company, to be terminated upon 60 days' written notice. On June 1, 1912, the railroad company entered into a contract with the Alliance Coal Company whereby, in consideration of the payment by it to the railroad company of the sum of $24,164, the latter agreed to construct a track to the mines of the coal company, which were situated upon or near the old right of way. The distance was 6.27 miles. On June 1, 1912, the railroad company entered upon the tract of land described in the bill and began constructing a road to the mines. On June 12, 1912, the appellee filed his bill, alleging that the appellant, acting under an unfounded claim, was commencing to construct a railroad track across his land without having acquired a right of way therefor, and sought an injunction. A preliminary injunction was issued on July 3, 1912, and appellant appealed therefrom to this court. On August 14, 1912, it filed an answer, claiming title to the right of way, and at the same time a cross-bill to quiet its title thereto. In the event that the court should hold against its claim of title, appellant prayed in its cross-bill that injunction be withheld, or suspended, and that it be permitted to acquire title by condemnation. On September 27, 1912, on appeal, an order was entered in this court to the effect that the injunction was properly issued, but directing the lower court to suspend the injunction and permit appellant to proceed with the construction of its line upon giving bond, and further directed the lower court to determine, in the regular course of equity proceedings, the question whether or not the railroad com-

pany still had its right of way, as it claimed, over the property in dispute, and, if it determined that it had, to enter a decree accordingly; on the other hand, if it determined that it had not, then to ascertain and assess appellee's damage for the taking of the right of way. The court below found that appellant was not entitled to a right of way, and ascertained what appellee's damages were, and adjudged the amount against appellant. This is an appeal from that decree.

The assignment of errors makes the following specifications: (1) That the lower court had no jurisdiction to hear and determine this action, because appellee had a plain, adequate, and complete remedy at law. (2) That the lower court was without jurisdiction because the amount in controversy did not exceed $3,000, exclusive of interest and costs. (3) That the court erred in finding and decreeing title to the disputed right of way in appellee. (4) That the court erred in admitting the testimony of the witnesses James A. Ownbey and Joseph K. Kinkaid. (5) That the court erred in awarding appellee $1,000 for the old grade. (6) That the allowance of mileage to J. A. Ownbey as a witness was unauthorized.

[1] 1. At the time of the entry by the appellant on June 1, 1912, the appellee and his grantors had been in possession of the old right of way for a period longer than that required to give title under the statute of limitations of Colorado. Their possession had been continuous, open, notorious, and adverse. Irrigation ditches had been cut across the old right of way. All of it susceptible of cultivation had been put into cultivation. The appellant entered under a claim of right, for the purpose of laying its track, with a full knowledge, however, of the adverse possession of appellee and the length of time such possession had continued. Appellant now maintains that appellee had a plain, adequate and complete remedy at law, and that therefore there was no jurisdiction in a chancery court to entertain this suit and issue an injunction.

In the case of Livingston v. Livingston, 6 Johns. Ch. (N. Y.) 497, 10 Am. Dec. 353, the rule was laid down that equity will interpose to prevent irreparable mischief. The rule has since been enlarged to the extent of holding that one in possession, claiming title, will be granted an injunction to restrain a trespass by one who claims under color of title where the threatened act tends to the destruction of the inheritance. More v. Massini, 32 Cal. 590; Scudder v. Trenton & Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; Falls Village Water Power Co. v. Tibbetts, 31 Conn. 165; Johnston v. Hyde, 25 N. J. Eq. 454; Pennsylvania Co. v. Ohio River Junction R. Co., 204 Pa. 356, 54 Atl. 259; Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; Pittsburg, etc., R. Co. v. Fiske, 123 Fed. 760, 60 C. C. A. 621; Chapman v. Toy Long, 5 Fed. Cas. 497, No. 2,610; 22 Cyc. 826.

We think there was ample ground for the issuance of the injunction. But that question is no longer open in this court. In the appeal from the order granting the injunction this court said in its decree:

"Upon consideration of the appeal from the injunction in this case, which was granted by the court below before the filing of the answer and cross-bill,

nd upon consideration of the motion of the appellant in this court upon the complaint, the answer, and the cross-bill to suspend the injunction and permit the railroad company to enter upon the land in dispute and construct and operate its railroad, pending the suit, across and along the tract whose title is in dispute herein, it is adjudged and ordered that, to the extent hereafter stated, the motion should be and is granted, that the original injunction in accordance with the decision of this court in City of Newton v. Levis, 79 Fed. 15, 25 C. C. A. 161, was not wrongfully granted, and the order for its issue should not be reversed, and is affirmed; that upon consideration of the motion it is adjudged and ordered that this cause be immediately remanded to the court below, and that the said court be, and it is hereby, ordered and directed to proceed with convenient speed in accordance with the views expressed in Northern Pacific R. R. Co. v. St. Paul Railroad Co. (C. C.) 4 Fed. 688, to determine in the regular course of equity proceedings the question whether or not the railroad company still has its right of way, as it claims, over the property in dispute, and if it determines that it has, to enter a decree accordingly; on the other hand, if it determines that it has not this right of way, then that it proceed to determine the necessity for the taking of the tract which in that case the railroad company desires to condemn, and if it determines that there is such necessity, then to ascertain and determine the damages resulting from such taking, and upon the ascertainment of such damages to render the proper decree."

That adjudication became the law of this case so far as this court is concerned. 3 Cyc. 395; Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260; The Lady Pike, 96 U. S. 461, 24 L. Ed. 672; Stewart v. Salamon, 97 U. S. 361, 24 L. Ed. 1044; Clark v. Keith, 106 U. S. 464, 1 Sup. Ct. 568, 27 L. Ed. 302; United States v. New York Indians, 173 U. S. 464, 19 Sup. Ct. 487, 43 L. Ed. 769. By that decree it was found that the injunction was properly issued and the order for its issuance was affirmed.

[2] 2. The bill alleges that the amount in controversy exceeds the sum of $3,000, exclusive of interest and costs. This is denied in the answer. It is contended by counsel for appellant that the amount in controversy is to be determined by the value of the strip of land actually taken, which was found to be $425, excluding the sum of $1,000 allowed as the value of the original grade. The sum of $4,075 was allowed as damages to the remainder of the tract. We think that such damages are to be considered, as well as the value of the land taken. Together they make up the amount in controversy. Therefore the jurisdictional amount is shown to be in accordance with the allegation of the bill. Hagge v. K. C. S. Ry. (C. C.) 104 Fed. 391; Bureau of National Literature v. Sells (D. C.) 211 Fed. 379; Simkins, Federal Equity Suit, 185.

[3, 4] 3. The claim of title on the part of appellee is based on two grounds, abandonment and adverse possession. This right of way having been granted by Congress over the public lands of the United States, the title thereto cannot be acquired against the grantee by limitation. Northern Pacific Railway v. Townsend, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044. In the last-named case the court said:

"In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title of the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use would be to allow that to be done by indirection which could not

be done directly, for, as said in Grand Trunk Railroad Co. v. Richardson, 91 U. S. 454, 468 [23 L. Ed. 356], 'a railroad company is not at liberty to alienate any part of its roadway so as to interfere with the full exercise of the franchises granted.' "

This doctrine is reaffirmed in the cases of Northern Pacific R. Co. v. Ely, 197 U. S. 1, 25 Sup. Ct. 302, 49 L. Ed. 639, and Union Pacific Railroad Co. v. Snow, 231 U. S. 204, 34 Sup. Ct. 104, 58 L. Ed. 184. The Townsend Case, however, recognizes the implied condition on which the grant was made; that is, "reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

In the case of Railroad Co. v. Baldwin, 103 U. S. 429, 26 L. Ed. 578, this statement is made as to the congressional grant of right of way over public lands:

"It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purpose designed."

The authorities above quoted from recognize that the right of way may be abandoned. "The question as to whether or not a railroad company has abandoned a right of way acquired by it is to a great extent one of intent; but such intention can be established by the acts of the company clearly indicating its purpose not to use such right of way and by long nonuser thereof." Gurdon & Ft. Smith Railroad Co. v. Vaught, 97 Ark. 234, 133 S. W. 1019.

[5] In this case the railroad company, for a distance of 25 miles or more, made a relocation of its line and ran all of its trains over the line thus relocated. The rails and ties on the original line were taken up, and the telegraph poles were cut down. This was done on or about November 12, 1899. No attempt was made to use any part of the old right of way for railroad purposes until June 1, 1912, a period of almost 13 years. It is contended that it never was the intention of the railroad company to abandon this old right of way, and that such intention is indicated by a letter to Binger Hermann, Commissioner of the General Land Office, of date November 21, 1900. Counsel for appellant emphasize the following statement in that letter:

"There are stations and industries on the old line which we still desire to reach, and it is therefore not abandoned."

The entire letter is as follows:

"Sir: The Denver & Rio Grande Railroad Company has received through the register and receiver at Pueblo copy of your letter to them of November 6th, calling attention to map and field notes in duplicate, filed by the Denver & Rio Grande Railroad Company, showing the definite location of its line of road over La Veta Pass from a point in the S. E. ¼ N. W. ¼, Sec. 20, Tp. 29 S., R. 68 W., to a point on the east boundary of the Sangre de Cristo grant, in unsurveyed Tp. 29 S., R. 70 W. We note your suggestion that the map does not describe this route as an amended line, and that the company should therefore furnish a statement as to the object of said line, and, if it is filed as a branch line, evidence of the company's authority under the state laws to construct the same should be furnished. We would respectfully report, in reply thereto, that, as we consider the matter, this is not to be considered either as an amended line or as a branch line, but as a new route for a short distance between termini.

"The Denver & Rio Grande Railroad Company has made a standard gauge route where it formerly had a narrow gauge route from Walsenburg west to Alamosa and beyond. In making a standard gauge line it was necessary to reduce grades and curvatures, which required a new route over the short distance from the old station of La Veta to what is called Wagon Creek Junction, near the station called Placer, on the old line. There are stations and industries on the old line which we shall still desire to reach, and it is therefore not abandoned, but the track thereon is still maintained; but for the through traffic to and from the San Luis Valley, this new standard gauge route takes the more southern pass, and, as above suggested, with lesser grade and smaller curvatures. According to our view of our statutes relating to the powers of railroad corporations, it is not necessary to designate the specific route to be followed between termini, and, if not necessary to state such specific route in the first instance, certainly not necessary to state a change in such specific route, or the making of a double track, even though one of the tracks constituting such double track be at some considerable distance separated from the other. See section 97, c. 19, Gen. Stats. of Colo.

"We do not think that this line can in any sense come under the provisions of section 127 of the same chapter relating to branch lines. It is but an additional route for a short distance for the main line, for the purpose of the more convenient and economical transportation of the business of San Luis Valley and country beyond. We respectfully submit that our application for rights of way for this new line, under the circumstances, is perfectly legitimate, and in strict accordance with the spirit of the right of way acts, and we respectfully ask that the maps be approved, and should be pleased to have advices from you as to your action, or as to any further information desired from the company preliminary thereto."

It is true that the statement relied upon appears in the letter. It is made in connection with other statements which must be noted. The entire sentence in which the statement appears reads as follows:

"There are stations and industries on the old line which we shall still desire to reach, and it is therefore not abandoned, but the track thereon is still maintained; but for the through traffic to and from the San Luis Valley, this new standard gauge route takes the more southern pass, and, as above suggested, with lesser grade and smaller curvatures."

The statement that there are stations and industries on the old line which appellant still desired to reach is followed by the statement that the track is still maintained. That statement was not true. The reference to "through traffic" carries with it the implication that local traffic was being hauled over the old line. That was not true. The letter also sought to convey the impression that appellant was at that time serving stations and industries along the old line. That was not true. No stations or industries along the old line were being served. The track was not maintained. No local traffic passed over the old line, the railroad company had rendered itself incapable of carrying traffic thereon, and it ceased to use that portion of the grant for railroad purposes. The letter above quoted stated to the Commissioner of the General Land Office that the making of the new line was the same as the construction of a double track. It is evident that the letter was framed for the purpose of deceiving the Commissioner of the General Land Office; the object being to secure a right of way over public lands traversed by the new line. Later, in 1906, the railway company went so far as to rent out a portion of the roadbed for a wagon road, a use not contemplated in the original grant.

When the railroad company on or about the 1st of June, 1912, undertook to lay a track on the land described in the bill, it did not intend to

relay the entire portion from which the track and ties had been taken in November, 1899. The purpose was to lay a track for a distance of 6.27 miles to a coal mine of the Alliance Coal Company. This was simply a spur track, as shown by the contract between the railroad company and the coal company, and was put down for the consideration of $24,164. It was not a reconstruction of the old line. The testimony is ample to warrant the finding that there was an abandonment of the right of way.

4. Since there was an abandonment, the question arises to whom did the right of way revert? The original entries were made subject to the right of way. The patents were issued for the entire tract, but did not include the right of way so long as it was used for the purpose contemplated by the grant. In the face of the patents, it cannot be said that the title reverted to the United States. The estate of the railroad company was, to use the language of the Townsend Case, "a limited fee." Upon the extinction of that title by abandonment it was merged in the title held by those holding under the patentees, and the land came within the provision of section 5519 of the Revised Statutes of the state of Colorado, which is as follows:

"That any railroad company having located its line of road, whether the same is completed or not, may make a new location of its line, and may acquire the right of way for such new line, in the same manner as is now provided for acquiring the right of way by the statutes of Colorado. Provided, that in acquiring said new right of way the previous right of way shall revert to the owner or owners of the land through which said previous right of way was granted, on the payment or tendering payment to the railroad company the amount assessed by the board of appraisers and paid by said railroad company for said previous right of way."

Nothing having been paid for the right of way, that portion of the section requiring payment did not apply. The court was right in finding and decreeing that appellee had title to the right of way in dispute.

[6] The commissioners appointed by the court to hear testimony and determine the value of the lands taken found that the old grade was worth $1,000 and added that sum to the value of the land. The record contains the following stipulations:

"It is hereby stipulated and agreed that, for the purposes of the appeal herein, the defendant need not print the evidence taken before the commissioners herein, and that such evidence showed the length, breadth, height, and slope of the old existing railroad grade referred to in the report of the commissioners herein, and that said commissioners viewed the same, and that there was no testimony before such commissioners showing the amount of money saved to defendant by reason of such grade, or what it would have cost defendant to have constructed such grade."

The following instructions were given to the commissioners at the time they were appointed:

"By the order appointing you, you are authorized and directed to go upon the premises and view them, so that you may have a more intelligent understanding of the evidence from knowing the lay of the land and the location of the railroad over it; and you may and should use and take into consideration and act upon your own observation, judgment, impressions, and information obtained from such view, together with all the other evidence in the case, in fixing the amount of compensation. The opinions of witnesses are to aid and assist you, if possible, in arriving at a just conclusion; but you are not to lay aside your own observation and judgment, and accept the conclu-

sions of witnesses if you think them extravagant, in being either too high, or too low, or incorrect. It is entirely a question for the exercise of your best judgment, adapting the testimony of the witnesses to the land and to the location of the railroad upon it, as you see it, and also using your own judgment and knowledge in the matter. * * * The commissioners are instructed that you have had an opportunity in this case to go upon and view the premises. This was for two purposes. In the first place, it was in order to enable you to better understand and apply the evidence submitted before you, and also in order that you may regard the facts which you have learned upon your own observation and view of the premises as so much additional evidence. * * * The commissioners are instructed that, in arriving at your estimate in this case, you should be governed by the evidence submitted, both the evidence of the witnesses which you have heard and the evidence gathered from your view and observation of the premises."

These instructions appear to have been agreed to by appellant. Whether that be true or not, appellant did not object to them. Those instructions expressly state the view should be regarded as evidence. Therefore the finding of the commissioners, based upon their "own observation, judgment, impressions, and information obtained from such view, together with all the other evidence in the case," was in accordance with instructions to which appellant made no objection. It cannot be heard to raise an objection now. The commissioners were required to ascertain the value of the property for the most advantageous uses to which it might be applied. Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; United States v. Chandler-Dunbar Co., 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063; Gurdon & Ft. Smith Railway Co. v. Vaught, 97 Ark. 234, 133 S. W. 1019.

The allowance of $1,000 for the old grade was within the power of the commissioners and does not appear to be excessive.

5. The objection to the admission of testimony is not urged before this court, and must therefore be regarded as abandoned.

6. The objection to the allowance of mileage to the witness Ownbey is without merit. He was not a party to the suit. He had no interest in the property at, or subsequent to, the time the suit was brought.

It follows that the decree of the District Court should be affirmed.

UNITED STATES ex rel. FALL CITY CONST. CO. v. JIMMERSON, County Assessor, et al.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1915.)

No. 4270.

MANDAMUS ⊂=117—COMPELLING PROPER ASSESSMENT OF PROPERTY FOR TAXATION—CONSTITUTIONAL PROVISIONS.

Mandamus lies to compel the assessor and equalization officers of a county of Arkansas to act in conformity with Const. Ark. art. 16, § 5, requiring all property subject to taxation to be taxed according to its value, to be ascertained as the General Assembly shall direct and make the same equal and uniform throughout the state, and so determine the true value of the property in the county subject to taxation, and thereby raise sufficient taxes to pay the courthouse contractor, though mandamus may not interfere with the officers in exercising their judg-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ment in determining true value, and though by assessing the property in the county at full value there will be an inequality and a want of uniformity because of the wrongful act of other assessing officers in fixing value at 50 per cent. of the true value.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 249; Dec. Dig. ⇐117.]

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Mandamus by the United States, on the relation of the Fall City Construction Company, against W. F. Jimmerson, as Assessor of Monroe County, and others, as members of the Board of Equalization of said county. There was a judgment dismissing the petition for the writ, and the relator brings error. Reversed, and cause remanded, with instructions to grant the writ prayed for.

F. Wm. Kraft, of Chicago, Ill. (G. W. L. Smith, of Brewton, Ala., on the brief), for plaintiff in error.

Thomas & Lee, of Clarendon, Ark., and C. F. Greenlee, of Brinkley, Ark., for defendants in error.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. The relator filed its petition for a writ of mandamus in the court below, and an alternative writ was thereupon issued. The defendants in error filed a demurrer to the petition for the writ, which was overruled. Defendants in error then amended their response, and the relator demurred thereto, and its demurrer was overruled, whereupon relator elected to stand upon the demurrer, and judgment was thereupon entered dismissing the petition for the writ. The petition alleged the following facts:

"That on or about the 17th of October, 1911, said relator entered into a contract with Monroe county, in the state of Arkansas, and the county court of said county, for the construction for said county of a county courthouse in the city of Clarendon, Arkansas, the county seat of said county, for a consideration of $118,000, a copy of which contract is hereto attached, marked Exhibit 'A,' and made a part of this petition.

"That said contract provided that said county courthouse should be constructed in accordance with certain plans and specifications mentioned and referred to in said contract, and that the consideration or contract price should be evidenced by county scrip to be issued to relator to the amount of $118,000, to be redeemed in lawful money of the United States in annual installments as follows:

July 15, 1912	$11,500.00
July 15, 1913	11,270.00
July 15, 1914	11,380.00
July 15, 1915	11,460.00
July 15, 1916	11,510.00
July 15, 1917	11,530.00
July 15, 1918	11,520.00
July 15, 1919	11,480.00
July 15, 1920	11,410.00
July 15, 1921	11,810.00
July 15, 1922	2,650.00
One warrant on demand	480.00

"That said county courthouse was constructed and completed by relator and accepted by said county, and all of said county scrip was issued and delivered to relator in accordance with the terms of said contract.

"That said county failed and refused to redeem the $11,500 of said county scrip which became due on July 15, 1912, and thereupon suit was instituted in this court by relator against said Monroe county on $3,920 of said scrip which became due July 15, 1912, including said warrant for $480 on demand, and on March 12, 1913, judgment was rendered by this court in favor of relator against said Monroe county for said sum of $3,980, which judgment remains wholly unpaid, and said Monroe county refuses to pay the same or any part thereof, after demand being made for the payment thereof.

"That besides the county scrip issued to relator as above set out, other scrip has been issued by said Monroe county largely in excess of its revenues, and all county taxes are paid in such scrip.

"That on account of the issuance of such other scrip by said county in excess of its revenues and the payment of county taxes in county scrip, it would be ineffectual to attempt to enforce payment of said judgment by mandamus to the county levying court of said county to require it to levy a special tax on the taxable property of said county for the purpose of paying said judgment.

"That the defendant W. F. Jimmerson is the duly elected, qualified, and acting assessor of said Monroe county, and the defendants R. B. Hall, H. A. Baggott, and D. R. Meadors are the members of the board of equalization of said county and constitute said board.

"That it is the duty of said assessor to assess or value, for purposes of taxation, all the real and personal property subject to taxation in said county, except certain property which is assessed or valued for taxation by the state board of railroad commissioners or the state tax commission, at its true value on money.

"That it is the duty of said board of equalization to equalize the assessments made by the assessor, by increasing the assessments of any and all property that may have been assessed or valued by said assessor at less than its true value, and by decreasing the assessments of any and all property that may have been assessed or valued by said assessor at more than its true value.

"The said relator alleges that the said assessor has failed, refused, and neglected to discharge his duty in that he has failed and neglected to assess and value for taxation and place upon the assessment books of said county for the year 1912 a great deal of property, principally personal property, subject to taxation in said county and to assessment by him, and has assessed or valued almost all the taxable property in said county actually assessed and placed upon the assessment books by him for said year at less than its true value.

"That said board of equalization has failed and refused to discharge its duty, in that it has failed and refused to increase the assessments of property undervalued by said assessor as above stated to the true value of said property.

"That the undervaluation of the taxable property of said county by the said assessor and board of equalization, as hereinbefore alleged, is a fraud upon relator as a creditor of said county, and is a refusal of said assessor and said board of equalization to discharge their duties according to law.

"That if the taxable property of said county were assessed at its true value, as required by law, the revenues of said county, even at the low rate of taxation allowed by the laws of the state of Arkansas, would very soon be sufficient to discharge the said judgment and the other indebtedness of said county to relator, in addition to paying the ordinary and usual expenses of said county.

"That, if the taxable property of said county is not assessed at its true value as required by law, relator will be unable to collect its said judgment against said county and the other indebtedness of said county to relator.

"That, unless required by authority of this court to discharge their duties according to law, said assessor and board of equalization will continue to undervalue the taxable property in said county subject to taxation by said

assessor, and thus defeat relator in the collection of its said judgment and other indebtedness of said county to it.

"That the total value of the taxable property in said county as assessed in the year 1912 is $5,769,114, whereas, if the same were assessed at its true value in money, as required by law, the total valuation thereof would be not less than $15,000,000."

The petition then prayed for a writ of mandamus commanding said assessor to assess and value for the year, 1913, and all subsequent years until said judgment and all other indebtedness of said county to relator shall have been fully paid, all of the taxable property of said Monroe county subject to assessment by said assessor at its true value in money as required by law, and also commanding said board of equalization to increase the assessment of all the property that might be undervalued by said assessor to the true value of said property in money, to the end that all of the taxable property of said county subject to assessment by said assessor be assessed at its true value. The following stipulation was contained in the contract:

"It is further agreed and declared that the actual value of the total taxable property in said county in the year 1911 is probably about $24,000,000 or more, and that the assessed value of the county is $6,000,000, and that hereafter said county, by its proper authority, will, if necessary, increase the courthouse building tax, or the assessed valuation of the county, to the full market value of the taxable property of said county as provided by law, and maintain such tax or said increased assessment from year to year in such manner as to enable the county to pay said warrants promptly and without delay."

The names of A. Flora, T. T. Bateman, and Dave Dial were substituted as the members of the board of equalization in place of the members named in the petition. The amendment to the response contains the only defense made against the allowance of the writ. It is as follows:

"That said W. F. Jimmerson, as assessor for Monroe county, assessed all the real and personal property in Monroe county to be assessed by him at an amount equal to the assessment made by the Arkansas tax commission on railroad property, telephone property, Pullman car property, and other public utilities subject to be assessed by said Arkansas tax commission in Monroe county, and that he has fully performed his duty as such assessor by assessing property in Monroe county at the same rate and on the same basis as similar property in other counties in the state of Arkansas has been assessed. That said Arkansas tax commission assessed the property subject to be assessed by it, to wit, said railroad property, telephone property, and Pullman car property, at 50 cents on the dollar of the true valuation thereof, and that the real and personal property in all other counties in the state has been assessed at 50 cents on the dollar, or in a sum not exceeding 50 cents on the dollar, of the true valuation thereof, and that said assessor assessed all the property in Monroe county subject to be assessed by him at 50 cents on the dollar of the true valuation thereof. He says that in following the instructions and advice of the Arkansas tax commission he assessed all property subject to be assessed by him in Monroe county, real and personal, at 50 cents on the dollar of the true valuation thereof, and by so doing he complied with section 5, article 16, of the Constitution of the state of Arkansas by assessing property for taxes in Monroe county equal and uniform with other similar property assessed throughout the state of Arkansas, which similar property and also railroad and telephone property and Pullman car property was assessed in all other counties in the state of Arkansas at 50 cents on the dollar of the true valuation thereof. That he assessed the property, real and personal, in

Monroe county, as high or higher than similar property in other counties in the state had been assessed."

It thus appears that the case must be determined upon the allegations of the petition and the amendment; the facts in both having been admitted by demurrer.

Section 5 of article 16, Constitution of Arkansas provides:

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value."

Section 9 of article 16 provides:

"No county shall levy a tax to exceed one-half of one per cent. for all purposes. * * *"

Section 10 of article 16 provides:

"The taxes of counties, towns, and cities shall only be payable in lawful currency of the United States, or the orders or warrants of said counties, towns and cities, respectively."

The following are statutory provisions of the state of Arkansas, and the sections mentioned refer to Kirby's Digest.

Section 6956, provides:

That every assessor, on or before January first succeeding his election, shall take the oath prescribed in section 20, article 19, Constitution of Arkansas.

This oath requires every assessor to solemnly swear that the value of all real and personal property, moneys, credits, investments in bonds, stocks, joint stock companies, of which statements may be made to him by persons required to do so by law, will be appraised at its actual cash value.

Section 6970 prescribes the form of the oath which the assessor shall attach to his return, and by this oath he is required to swear that the property therein mentioned is not appraised at less than its true value in money.

Section 6974 provides that each separate parcel of real property shall be valued at its true market value in money, and that the price at which real estate would sell at auction, or at a forced sale, shall not be taken as a criterion of such true value; that personal property of any description shall be valued at the usual selling price of similar property at the time of listing; that investments in bonds, stocks, joint-stock companies, or otherwise, shall be valued at their value in money.

Section 7004 provides that the board of equalization of each county, in the equalization of real property not previously entered for taxation on the tax books as then listed, shall raise the value of such tracts and lots of real property as in the opinion of the county board has been returned below their real value in money to such price or sums as it may find to be the true value thereof, agreeably to the rules prescribed by law for the valuation of real property, or may reduce the valuation of such tracts or lots as in the opinion of the board have been returned above their true value as compared with the average valuation of the real property of such county.

Section 7008 provides that the clerk shall lay before the board of equalization the returns of real property made by the assessor, and said board shall immediately proceed to equalize the valuation of such real property, so that each tract or lot shall be entered on the tax books at its true value in money, and for this purpose the board shall raise the valuation of such tracts as in the opinion of the board have been returned below their true value to such price or sum as may be deemed to be their true value. The board shall also reduce the valuation of such tracts or lots as in the opinion of the board have been returned above their true value, as compared with the average valuation of the real property of the county.

Section 12 of Act 257 of 1909 provides that the Arkansas tax commission shall meet as a state equalization board of taxes annually; that it shall examine and compare the returns of the assessment of property in the several counties of the state, and proceed to equalize the same, so that all taxable property in the state shall be assessed at its true value. They shall be governed by the following rules:

First. They shall add to the aggregate valuation of the real property of every county which they believe to be valued below its true and full value in money such per centum in each case as will bring the same to its true and full value..

Second. They shall deduct from the aggregate valuation of the real property of every county, which they believe to be valued above its true and full value, such per centum in each case as will reduce the same to its true and full value.

Fourth. They shall add to the aggregate valuation of any class of personal property of any county, township, village or city which they believe to be valued below the true and full value thereof, such per centum in each case as will raise the same to its true, full, and proportionate value.

Fifth. They shall take from the aggregate valuation of any class of personal property in any county, town, township, village, or city, which they believe to be valued above the true and full value thereof, such per centum as will reduce the same to its true, full, and proportionate value.

The Arkansas tax commission assesses for taxation railroad property, telephone property, Pullman car property, and other public utilities.

Section 12 of Act 251 of 1911 provides that if in the opinion of the tax commission the valuations fixed by railroads or other corporations is the true and full value in money of the property listed, the commission shall accept said valuation and appraise the property at same. If the commission shall be of the opinion that the valuation fixed in any statement is below the true and full value in money of the property, it shall fix the value in each such case at a sum which it believes to be the true and full value of the property in money.

It must be admitted that the Constitution of Arkansas and the legislation enacted thereunder, beyond all question, requires all officers of the state having anything to do with the assessment and equalization of property for taxation in the state of Arkansas to assess and equalize it at its true value in money. It will certainly not be contended by any one that any officer or board of the state is above the law or can act lawfully in defiance thereof. It is the plain duty under the Constitution and laws of the state for each assessor and board of equalization to assess and equalize property subject to taxation accord-

ing to its true value in money. The relator asks that the performance of this duty may be compelled by mandamus. There seems to be no contention by counsel that the writ of mandamus may not be issued to compel the performance of a plain duty which the party commanded has lawful authority to do. The only argument that seems to be presented is that which is disclosed by the return to the alternative writ. This, stated in a few words, is that the assessor for Monroe county assesses the property in that county subject to be assessed by him at 50 cents on the dollar or in a sum not exceeding 50 cents on the dollar of the true valuation thereof. This is admitted. It is alleged that the Arkansas tax commission so assessed property subject to its jurisdiction. The assessor says that, in assessing property in Monroe county at 50 cents on the dollar of the true valuation thereof, he is complying with section 5, article 16, Constitution of Arkansas, by assessing property for taxes in said county equal and uniform with other similar property assessed throughout the state of Arkansas. Thus we have, as the only justification for not assessing property subject to taxation in Monroe county at its true value in money, the excuse that if the assessor did so he would assess property higher than it is assessed in the other counties of the state, and therefore the equality and uniformity prescribed by the Constitution would be violated. There certainly is nothing which inheres in the 50 per cent. valuation which makes it more liable to be uniform and equal than any other per cent.

If the assessing and equalizing officers may assess and equalize the value of property in Monroe county of the state of Arkansas at 50 cents on the dollar, they may with like reason and authority assess and equalize it at 5 per cent. or 10 per cent., and having adopted such illegal and unlawful valuation they may contend that it cannot be changed by the courts for fear of violating the uniformity and equality clause of the Constitution. We cannot adopt such reasoning. Uniformity and equality are not the only commands of the Constitution and laws of Arkansas. There is the further command that property must be assessed and equalized for taxation at its true value, and the equality and uniformity required must be worked out by giving this true value to each parcel of property subject to taxation. Moreover, it is not the writ of mandamus, if it shall issue in this case, which violates the equality and uniformity required by law in the assessment and equalization of property for taxation, but the unlawful acts of the assessors and boards of equalization, which in defiance of law have illegally assessed property at half its value.

It is contended that this case is ruled by Ex parte Ft. Smith & Van Buren Bridge Co., 62 Ark. 461, 36 S. W. 1060. It is claimed that the precise question was decided by the Supreme Court of Arkansas in that case contrary to the contentions of the relator in this case. Let us see if this is so. The bridge company owned a bridge over and across the Arkansas river, one-half of which was in Sebastian and the other in Crawford county, Ark. The assessor assessed the half of the bridge in Crawford county for the year 1895 at $150,000. The bridge company asked that the assessment be reduced to $75,000. There was

an appeal, and the case finally reached the Supreme Court. It was practically conceded that the sum of $150,000 would not have been in excess of a fair valuation of the half of the bridge assessed in Crawford county. The Supreme Court decided:

"As the assessment of the real property of Crawford county was purposely equalized at one-half of its market value, so the valuation of one-half of the bridge of appellant should have been reduced by the county court to $75,000 as the owner requested; that being fully as much as or more than one-half of its market value."

What the court decided was that, if the assessor in any particular county uniformly assessed property at 50 cents on the dollar of its true valuation, he could not single out a bridge company, or some particular taxpayer, and assess its or his property at its full value. Whether the assessor of Crawford county had a right to assess property at 50 per cent. of its value was not in question. What would become of the Constitution or the laws of Arkansas in regard to the assessment and equalization of property for taxation if the assessors and equalizing boards could agree together to assess all property at 10 per cent. of its value in money, and that any attempt to question such action should be met successfully by the claim that to do so would violate the equality and uniformity clause of the Constitution. To sustain such a position would make the Constitution and the laws of the state, which were enacted and passed to secure an equal distribution of the burdens of taxation, the instrumentalities to defeat their own object and purpose. The argument is unsound, and is neither sanctioned by law nor justice.

This court in Huidekoper v. Hadley et al., 177 Fed. 1, 100 C. C. A. 395, 40 L. R. A. (N. S.) 505, directed that a mandamus issue in a somewhat similar case. It is true there were allegations in that case that the acts of the assessors and officers having in charge the collection of taxes were committed intentionally and fraudulently in order to prevent the assessment and collection of taxes, and there are no such allegations in the petition in this case. But in a case like the one at bar the question is: Is there a plain duty required of the defendants in error by law which they refuse to perform to the damage of the relator? It is not material whether their acts are committed with intent to defraud the relator or not. The defendants have no discretion under the law as to the valuation they shall put upon property for taxation. Of course, they may exercise their judgment in determining what the true value of property is, and this court cannot interfere with the exercise of that judgment; but it can, and ought to, compel them to act in accordance with the undisputed law of Arkansas. There is no claim here that defendants in error have or intend to assess property at its true value.

The case of Taylor et al. v. Louisville & Nashville R. R. Co., 88 Fed. 350, 31 C. C. A. 537, does not rule this case, but is in line with the Van Buren Bridge Company Case, supra. It was held in the Taylor Case that under the Tennessee Constitution of 1870, declaring that all property shall be taxed "according to its value," to be ascertained as the Legislature shall direct, "so that taxes shall be equal and uniform throughout the state," when it is the uniform practice in the various

counties of the state to assess real property at not exceeding 75 per cent. of its true value an assessment upon railroad property at its full value, violates the constitutional provision in regard to uniformity, and the tax will be enjoined. The following cases illustrate and sustain the power of the court to issue mandamus in cases similar to the one at bar: Webb v. Renfrew, 7 Okl. 198, 54 Pac. 448; State Board of Equalization et al. v. People of the State of Ill. ex rel. Goggin et al., 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513; Chicago & N. W. R. Co. v. Board of Sup'rs of Boone County, 44 Ill. 240; Hicks, County Auditor, et al. v. Cleveland, 106 Fed. 459, 45 C. C. A. 429 (Circuit Court of Appeals, 4th Circuit); Cunningham v. City of Cleveland, Tenn., et al., 152 Fed. 907, 82 C. C. A. 55; City of Cleveland et al. v. United States, 166 Fed. 677, 93 C. C. A. 274; St. Louis Nat. Bank v. Marion County, 72 Ark. 27, 79 S. W. 791; City of Little Rock et al. v. United States ex rel. Howard et al., 103 Fed. 418, 43 C. C. A. 261 (Circuit Court of Appeals, 8th Circuit).

If Monroe county can contract with the relator to build a courthouse for the use of its people, accept the same, and then refuse to pay for it on the ground that in violation of the Constitution and laws of Arkansas it is assessing property for taxation at only 50 per cent. of its true value, then are courts of justice established for no purpose.

We think the relator is entitled to his writ. The judgment below therefore is reversed, and the case remanded, with instructions to grant the writ prayed for.

DINET v. RAPID CITY, S. D.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1915.)

No. 4336.

1. APPEAL AND ERROR ⟸209—QUESTIONS REVIEWABLE—QUESTIONS NOT PRESENTED TO TRIAL COURT.

   The question of absence of evidence to support the verdict is not reviewable, where not presented to the trial court during the trial.

   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1290–1298, 1300, 1303; Dec. Dig. ⟸209.]

2. APPEAL AND ERROR ⟸110—QUESTIONS REVIEWABLE—RULING ON MOTION FOR NEW TRIAL FOR WANT OF EVIDENCE TO SUPPORT VERDICT.

   A ruling of the trial court on motion for new trial on the ground that there is no evidence to support the verdict is not reviewable.

   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 740–748; Dec. Dig. ⟸110.]

3. APPEAL AND ERROR ⟸1050—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

   Where, in an action on municipal bonds, the evidence without conflict showed that the bonds were illegally issued, and the real issue was as to whether plaintiff purchased the bonds with notice of their invalidity, error in overruling an objection to a question asked a witness for the city as to whether he remembered what his idea was as to the question voted on at the election authorizing the bonds was not prejudicial.

   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⟸1050.]

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4. APPEAL AND ERROR ⊂⊃1052—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE—CURING BY OTHER EVIDENCE.

Error in permitting a witness to testify that the relation between two persons was that of principal and agent was cured by the subsequent testimony of the alleged principal that he had had a transaction with the witness through the alleged agent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171–4177; Dec. Dig. ⊂⊃1052.]

5. TRIAL ⊂⊃76—EVIDENCE—OBJECTIONS—MOTION TO STRIKE OUT TESTIMONY.

Where there was no objection to testimony when offered, the remedy of a party complaining is by motion to strike it out.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 172, 183–190, 237; Dec. Dig. ⊂⊃76.]

6. MUNICIPAL CORPORATIONS ⊂⊃955—BONDS—BONA FIDE PURCHASERS—EVIDENCE.

In an action on municipal bonds, defended on the ground that they were illegal, because in excess of the constitutional limit of indebtedness, and issued as a donation to a railroad company, while on their face issued for the purpose of funding a valid indebtedness, testimony of a witness that he had a conversation with plaintiff, prior to the election voting the bonds, at which time plaintiff made statements as to the necessity of carrying the election, was proper on the issue that he was not a purchaser in good faith of the bonds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2002–2009; Dec. Dig. ⊂⊃955.]

7. WITNESSES ⊂⊃290—EXAMINATION—DIRECT EXAMINATION—REDIRECT EXAMINATION.

Where a witness on redirect examination was given an opportunity to correct any mistake made on cross-examination, but the witness reaffirmed statements made on cross-examination, sustaining of an objection to a further question on redirect examination on the same subject was proper, especially in the absence of any claim that the witness had inadvertently made a mistake.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1005; Dec. Dig. ⊂⊃290.]

8. WITNESSES ⊂⊃286—REDIRECT EXAMINATION—DISCRETION OF COURT.

Where a witness on cross and redirect examinations testified to transactions occurring during specified years, a further question on redirect examination as to whether he referred to a later period was properly excluded, within the discretion of the court, in the absence of any claim of any transaction occurring during the later period.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 994–999; Dec. Dig. ⊂⊃286.]

9. WITNESSES ⊂⊃290—EXAMINATION—REDIRECT EXAMINATION.

Where a witness on direct examination testified to a fact and as to his means of knowledge, questions on redirect examination calling for the same matter were properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1005; Dec. Dig. ⊂⊃290.]

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action by Henry G. Dinet against the City of Rapid City, S. D. There was a judgment for defendant, and plaintiff brings error. Affirmed.

S. E. Wilson, of Hot Springs, S. D., and Norman T. Mason, of Deadwood, S. D. (Clifford A. Wilson, of Hot Springs, S. D., and Eben W. Martin, of Deadwood, S. D., on the brief), for plaintiff in error.

A. K. Gardner, of Huron, S. D. (Albert R. Denu, George A. Jeffers, and Charles J. Buell, all of Rapid City, S. D., on the brief), for defendant in error.

Before SANBORN, HOOK, and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. This action was brought by plaintiff in error to recover the principal and interest due upon 70 bonds of defendant in error, for $1,000 each, dated May 1, 1891, claiming to be the owner and holder thereof for value before maturity without notice of any fact affecting their validity. The answer of defendant in error, in addition to a general denial, pleaded two other defenses: First. That the bonds were in excess of the constitutional limit of indebtedness of defendant in error. Second. That although the bonds on their face purported to have been issued for the purpose of funding the valid indebtedness of defendant in error, they were in fact issued as a donation to the Dakota, Wyoming & Missouri River Railroad Company.

[1, 2] A trial to a jury was had, resulting in a verdict for defendant in error. It is claimed there is no evidence to support the verdict. This question is not before us, as it was in no way presented to the trial court during the trial. It was presented in a motion for a new trial, but the ruling of the trial court on that motion is not reviewable here. The reason for this has been so many times stated that we refrain from again repeating it.

[3] Complaint is made of the admission and rejection of evidence. The witness Brennan, called by the defendant in error, was asked by its counsel:

"Do you remember what your idea was as to the question voted on at the election of March 24, 1891?"

This question was objected to as immaterial. The objection was overruled, and an exception taken. The question was immaterial. In view, however, of the fact that when the case went to the jury there was no conflict in the evidence showing the bonds to have been illegally issued, no prejudice resulted to plaintiff in error by the overruling of the objection. The court might have properly taken this question from the jury. The real contest on the evidence was as to whether the plaintiff in error purchased the bonds with notice of their invalidity.

[4] The witness Friend, called by defendant in error, had testified that he had received in the early part of 1908 from a Mr. Elan four of the bonds in question. The witness was then asked by counsel for defendant in error the following question:

"I will ask you if you know what relation or connection there was between Mr. Elan and Mr. Coad at the time these bonds were turned over to you."

This question was objected to by counsel for plaintiff in error as incompetent, not binding on the plaintiff, and involving unsworn declarations of some third party. The objection was overruled, and an exception taken. The witness answered: "His agent." Elan had tes-

tified previously that he had seen a power of attorney from Coad to Elan in the possession of Elan. Coad, himself, when on the stand testified:

"I had a transaction with Mr. Friend, who testified yesterday, through Mr. Elan, a Milwaukee broker."

If there was any error in overruling the objection to the question asked the witness Friend, it was cured, as Coad himself testified that he did have a transaction with Friend through Elan.

[5] The witness Mathias testified concerning certain pencil notations which appeared on the bond register of defendant in error. These notations purported to show the disposition of the bonds that were authorized to be issued. There was no objection to the testimony at the time it was given, but subsequently there appears in the record a statement that this notation was objected to for the reason that it was not shown that it was made at the proper time by the proper officer in due form. The objection made after the witness had testified amounted to nothing. Counsel's remedy would have been a motion to strike out the testimony; further, there was no question about the disposition of the bonds.

[6] The witness Crouch, called by defendant in error, testified to a conversation which he had with the plaintiff in error in the presence of Coad, Muhlke, and Furst as to the necessity of carrying the Rapid City election held on March 24, 1891, at which the bonds were voted. This would fix the conversation prior to the date of the election. The testimony was introduced on the issue pleaded that Dinet was not a purchaser in good faith of the bonds sued upon.

[7-9] When the witness Coad was called to testify on the part of plaintiff in error, he testified that he never met Muhlke until October, 1891, that Crouch himself was not connected with the railroad project until August, 1891, and that the witness was not acquainted with the plaintiff Dinet at that time. On cross-examination Coad testified:

"I think I was first introduced to Mr. Dinet in Mr. Muhlke's office, I never saw him around there but a few times in 1891, 1892, and 1893. I wouldn't say I saw him there a half dozen times in those three years."

It thus appears that Coad had testified on the direct examination that he was not acquainted with the plaintiff Dinet in 1891. On cross-examination he testified that he never saw Dinet around there but a few times in 1891, 1892, and 1893. Counsel for plaintiff in error on redirect examination asked the witness the following question:

"Did I understand you, in response to a question of Mr. Shrader, to say that you only saw Mr. Dinet in the office of Mr. Muhlke in 1891, 1892, and 1893 a few times? A. Very few times."

Counsel for plaintiff in error then asked this question:

"Did you see him at all in 1891, 1892, and 1893?"

This question was objected to by counsel for defendant in error as seeking to contradict the statement of their own witness and argumentative. The objection was sustained, and an exception taken Counsel then asked the following question:

"I will ask this question: Did you mean 1891, 1892, and 1893, or 1901, 1902, 1903?"

Counsel for defendant in error objected to the question as argumentative, not proper cross-examination, irrelevant, incompetent, and immaterial. The objection was sustained, the court stating "that the ground had all been covered upon direct and cross examination," and exception was taken and allowed. Counsel for plaintiff in error then asked the following question:

"You state positively that Mr. Crouch had nothing to do with this road until August, 1891. Will you state to the court and jury what are the facts and circumstances that make you so positive concerning that statement?"

Counsel for defendant in error objected again as cumulative. The objection was sustained, and an exception taken.

We do not think there is reversible error in the rulings of the trial court in excluding questions asked by counsel of the witness Coad by plaintiff in error on redirect examination as above specified. The first question asked the witness by counsel on redirect gave the witness the opportunity to correct any mistake which he had made in testifying on cross-examination. The witness, however, by his answer reaffirmed what he had said on cross-examination. To again ask the witness what was practically the same question was not permissible, as there was no claim that the witness had inadvertently made a mistake. To then ask the witness if he did not mean 1901, 1902, and 1903, instead of 1891, 1892, and 1893, there being no claim that anything occurred 10 years later, was not permissible; at least, it was within the discretion of the court to refuse to allow the question to be asked. The court very properly remarked that the matter had all been covered on direct and cross examination.

In regard to the next question, the witness Coad had testified on direct examination that Crouch had nothing to do with the road until August, 1891. It was not proper redirect, and the witness had already testified fully as to his means of knowledge.

The judgment of the court below is affirmed.

OTIS ELEVATOR CO. et al. v. INTERBOROUGH RAPID TRANSIT CO. et al.

(Circuit Court of Appeals, Second Circuit. January 12, 1915. On Petition for Leave to Amend Decree, February 19, 1915.)

No. 110.

1. PATENTS ⇐91—PRIORITY OF INVENTION—REDUCTION TO PRACTICE.

Evidence that, more than a year before application for a patent, a machine was built from drawings made under direction of the patentee embodying his invention, and that such machine was practically tested and sold commercially as an operative machine, is sufficient to carry the date of invention back, beyond reasonable doubt, to the date when the construction of such machine was ordered.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 121-123; Dec. Dig. ⇐91.

Reduction of invention to practical use or operation as affecting patentability, see note to Excelsior Supply Co. v. Weed Chain Tire Grip Co., 113 C. C. A. 7.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. PATENTS ⊂⊃26—INVENTION—EVIDENCE TO ESTABLISH.
A new combination, producing a device well adapted for the service required, and which overcomes objections recognized for years in devices intended for the same purpose, discloses patentable invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⊂⊃26.]

3. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—AUTOMATIC MOTOR STARTER.
The Ihlder patent, No. 742,031, for an automatic motor starter, claim 3, was not anticipated and discloses patentable invention; also *held* infringed.

Appeal from the District Court of the United States for the Southern District of New York.

The following is the opinion of Hunt, Circuit Judge, in the lower court:

Claim 3 of the patent in suit reads as follows: "In a switch, the combination of a plurality of contacts, a plurality of contact arms provided with contacts co-operating therewith, and means for successively actuating said contact arms, said means consisting of a movable member provided with bearing surfaces of varying lengths upon which the contact arms are adapted to bear, and electro-magnetic means for actuating said member, for substantially the purposes set forth."

The patent is for an automatic motor starter, and under the principles of law applicable is to be read as for a combination of elements in an automatic motor starter. We must regard the Egger, Hall, Marvin, and Edmonds patents as disclosing certain obsolete and commercially impracticable combinations of pivoted switch levers adapted to be actuated successively by cam mechanism which was actuated in turn by electro-magnetic means in connection with devices having nothing whatever to do with motor starters. No one of these devices could be employed to regulate electric motors automatically without decided changes. Patents to Herdman, Van Emon, Whittingham, Moore, Sperry, and Knight & Potter antedate the latter part of 1900, which is the time when the Otis Elevator Company built and shipped a commercial device claimed to embody the subject-matter of the patent in suit. But I do not find that any one of these several patents discloses the combination of elements recited in the claim in issue.

[1] Baxter by certified copy shows that he filed application for patent on May 21, 1902, for a device apparently recited by claim 3 of the Ihlder patent. Ihlder did not file his application until June 10, 1902, and we may assume that Baxter was in possession of the invention of claim 3 prior to Ihlder, unless Ihlder by proof which satisfies the court beyond a reasonable doubt can carry back his date of invention further than the date of Baxter's application. But it seemed to me that Ihlder maintained the burden of proof required of him with respect to the establishment of his invention as of a date prior to October 30, 1900. It cannot be successfully disputed that upon that date an order was issued for the construction of a type of controller to be made according to a drawing previously made in accordance with the directions of Ihlder. Such a controller was completed on December 10, 1900, was connected up to a motor with electrical circuits, tested, found to be operative, and was shipped from the factory on the following day. It is proved that on December 12, 1900, this controller was shipped to San Francisco as an operative commercial mechanism. There can be no reasonable doubt that this controller, 3M No. 35, conformed in manufacture with a print of the drawing, Exhibit I, that it is shown in the photograph, Exhibit P, or that it was in all essential respects Complainant's Exhibit U. The conception of the invention of Ihlder's patent was in Ihlder before the order for the making of the controller sent to San Francisco. Construction, practical testing, and sale followed, thus proving that the date of invention was prior to October 30, 1900. Continental Rubber Works v. Tire Co., 178 Fed. 452, 101 C. C. A. 436.

[3] As indicated, the patents that relate to motor starters which are to be considered in the case are therefore those of Herdman, Van Emon (two), Whittingham, Moore, Sperry, Knight & Potter, and Reichel. Ihlder discloses a series of pivot switch levers successively actuated to make butt contact with a corresponding series of fixed contact terminals by means of a cam mechanism which in turn is actuated automatically by a solenoid controlled by a dashpot. Herdman discloses an automatic controller of the pivoted arm and sliding contact type. A solenoid magnet controlled by a dashpot sweeps the arm slowly across a series of contact terminals of resistance sections. The operation is similar to that of the device disclosed by Ihlder, but may be differentiated in three important particulars: (1) Herdman shows sliding contact; (2) his device does not reproduce the action of the intelligent operator; that is, as Mr. Vansize said, it is not "fool proof"; and (3) it is not adaptable for use with large and small motors, requiring, as it does, a multiplication of subdivisions of resistance to preserve its own operation. Ihlder uses butt contacts, his device so nearly reproduces the results obtained by the skilled operator that it is practically "fool proof," and it is not at all dependent upon the number of sections of resistance. They may be large or small, as suits the motor and the work to be performed.

The Van Emon patent is of very doubtful commercial practicability because of the danger of arcing and burning, as explained in the evidence which is not necessary to be detailed in this memorandum. It is enough to say that the patent illustrates an effort to obtain in switches an action which would correspond to that of an intelligent operator; but as I understand the evidence the use of individual adjusted dashpot mechanisms is a different conception from the Ihlder patent which is explained as accomplishing by different extents of travel of a single dashpot a sequence in which the operation may take place.

The question is whether, in view of the disclosures of the patents already referred to and of the facts that switches making butt contacts were known in the electrical art, Ihlder can claim invention. In the case of Sundh Electric Co. v. Interborough Rapid Transit Co., 222 Fed. 334, decided in this district by Judge Hazel June 27, 1911, this question was discussed, the court having before it, among others, the Herdman and Van Emon patents which are of special importance to the present suit; and while the conclusion reached is not binding on this court, a reading of the opinion of Judge Hazel convinces me that the distinctions drawn by him are sound and that the end he reached was just. I shall not enter upon the matter in detail. It seems to have been considered essential that in any automatic means for starting motors it would be necessary to avoid the switching mechanisms of the wiping or sliding contact type in the use of which what is called arcing occurred and in time resulted in burning out and destroying the switch.

The witness Quimby, who has had large practical experience in the operation of automatic starters in connection with pumps operated by electricity, said that starters having the sliding contact type of switches did not prove reliable in connection with electrically operated pumps and that, after a vast experience, he in 1902 inspired the organization of the Sundh Company to get a controller which could meet his requirements. The contention of the defendants that the device of the patent in suit was produced by coupling without modification an old solenoid engine and dashpot, which could be used to run various kinds of machines and which was old in use in an automatic starter to actuate the movable arm member of a sliding contact type of switch mechanism, with another old type of switch mechanism which could be operated by hand, is not well founded. Ihlder did much more. He substituted for much of the operating mechanism of the old hand starters a different form of contact, recognized old elements, and perfected an efficient and reliable automatic starter in which he secured, by co-ordinating with a group of other switches provided with butt contacts, a solenoid and dashpot, and an intermediate cam mechanism, a device which obtained results invariably which the most intelligent operator would get.

[2] Such a new combination, producing as it did a device so well adapted for the service required of an automatic starter, and which overcame the objections which appeared, as one reads the history of the art, to have been recognized for years as inherent in automatic starters of movable arm and

sliding contact type, constitutes invention under the patent act. Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586; National Malleable Castings Co. v. Foundries Co. (C. C.) 182 Fed. 626; Eck v. Kutz (C. C.) 132 Fed. 758.

Plaintiff has sustained his allegations of infringement in that the several automatic starters which were installed for the Interborough Company in March, 1908, and which were used by that company until December, 1912, infringed the third claim of the patent in suit. Here, again, the opinion of Judge Hazel is persuasive, and his finding that there was infringement of the claim of the Sundh patent by the controllers B and C in evidence will be accepted. The Court of Appeals in this Circuit in the Sundh Case, 198 Fed. 94, 117 C. C. A. 280, refers to the devices of Sundh and Ihlder, compares them with detailed care, and affirms the view that there is infringement so far as the original controllers of the Interborough Company are concerned. Without attempting to state the mechanical points, it appears that the rotary cams in defendant's controllers in structure and in function closely correspond to the cam-shaped edges of the plate of the controller of the Ihlder patent. There is a difference in the reversal of operation, but the same differences exist as to operation between the controller of the Sundh patent and that of the Ihlder patent, and the Court of Appeals in the Sundh Case has found the substantial invention of each patent to be the same. Claim 3 of Ihlder's patent reads with the same precision upon defendant's controllers as upon the controller of Sundh.

The Interborough Company's rebuilt controller also infringes the claim in issue. The new controllers were substituted in December, 1912, after the decision of the Court of Appeals in the Sundh Case and after the bill had been filed in the present suit; but the new controllers and their electrical circuit arrangement remain as shown in the exhibit marked "E." There are certain substituted bits of mechanism, but as I understand the evidence the cam action undoubtedly is retained, and the arrangement is such as to their bearing surfaces as to produce successive movements of the switch levers. The rotary cams in the new controllers have been cut away so as to leave only the shoulders or acting faces, while the plain holding surfaces, both low and high, have been transferred to the fixed brackets. But the fact that the bearing surfaces are stationary and do not have different lengths does not substantially change the case. The means employed to actuate the switch arms in the new controllers are the mechanical equivalents of those employed in the controllers theretofore used. The Paper Bag Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122.

Mr. Waterman said, among other things: "I was asked if the operation of this pin could be said to be a cam action, and I said it could; but I have not designated it as a cam. I should say that this pin was simply a part of a cam, the rest of which was cut away, and it acts in the same manner. As the shaft is rotated the pin first makes contact on what is then its upper surface. As the shaft continues to rotate, the contact with the pin travels around the pin. It eventually gets some 100 degrees or so, maybe 120 degrees around the surface of the pin. That is the cam action. Now the mere fact that the cam is cut away is of small importance, and has no effect, from the engineering point of view, on the existence of the cam. You may cut away any part of the cam. Of course a cam is merely a sliding surface, an eccentric member which moves something. And here we have a sliding surface, eccentric member which moves something, and it is virtually a cam, although I did not myself choose to apply that term to it."

The eccentric lugs placed opposite the pins on the rotary collars, and which, after the switch arms have been moved to closed position, come up in front of the links, prevent any displacement of the latter from their seats upon the fixed brackets and make bearing surfaces of differing lengths, and it is in evidence that these lugs bear against the front of the dependent levers, the paint having been rubbed off by contact. In functional result there appears to be no difference between the setting of the eccentric pins at different angular relations with respect to the switches, and where cams are set at different relations with respect to the switches. "There is," said

Mr. Waterman, "no change in this structure, so far as its being an automatic starting switch, so far as the plurality of contacts—'the plurality of contact arms provided with contacts co-operating therewith'—are concerned. There is also means for successively actuating the contact arms."

The findings must be that the title to the Ihlder patent is as alleged in plaintiff's bill, that there has been no anticipation of the third claim of the Ihlder patent, that the claim involved invention, and that there has been infringement by defendant's first and second controllers.

Decree in favor of plaintiffs; form of decree to be submitted by plaintiffs to defendants, and thereafter to be settled by the court.

W. Clyde Jones, of Chicago, Ill., for appellants.

W. B. Whitney, of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. The decree is affirmed, upon the opinion of Judge Hunt.

On Petition for Leave to Amend Decree.

Petition for leave to apply to District Court to amend decree finding infringement and ordering accounting, which decree was recently affirmed by this court.

W. Clyde Jones and Arthur B. Seibold, both of Chicago, Ill., for appellants.

PER CURIAM. It was proved to the satisfaction of the District Court and of this court that the Cutler-Hammer Company had made and sold controllers like Exhibit F and that such controllers infringed the patent. Under the present decree, in the opinion of a majority of the court, complainant is entitled to profits and damages, if it can prove any, on account of all such controllers—i. e., controllers like Exhibit F—down to the accounting, whether they were sold to the Interborough Company or to anybody else. It is unnecessary to amend the decree in order to give complainant any further relief, and therefore the motion for leave to apply for amendment to the District Court is denied.

TRUSSED CONCRETE STEEL CO. v. GOLDBERG et al.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1915.)

No. 2585.

PATENTS ⊂⊃328—INFRINGEMENT—CONCRETE FLOOR CONSTRUCTION.

Claim 4 of the Buente patent, No. 681,870, for fireproof floor construction, consisting of concrete joists, reinforcing trussed structures therein, and hollow refractory centers between the trussed structures, and the Kahn patent, No. 768,284, for a combined steel and concrete beam, as limited by the prior art, *held* not infringed.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit by the Trussed Concrete Steel Company against A. L. Goldberg and others. From a decree dismissing the bill, complainant appeals. Affirmed.

E. N. Pagelsen, of Detroit, Mich., for appellant.

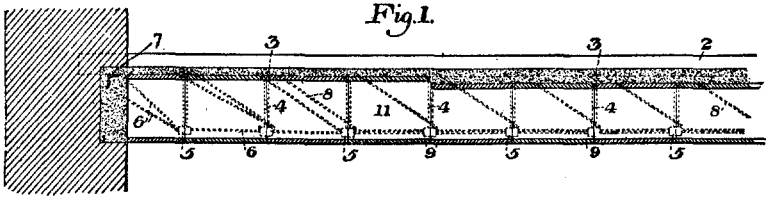
C. P. Byrnes, of Pittsburgh, Pa., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Suit for infringement of United States patent No. 681,870, September 3, 1901, to Buente, on fireproof floor construction, and United States patent No. 768,284, August 23, 1904, to Kahn, on combined steel and concrete beam. The District Court held neither patent infringed, and accordingly dismissed the bill.

The structure of Buente's patent in suit consists, broadly, of a series of concrete joists, metal reinforced, having hollow tile or refractory centers between joists; the concrete not only inclosing the reinforcement which helps form the joists, but completely filling in the space between the tiles. The floor was designed to be constructed "in place," as distinguished from a factory construction. In building floors of this general nature in place, it had been customary to use temporary supports or "centering" for sustaining the weight of the wet and heavy concrete structure during the setting and drying process. The first of the three objects of the invention stated in the specifications was to dispense with these temporary supports. Buente accordingly provided a wooden sleeper connecting the main floor beams (or extending from the floor beams to the wall), represented by the numeral 2 in Fig. 1 of the patent drawing here reproduced, being a partial vertical section taken at right angles to the main floor beams.

Fig. 1.



The drawing shows a series of plates *3* projecting beyond the sides of the floor joists, each plate provided with a depending support *4* having a clip *5* secured at its lower end, the clip supporting the tile. "A truss wire *6* preferably secured to angle bars *7* at the ends of the sleeper extends through these clips, forming a trussed structure." Supplemental truss wires or rods *8* (inclined in opposite directions on opposite sides of the center of the sleeper) extend from the end of each plate *3* downwardly to and secured in the clip at the lower end of the next rod *4*. Fig. 4 below is a partial side elevation of the "trussed floor sleeper" of the patent.

Fig. 4.

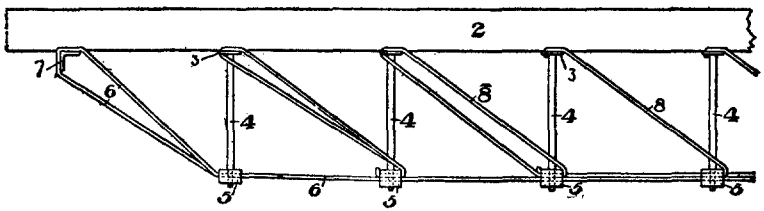
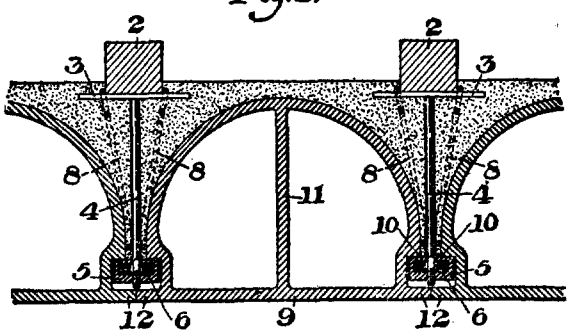


Fig. 2, below, is a broken cross-section at right angles to Fig. 1, and shows one form of construction disclosed, including the tile *9* and the shoulders *10* resting on the clips *5*.

Fig. 2.

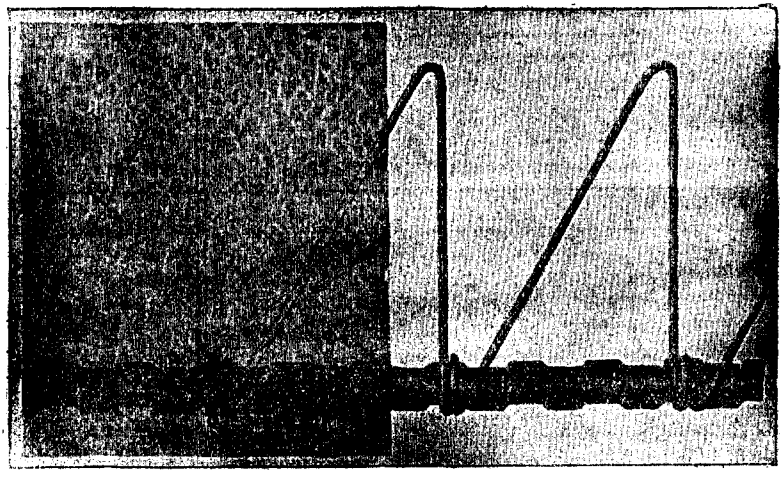


Claim 4 is the only one involved, and reads as follows:

"4. In fireproof flooring, a series of concrete joists containing reinforcing truss structures and hollow refractory centers between the trussed structures, substantially as described."

The claim thus covers three elements in combination: (1) The concrete joists; (2) reinforcing truss structures therein; (3) hollow refractory centers between the trussed structures.

The defendant's alleged infringement consists in their use, in their own building, of the so-called Gabriel trussed bar, as reinforcement for concrete in a tile and concrete floor. A section of the bar partly inclosed in the concrete is shown below.



The important defense is that the claim in suit, if so construed as to cover defendant's structure, is invalid in view of the prior art.

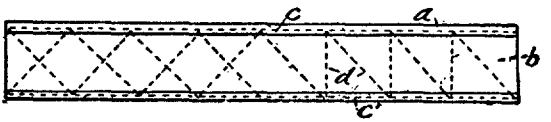
The theory of reinforcement of concrete is that the upper part of a beam under load receives compression, while the lower part is subject to tension; that concrete strongly resists compression stresses, but only slightly resists tension strains; steel, which has strong tensile resistance, when inserted below the neutral axis of the beam, reinforces the concrete by supplying the element which the latter lacks.

Buente was by no means a pioneer in the art of metal reinforced concrete (or cement) and tile floor construction. For example: As early as 1877, 24 years before the patent in suit, Hyatt (British, No. 289) disclosed metal-reinforced cement or concrete beams supplemented by hollow tile construction, capable of being made either in factory or in place. Lee (1894, No. 522,426) showed a floor "formed of tile blocks cemented together and tension rods cemented in the base of the floor." This general form of construction was extensively commercially manufactured previous to Buente. Crawford (1899, No. 621,446) showed a metal joist in the form of an I-beam embodied in concrete, with hollow tile between the joists, surrounded by concrete except on the lower side of the beam. McCarthy (1891, No. 461,960) had disclosed. in connection with tile construction, wire tension supports inbedded in concrete, although not as a part of the joists.

Nor was metal reinforcement in truss form unknown when Buente entered the field. The familiar theory of the truss is that the tension

member, or tie beam, is hung or "trussed" from the upper or compression member, whereby the compression strain is communicated in part to the (lower) tension member.

To say nothing of metal reinforcements of arch and truss form in bridge and allied arts, or of Hyatt's formation of metal reinforcement for concrete beams, Waite (1898, No. 606,696) had disclosed in a beam construction for buildings a metal reinforcement in the form of a complete truss, as shown by the figure below, in which *a* represents concrete or other similar element, *c* and *c'* respectively the upper and lower metallic chords, and *d* metal members connecting the top and bottom chords.

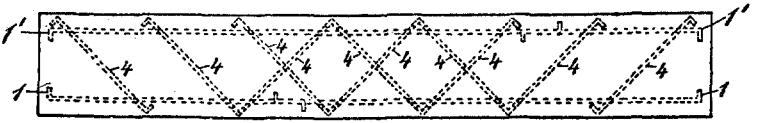


We think the triangular web construction of the tying members, in connection with the upper and lower chords, effects a true truss. However, it is perhaps enough to say that one of complainant's experts admits that it was not new at the date of the patents either to Waite or to Buente to reinforce concrete joists with complete trusses.

Complainant insists, however, that the reinforcement of the Buente patent is not a complete truss, but only a part truss, and that Buente was the first to suggest part-truss reinforcing structures in concrete joists, supporting hollow tile or refractory centers. The argument that Buente's reinforcement was an incomplete rather than a complete truss rests upon the proposition that the wooden sleeper, although presumably intended not to be removed, but to be used as a connection for the superimposed floor, served only a temporary purpose as a truss element; that the concrete when in place effectively supplied the upper chord or compression member, and that the "truss structure" of the claim in suit means an incomplete truss, as distinguished from a "trussed structure" resulting from the union of the concrete and metal reinforcement. This argument lays stress upon the statement in the specification that "the trussed sleepers form temporary core joists which support the hollow centers while the concrete is applied," and that, "if the sleepers are burned, the metal plates or bars will transmit the strains from the diagonals to the concrete and hold the structure intact," and upon the fact that claim 4 omits the "sleeper" as a separate element, which is, however, contained as such in others of the claims.

Assuming for the purpose of argument only that this contention is correct (and in the face of serious doubts, at least), we find, however, that part or incomplete trusses were not new in the art at the time of the Buente patent in suit. Devices of this general nature are, we think, found in Melber (1900, No. 660,508), which shows upper and lower tension rods, and diagonally disposed rods, all imbedded in the cement or concrete construction for the purpose of taking up the horizontal, vertical, and resultant sheering strains, respectively; the ends of the

diagonal rods being unattached to the tension rods (Fig. 7 being here reproduced); also in Hennebique (1898, No. 611,907), whose U-shaped



stirrups (which happens to be the name Gabriel gives to his wire loops) imbedded in the concrete connect the "chord of tension" formed by the horizontal bars with the "chord of compression" formed by the beton, thus playing "in the joists of strengthened beton the part which the suspension rods play in the trussing of metallic girders." Thus, in both Melber and Hennebique, the concrete is needed to complete the truss effect.

We therefore find in the specific prior art each element of the claim in suit, viz.: The concrete joists; the reinforcing metal truss structures; the hollow refractory members between the joists. True, unless Hyatt shows essentially a truss (as we think he does), we find in none of the references all of the three elements here involved. For example, while Lee and Crawford have tile and metal-reinforced concrete, the reinforcement is not in truss form; and while Waite and Melber have trussed reinforced concrete beams, they have no tile members. Hyatt, however, shows the tile and concrete, reinforced as stated.

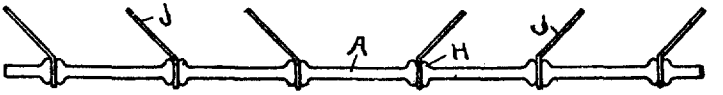
We find it unnecessary to consider the effect of an earlier issued patent to Buente, originally included in the present suit but later withdrawn.

No light upon this question of invention is afforded by favorable public reception and use; for the conception of the patent in suit was impracticable commercially, as the floor beam, unless made expensively strong, is too weak to sustain (without deflection) the weight of the concrete during construction and thus to dispense with the centering, and the Buente truss seems never to have been used. The patent was purchased by complainant but a few months before beginning this suit.

In view of the prior art, the claim is, in our opinion, void, unless at least restricted to the form shown in the description of the specifications illustrated by the drawings of the patent. Duff v. Sterling Pump Co., 107 U. S. 636, 639, 2 Sup. Ct. 487, 27 L. Ed. 517; D'Arcy v. Staples (C. C. A. 6) 161 Fed. 733, 738, 88 C. C. A. 606; D'Arcy v. Murray, 161 Fed. 352, 354, 88 C. C. A. 364. So limited, the defendant's device does not in our opinion infringe the Buente patent. The device of that patent (construed most favorably to complainant's construction) and the device of defendant are wholly unlike, except as each has a metal tension member with metal reinforcement radiating therefrom.

The Kahn patent in suit, as already said, relates to a combined steel and concrete beam. The stated objects of the invention are: (1) "To provide for a longitudinal tension bar for said beam, supplemented with washers or deformations to insure better contact with the concrete body and to prevent stripping"; and (2) "to construct the main tension bar of uniform cross-section," to prevent waste of material, and to enable the use of a greater or less number of washers as desired. For the

purpose of holding the washers securely in position, the bar is upset or distorted on each side of the washer, after the same is put on the tension bar, by squeezing a portion of the bar out radially, so as to form a lug or ear on each side of the washer. The latter "may extend perpendicularly to the main longitudinal beam or may be inclined obliquely thereto." Fig. 6 below shows the obliquely inclined form. The claims in suit are Nos. 3, 4, and 10, which are printed in the margin.[1]



The defense is substantially the same as made to the Buente patent. In view of the prior art, there was nothing novel in the mere idea of a metal tension bar with projections therefrom, either vertical or oblique, for binding and preventing stripping. The part-truss reinforcing structures to which reference has been made show the general idea involved in a bar so equipped. Kahn himself, by his patent of August 18, 1903 (No. 736,602), had shown a tension bar with arms projecting obliquely therefrom and fastened rigidly thereto. In a later patent of February 9, 1904 (No. 751,921, originally included in this suit, but subsequently withdrawn), Kahn showed a tension bar with rigidly attached and laterally extending arms formed by striking up portions of the web running along the two opposite sides of the main bar. Complainant's commercial structure employs this bar of the second Kahn patent last referred to. Nor were washers on or deformations of the tension bar new, for the purpose of getting a better grip on the concrete. Hyatt shows both a "washer" on a bolt projecting from the rod and a "stop" on the rod. It is evident that whatever patentable novelty resides in the patent in suit is to be found in the specific method of attaching the washers or arms to the tension bar. It seems clear that defendant has not adopted Kahn's specific method, which is all we think the patent covers.

Defendant's construction consists of wire clips wound around a bar originally constructed with deformations. These loops are not the "perforated members strung upon the bar" described in the fourth claim. While the deformation of the tension member naturally has some effect in keeping the wire loops in place, it does not completely

[1] 3. In a beam, the combination of a longitudinally-disposed tension member, of auxiliary pieces placed upon said member at points intermediate its ends and secured in position by deformation of the member without varying its cross-sectional area, and a beam of plastic material surrounding said tension member, the tension member being below the neutral axis of the beam.

4. In a metallic reinforcement for concrete, the combination of a metallic bar longitudinally disposed, of auxiliary perforated members strung upon the bar and secured in place, said auxiliary members being inclined in opposite directions from the middle of said bar.

10. In a metal reinforcement for concrete, the combination of a tension member, of a plurality of auxiliary members placed upon the tension member intermediate its ends, said auxiliary members having arms projecting laterally from one side, the cross-section of said tension member being changed to form shoulders for the support of said auxiliary members.

effect that result; and the manner of their attaching does not bring them within the meaning of the third claim. The patent cannot be construed broadly enough, in view of the prior art, to include defendant's method of construction as an infringement of claim 10. In our opinion, defendant's device is not within the letter or spirit of the Kahn patent in suit, as limited by the prior art.

The decree of the District Court is accordingly affirmed, with costs.

NEWTON WASHING MACH. CO. v. GRINNELL WASHING MACH. CO.

(Circuit Court of Appeals, Eighth Circuit. February 17, 1915.)

No. 4252.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—WASHING MACHINE.

The Phillips patent, No. 950,402, for a gearing for operating a washing machine and wringer at the same time, while for a combination of old elements, was not anticipated, and the device produces a new and improved result, which rendered it patentable; also *held* infringed.

Appeal from the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Suit in equity by the Grinnell Washing Machine Company against the Newton Washing Machine Company. Decree for complainant, and defendant appeals. Affirmed.

Taylor E. Brown, of Chicago, Ill. (Clarence E. Mehlhope and C. G. Roe, both of Chicago, Ill., on the brief), for appellant.

J. R. Orwig, of Des Moines, Iowa (Orwig & Bair, of Des Moines, Iowa, on the brief), for appellee.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

YOUMANS, District Judge. This is an appeal from a decree enjoining the appellant from manufacturing, selling, or using a certain washing machine held to be an infringement of letters patent No. 950,402, issued to William F. Phillips on February 22, 1910, and afterwards assigned to appellee.

Taking the statement of assignment of errors as made in the brief of appellant, which statement is the same in all essential particulars as that in the record, it is as follows:

"(1) That the court erred in holding the Phillips patent, No. 950,402, good and valid, instead of holding the same to be devoid of patentable novelty and invention.

"(2) That the court erred in holding appellant's washing machine to infringe claims 5, 6, 7, and 8 of said Phillips patent.

"(3) That the court erred in not holding said claims 5, 6, 7, and 8, of the Phillips patent limited by the necessity of the prior art, as well as the terminology of said claims, to the structure actually disclosed in the Phillips patent; and that when thus properly limited and construed, the appellant's machine did not embody said structure, or infringe said claims.

"(4) That the court erred in directing the issuance of an injunction against the appellant and in not dismissing the bill of complaint for want of equity."

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The first assignment of error raises the question of patentable novelty and invention; the second and third, the question of infringement; the fourth is general, and must be taken as a summing up of the other three.

Appellee's patent is a gearing device. It is applied, in this instance, to a washing machine and a wringer combined. The wringer is reversible. There is no new element in the combination. Therefore, in order to be patentable, the combined action must produce some new result, or an old result in a more efficient and economical manner. The new result in this instance is the washing and wringing of clothes at the same time in a safe and convenient way. This does not mean that one garment is washed and immediately thereafter passed through the wringer. It means that, while some garments are going through the wringer, other garments are being washed, and that the two operations go on simultaneously. The wringer is made subject to perfect control by a lever easily and safely manipulated by the operator. The device possesses elements of utility, novelty, and invention. The washing machine and wringer are by the gearing device made to act jointly, and a new and useful result is produced. The device is therefore patentable. Richards v. Chase Elevator Co., 159 U. S. 477, 16 Sup. Ct. 53, 40 L. Ed. 225; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 C. C. A. 504; Bliss v. Spangler, 217 Fed. 394, 132 C. C. A. 210.

The patent of the appellant was taken out later than that of appellee. It produced the same results by practically the same device. The only real difference in the two is the place of mounting the power shaft on the tub. The language of the claim, in the application for patent, does not limit the mounting of the power shaft to any particular place on the tub. The limitation is to some place on the tub. We are of the opinion that the lower court was right in holding the appellant's patent to be an infringement on the Phillips patent.

It is insisted by counsel for appellant that the Phillips patent is void by reason of anticipation. It is contended that the Phillips patent was anticipated by at least four American patents and one British patent. The American patent most strenuously urged as an anticipation is the Woodrow patent. This particular patent is shown by the record to have been held an infringement of the Phillips patent, by the same court which held appellant's patent to be an infringement (Grinnell Washing Mach. Co. v. Woodrow [D. C.] 209 Fed. 621), and that the decree was not appealed from. This is not conclusive, but it should, at least, be taken into consideration. The British patent was called the Shedlock patent. It is contended, also, by appellant that one of the elements entering into the Phillips patent appears in a certain book copyrighted in 1868, entitled "507 Mechanical Movements." In their brief counsel for appellant say:

"This British patent embodies, broadly, all the features of the Phillips patent, so far as the claims in issue are concerned. It discloses a power-driven washing machine, provided with a reversible wringer machine, both being operated from the same source of power. Moreover, it discloses every feature of Phillips' alleged invention, except such specific details of gearing as Phillips found most convenient and economical in adding to his particular

form of dolly driving mechanism, the old familiar No. 53 device for reversing the wringer."

The qualifying clause in the foregoing quotation, "excepting such specific details of gearing as Phillips found most convenient and economical in adding to his particular form of dolly driving mechanism, the old and familiar No. 53 device for reversing the wringer," marks the distinction between the Phillips and Shedlock patents. The former is convenient and economical, and can be easily and safely operated by persons without mechanical experience. The latter is inconvenient and unwieldy, and requires a person with experience to operate it. The other patents referred to are also wanting in convenience and ease and safety of operation as compared with the Phillips patent.

In the case of Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, the court said:

"Indeed, it often requires as acute a perception of the relation between cause and effect, and as much of the peculiar intuitive genius which is a characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device de novo. And this is not the less true if, after the thing has been done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of before. The apparent simplicity of a new device often leads an inexperienced person to think that it would have occurred to any one familiar with the subject; but the decisive answer is that with dozens and perhaps hundreds of others laboring in the same field, it had never occurred to any one before. The practiced eye of an ordinary mechanic may be safely trusted to see what ought to be apparent to every one. As was said by Mr. Justice Bradley, in Loom Co. v. Higgins, 105 U. S. 580, 591 [26 L. Ed. 1177]: 'Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention.'"

In our opinion the Phillips patent is a combination of old elements producing a new and useful result, or an old result in a more facile, economical, and efficient manner, that it is not shown to have been anticipated, and it is therefore patentable.

The decision of the lower court is affirmed.

TRUSSED CONCRETE STEEL CO. v. CORRUGATED BAR CO.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 154.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—EXPANDED METAL.

The Forsythe patent, No. 862,897, for expanded metal and process of making the same, discloses patentable invention and is valid, but is entitled to only a narrow construction and range of equivalents, and, as so construed, *held* not infringed.

Appeal from the District Court of the United States for the Western District of New York.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

This cause comes here upon appeal from a decree of the District Court, Western District of New York, dismissing the bill of complaint in a suit for infringement of patent. The patent is No. 862,897 issued August 13, 1907, on application filed February 1, 1907, to William D. Forsythe, assignor to complainant, for "expanded metal."

The opinion of the District Court will be found in 214 Fed. 393. See, also, 197 Fed. 946.

F. L. Chappell and Chappell & Earl, all of Kalamazoo, Mich. (W. Merle Smith, of Youngstown, Ohio, of counsel), for appellant.

J. A. Carr, of St. Louis, Mo., and Lyman M. Bass, of Buffalo, N. Y., for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Judge Hazel has discussed the various questions presented, quite fully; reference may be had to his opinion for details as to the prior art.

The patentee states that his invention consists of a—

"process for forming expanded metal which is made up of three steps—(1) shearing the sheet metal along longitudinal lines, slits being formed of four connected portions, one of the portions extending transversely of the line of the slits, one of the portions extending in one direction from the center of the first slit and parallel to the general line of slits, and the two other portions extending parallel to the first, but in opposite directions and from the ends of the first slit, the second portion of the slit extending up between the third and fourth portions of the next adjacent; (2) striking up the tongues which are formed by the first, third, and fourth slits spoken of, so that said tongues project at right angles from the body of the plate and have portions at their ends projecting parallel to the plate; and (3) expanding the sheet laterally, so that the halves of the tongues will separate at their bases and swing down toward the main sheet. My invention also consists in a novel expanded metal, consisting of longitudinal ribs or bands connected by transverse ties, each in a plane at right angles to the main sheet. These ties are formed in halves connected at the outer ends to the main ribs and connected together at the inner ends, the ribs and ties being integral."

The claims relied on are:

"1. The process for forming expanded metal which consists in slitting the same along longitudinal lines so as to form parallel bands connected by tongues split through their bases, striking up the tongues, and bending the unsplit portion of the same back parallel to the main sheet, and then expanding the material by separating the longitudinal members laterally."

"3. The process of forming expanded metal which consists in slitting the same along longitudinal lines, so as to form parallel bands connected by tongues split through their bases, and expanding the material.

"4. An expanded metal comprising a series of longitudinal members, and a series of ties connecting the same, each tie formed of two parts connected at a line midway between the main tension members, all the members being integral."

"6. An expanded metal comprising longitudinal members, and a series of ties between adjacent longitudinal members, each tie formed of two parts united at their ends."

The contention that defendant is estopped from questioning the validity of the patent has been fully discussed by Judge Hazel, and we concur in his disposition of that branch of the case. Since we have reached the conclusion that the patent is a valid one, this question of estoppel is unimportant. Even an original patentee, who has assigned

his patent and is sued for alleged infringement of it, may show, if he can, that the state of the prior art requires a construction of the claims which will negative infringement by the device he makes.

This was a very crowded art, and the District Judge found it difficult to make a place in it which would sustain the Forsythe patent. The process and product which the patentee points out, and in which the bent-up tongue, with its bent-over unslitted tip, facilitates expansion, without strain or distortion, the two halves of the tip bending over towards each other on a line in extension of the slit, and folding down till furthest extension is reached, did, we think, effect sufficient improvement to sustain the grant of a patent therefor. It is unnecessary to discuss the prior art at length; Judge Hazel has sufficiently rehearsed it. Some of his statements as to the operation of certain of the prior art patents are criticized; but it is quite apparent, from the multitudinous varieties of expanded metal which the record discloses, that this Forsythe patent can be given no broad construction and no wide range of equivalents.

Coming now to the claims: The first one covers the precise process disclosed in the specification with its "three steps": (1) Shearing the sheet metal; (2) striking up tongues and bending over tips; and (3) expanding the sheet laterally. We can find in the record no proof that defendant's tongues are struck up and the unsplit portion of the same bent back parallel to the main sheet. Patent No. 1,080,418, under which defendant is manufacturing, does not show any such step; it describes the slitting of the sheet and then says:

"After slitting the opposite sides or edges of the sheet are drawn apart to expand it to the desired extent."

Nor is this step of striking up and bending shown in the photograph of defendant's sheet in process of construction on page 20 of complainant's brief. Nor is it disclosed in the exhibit marked "Sample Defendant's Material."

Claim 3, also for process, entirely eliminates this second step; but in so doing it eliminates the very element of novelty on the strength of which validity is found over the prior patents of this crowded art. This claim could be saved only by reading into it these upstanding tongues with bent-over tips, whose folding in, each on a line in prolongation of the slit through the tongue, constitute a real, though small, advance in the art; the improvement tending to some extent to avoid strain and distortion when expanding. But, if these struck-up tongues and bent-over tips are read in, claim 3 becomes a duplicate of claim 1, and is not infringed.

Claim 4 is broad enough textually to sweep in much of the prior art. It can be sustained only by confining it to the specific structure shown in the patent, with each tip of each tongue folded over on a prolongation of the line of the slit. But defendant's structure manifestly has not this element. See exhibit marked "Sample Defendant's Material."

The same remarks apply to claim 6.

The decree is affirmed, with costs.

NATIONAL MALLEABLE CASTINGS CO. et al. v. T. H. SYMINGTON CO.

(District Court, D. Maine. April 8, 1915.)

No. 705.

PATENTS ⊂=328—INFRINGEMENT—DRAFT-RIGGING FOR RAILWAY CARS.

The Byers patent, No. 673,419, for a draft-rigging for railway cars, is for a combination of elements, all of which were old, with the exception of the pocket for housing the parts, which is the leading feature of the invention, and as described consists of a box secured to both sills, tying the sills together and spacing them. In view of the prior art, the patent is not entitled to a broad construction, nor a wide range of equivalents, and, so construed, *held* not infringed.

In Equity. Suit by the National Malleable Castings Company and Jacob J. Byers against the T. H. Symington Company. On final hearing. Decree for defendant.

Fish, Richardson, Herrick & Neave, Charles Neave, and Clarence D. Kerr, all of New York City, and George I. Haight, of Chicago, Ill., for complainants.

Edwin F. Samuels, of Baltimore, Md., and Benjamin Phillips, of Boston, Mass. (Howard R. Ives and Libby, Robinson & Ives, all of Portland, Me., of counsel), for defendant.

HALE, District Judge. This suit in equity charges infringement of letters patent No. 673,419, issued on May 7, 1901, to complainants, on the application of Jacob J. Byers, for an invention relating to draft-rigging for railway cars. In premising, complainants point out that railway cars must be capable of being coupled together to form a train, and for this purpose a coupler is provided at each end of every car—the coupler on the end of one car engaging that on the adjoining end of the next car. If each coupler were attached rigidly to its car, there would be strain and shock connected with the starting or stopping of the train; and for many years it has been the custom to have some yielding or cushioning devices between each coupler and the car to which it is attached. For this purpose a "draft-rigging" is provided at each end of every car. This includes a drawbar, carrying a coupler at its outer end, and at its inner end certain shock-absorbing mechanism, interposed between the drawbar and the parts which are rigidly connected with the car. Complainants point out that the shock-absorbing mechanism shown in the case before us consists substantially of a pair of springs arranged one above the other, between the drawbar and the parts rigidly connected with the car. Whether the car is pulled or pushed, the springs will be compressed between the drawbar and the car, and the shock of pulling or of pushing is minimized by the springs. Such devices are especially necessary upon freight cars, where great weights are drawn, and the parts are made very strong, and therefore very heavy. The devices provided in this case are heavy. The coupler weighs 300 pounds, the yoke 112 pounds, the springs 55 pounds, and the followers 60 pounds, making a total of over 700 pounds. Owing to

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the great strain to which the draft-rigging is at times subjected, the parts, although heavy and strong, frequently break. It is of importance, then, that there be a capacity for ready replacement; and this replacement must be achieved in a limited space under the car. Complainants allege that they have brought before the court a draft-rigging adequate for the demands of the railroads and car builders, in that such rigging is of a character that it can be put in place on the car and taken down in parts; that the shock-absorbing mechanism is capable of being placed in position after the other parts of the rigging have been mounted on the car, and of being removed without disturbing the remainder of the draft-rigging. And they contend that the inventor, Byers, was the first to devise a draft-rigging presenting these capabilities.

Complainants allege infringement by the defendant of claims 1, 2, 3, 5, 6, 7, 8, and 10, those claims being as follows:

1. A draft-rigging having in combination with the drawbar a yoke, the arms of which are connected to the sides of the drawbar, springs arranged one above the other within the yoke, and followers also arranged between the arms of the yoke, said springs and followers being removable from below, independently of the drawbar, substantially as described.

2. A draft-rigging having a yoke, the arms of which are adapted to be connected to the sides of the drawbar, springs arranged one above the other between the arms of the yoke, and followers adapted to fit against the ends of both springs, and also contained between the ends of the yoke, said springs and followers being removable from below independently of the drawbar, substantially as described.

3. A draft-rigging having a pocket, lugs, extending horizontally across the pocket at the upper and lower portions thereof, respectively, followers within the pocket which bear against the lugs, and a yoke which extends within the pocket between the lugs and around the rear follower, substantially as described.

5. A draft-rigging having a yoke open at the bottom, and having a spring and followers arranged between the arms of the yoke, and a pocket within which the yoke extends, and which is also open at the bottom to permit removal of the spring and followers independently of the drawbar, substantially as described.

6. A draft-rigging having a yoke open at the bottom, and having a spring and followers arranged between the arms of the yoke, a pocket which contains the yoke, and is also open at the bottom to permit removal of the spring and followers, and a detachable closure for the opening in the pocket, substantially as described.

7. A draft-rigging having, in combination with the drawbar and spring mechanism, a yoke the arms of which are connected to the sides of the drawbar, a pocket within which the yoke extends, and a key which extends horizontally through the drawbar and yoke, and through slots in the walls of the pocket, substantially as described.

8. A draft-rigging having springs set one above the other, and a follower engaging the ends of both springs and having at the middle a stop projection which separates the springs, substantially as described.

10. A draft-rigging having springs arranged vertically, one above the other, followers, a yoke between the sides of which the springs and followers are set, said springs and followers being removable vertically from below independently of the drawbar, substantially as described.

It will be seen that claims 1, 2, and 10 are general in their scope, and describe a draft-rigging having the combination of a drawbar and yoke, springs, and followers, with the statement that the springs and followers are removable from below, independently of the drawbar.

Claim 8 is also general, and relates to a draft-rigging having springs, one above the other, and a follower engaging the ends of the springs, and having at the middle a stop projection separating the springs. Claims 3, 5, 6, and 7 are in detail. They describe a draft-rigging having a pocket, lugs extending across the pocket at the upper and lower portions of the pocket, followers within the pocket bearing against the lugs, and a yoke extending within the pocket between the lugs and around the rear follower. Claims 5 and 6 point out that the springs and followers are removable from below, independently of the drawbar.

The specification thus points out the advantages to be derived from the invention described in the claims:

"The pocket may be cast in a single piece, and is provided with horizontal lugs which extend across the pocket, above and below, and constitute abutments for the followers which are set in the pocket. The pocket and lugs are suitably braced by metal ribs or flanges. * * * The drawbar shank is connected with the rear follower by a yoke which is fixed to the drawbar by riveting or otherwise, and extends within the pocket, between the lugs, and around the rear follower, as shown. The pocket is open at the bottom, so that the follower-plates and springs may be removed freely from within the yoke in a vertical direction without the necessity of disengaging the yoke from the drawbar, since the follower-plates are not connected with the drawbar otherwise than by being placed between the sides of the yoke. This removal is made possible by taking off a cap-plate, which closes the opening at the bottom of the pocket and is secured by bolts, and the follower-plates can then be pried out by means of a tool applied to toothed recesses formed in the edges of the follower-plates. * * * The advantages of my invention will be appreciated by those skilled in the art. The springs arranged one above the other, the pocket having horizontal lugs or abutments for the followers, the free removability of the springs and the followers from below, from between the arms of the yoke, and from the pocket, and the construction of the draft-arms, together with the other items mentioned in the claims, constitute, severally and in combination, important parts of my invention."

Complainants say that the defendant's infringement consists in an agreement made in August, 1913, to furnish specifically constructed parts, consisting of cheek-castings and spacer-blocks, to the Pressed Steel Car Company for installation on Boston & Maine cars, with the intention that the parts should be assembled in such a way as to make up the combination of the patent in suit, and that the parts as furnished were capable of use for no other purpose; that in accordance with this agreement, during March and April, 1913, the parts referred to were furnished by the defendant to the Pressed Steel Car Company, intended by the defendant to be applied to car under-framings constructed for Boston & Maine cars. Complainants rely upon this agreement to infringe as sufficient to constitute technical infringement. They urge that, if sales have not actually been made, a wrong is threatened sufficient to call for an injunction, pursuant to the familiar principle that contributory infringement is intentional aiding of one person by another in the unlawful making, or selling, of a patented invention, or of some part of a patented invention, with intent and purpose of so aiding. Bump on Patents, 294; Goodyear Shoe Machinery Co. v. Jackson, 112 Fed. 146, 148, 50 C. C. A. 159, 55 L. R. A. 692; Canda v. Michigan Malleable Iron Co., 124 Fed. 487, 489, 61 C. C. A. 194. A sharp contention is raised wheth-

er or not the facts disclose a contributory infringement, even though it should be found that the defendant did agree to sell a part of the patented invention with a purpose of aiding as alleged. For proof of the alleged agreement for contributory infringement, complainants rely upon the answers to interrogatories put by them to defendant. And accordingly the alleged infringing construction is spoken of as "the machine of the interrogatories." If this machine, when put together, shall not be found to be an infringement of complainants' patent, then, of course, no infringement is shown. The inquiry presented at the threshold of the case is therefore whether or not the construction in which the alleged contributory infringement occurs was in fact an infringing device. The complainants say that such construction—to wit, the machine of the interrogatories—was clearly an infringing structure. The defendant says that it was not. In deciding this question, much depends upon the scope to be given the Byers invention. Complainants urge that the patent should be given a broad scope; that its purpose was to effect free removability of the springs and followers from below, from between the arms of the yoke, and from the pocket. The defendant says that, in view of the prior art, the Byers patent should be limited to the construction shown in its drawings and models, and should be restricted to a rigid pocket, with lugs extending horizontally across the pocket, and should conform to the other details set out in the specification, and especially described in claims 3, 5, 6, and 7.

The device of the Byers patent, constructed in accordance with the detailed claims, consists of a box or pocket, having lugs extending horizontally across it at the upper and lower portions, having followers within the pocket which bear against the lugs, and a yoke extending between the lugs and around the rear follower. The box, or pocket, is rigid, and ties the sills together, furnishing a bearing for the followers across their upper and lower edges. Complainants' brief describes the contents of the pocket substantially thus:

"A yoke arranged horizontally with its arms at the sides of the spring, secured also, at their forward ends, to the sides of the drawbar. The cushioning mechanism consists of two springs, arranged one above the other and placed between the two followers, which are also surrounded by the yoke. The springs are separated from each other by a spacer-block which supports the upper spring, and acts as a stop to prevent too great compression of the springs. The yoke is supported in longitudinal guideways in a casting attached to the draft sills of the car. These longitudinal slots afford an extended bearing for the yoke, and prevent excessive wear on any point on the yoke, and hold it in alignment with the spring and followers. The springs, arranged one above the other, and the followers on end, may be freely inserted into the loop of the yoke vertically from below, and are retained in such position by a cover-plate which has a bearing on the bottom spring, and so holds the springs and followers in position."

Complainants speak of the pocket as a supporting casting, which as they say, quoting from Byers, "may be cast in a single piece." They contend that the pocket may be made in any number of pieces, or in any suitable form; but, if made in a single piece, this casting or pocket will tie the sills together, a very desirable function, especially with cars having wooden draft sills, or widely spaced steel sills. Although the rigid box, or pocket, is claimed to be nonessential to the opera-

tion of the draft-rigging, it is shown in the Byers construction, and is described in the specification of the patent. It is claimed that Byers solved the draft-rigging problem by devising "a construction in which the parts could be put up and taken down piecemeal, and in which the springs and followers, in particular, were very readily accessible, and could be easily removed and replaced without disturbing the remainder of the rigging." The substantial contention is made that the Byers invention is not limited to a rigid box, or to a one-piece box, or to any particular form of box or pocket, so long as it achieves the free removability of the springs and followers from below, between the arms of the yoke and from the pocket. It is not denied by the complainants but that every element in the Byers construction is old; but it is contended that his combination of these elements presents a new and useful invention.

In order to find the scope and extent of Byers' invention, it is necessary to examine the prior art. The patent to Perry, No. 228,385, issued in 1880, discloses the idea of making separate spacer-blocks and shaping them to conform to the springs. The Hinson patent, No. 625,332, issued in 1899, shows the follower and spacer-block combined in a device called a "head-block" very similar to that shown in the Byers drawing.

The Frost patents, No. 510,854, issued in 1893, and No 532,272, issued in 1895, disclose a draft-gear having a horizontal yoke, with springs and followers removable from below. The arms of the yoke are in the same horizontal plane with the openings in the top and bottom. So far as I can see, the stop castings of any of the patents referred to could be combined, without alteration, with the yoke, springs, and followers of the Frost device. Frost's structure is simple, and perhaps primitive; but it gave to the public a draft-attachment having a yoke riveted to the sides of the drawbar, having its arms at the sides and the openings vertical; the springs and followers being removable from below. They seem to me to present the elements of the Byers general claims 1, 2, and 10.

The Reagan patent in 1893, No. 491,785, sets forth that its object is "to provide a generally improved construction of draft-rigging, one of the principal advantages of which consists in the convenience it affords in separating the parts, and in their adjustment, as for removing a broken draft-spring and inserting a perfect one in its place." The specific method of removal provided by this patent lacks the convenience of the later inventions; but it shows inventive thought in this direction. This patent in its claims shows also cheek-plates in combination with draft-timbers; these plates being bolted to, and formed with, studs countersunk into the draft-timbers, and a tie plate connecting the cheek-plates at their bases.

The Simons patent of 1899, No. 627,540, discloses the idea of removing the springs and followers without disconnecting any part of the yoke. It is clear that Simons had the idea of free removability. He shows the springs and followers located in openings in the sills and removable by withdrawing them from the opening in the yoke; the guides are held by means of removable bolts. Simons' structure comprises a yoke secured to the top and bottom of the drawbar, and springs

and followers within the yoke, removable independently of the draw-bar. With the exception of the special feature of the Byers pocket, and the positioning of the Simons structure, it is difficult to see any structural difference between the device of Simons and that of Byers. The same disclosure of the idea of free removability occurs in Reagan and in some others.

The structure concerning which contributory infringement is alleged appears by the answers to the interrogatories made by the complainants to the defendant. This may be regarded as the alleged offending machine. It is said by the defendant that this structure is made under the William H. Emerick patent, issued in 1902, No. 693,643. This patent to Emerick has already been the subject of controversy, and has lately received the consideration of the court in the Northern district of Illinois. Symington v. Miner, 216 Fed. 198. It is not shown that the record in that case bears any such relation to this record as to make it helpful in the matter now before me.

It is not necessary in the case at bar to decide whether the alleged offending device is made under the Emerick patent. That device substantially shows independent counter castings, or cheek-plates, secured to the opposite faces of the sills. Its stops engage the vertical edges of the followers only at each corner of the cheek-plate, forming ways for the yoke, and limiting the play of the followers. It is contended by the defendant that these stops or lugs, "instead of engaging the followers along their top and bottom edges, engage the upper and lower portions of the vertical edges of the followers, as do the old-fashioned cheek-plates shown in the Perry and Reagan patents, except that the defendant, in producing its cheek-plates, has cut a notch in the central portion of the vertical stop shoulder of the old-fashioned cheek-plate to provide for the passage of his yoke." It is contended, further, that the cheek-plates, "secured to the opposite sides of the sills, are not rigidly connected; for the car structure on which they are supported, while apparently rigid, is, in fact, flexible under the tremendous strains to which it is subjected." It is urged, however, by complainants, that no single pocket casting was adopted by Byers, and that his claims, therefore, cover a construction such as the defendant's in which the operative parts are arranged "in substantially the same way and perform the same functions as in Byers." It is urged by complainants, too, that defendant's structure makes a pocket as distinct as the pocket of Byers; that, inasmuch as the Byers invention is a radically new departure in the art, it is entitled to a broad range of equivalents; and that the defendant's form of structure is clearly an equivalent, even if not regarded as the very thing specified in the patent.

Upon a careful study of the prior patented art, I cannot sustain the contention that the Byers invention is a radically new departure in the draft-rigging art. Every element in the patent is old. The combination of elements for the purpose of effecting free removability of the springs and followers from below does not reveal a new purpose; for this purpose is disclosed in various patents to which I have called attention; and, although it has not been carried out with the success ascribed to the patent in suit, it has been disclosed in a sufficient degree to show inventive thought. Claims 1, 2, and 10 of the patent in suit are

vague. Claim 8 relates merely to a draft-rigging for springs, and a follower, with a stop projection between the springs. The detailed claims, namely, 3, 5, 6, and 7, relate to a pocket clearly defined as a distinct thing—a box secured to both sills, tying the sills together, and spacing them. This appears by the testimony of the expert, Mr. Livermore, and by the testimony of Byers, the inventor. So far as anything is disclosed in the record, Byers was the first to use an integral box or pocket, open at the bottom, in the manner described. The detailed claims to which I have alluded are directed to the structure shown in the patent and in the drawings, and must, I think, be limited to that structure. The separate elements named in the specification are old. The only new thing is Byers' "integral housing," which may be properly described as a box or pocket, with its horizontal stops, two at the front and two at the rear, extending across the box engaging the top and bottom edges of the followers. It is the feature of the detailed claims, and must be held to embody the sole advance which Byers has made in the art. The invention was in a crowded art, and is not entitled to a broad scope, or to carry with it a wide range of equivalents.

The record does not disclose any such commercial success of the patent in suit as to demand the special recognition of the court. It is contended by the defendant that for commercial use the complainants have adopted the defendant's structure. Whether this is so or not, it is unnecessary to decide. It is enough to say that the proofs of commercial success of the patent in suit are not persuasive.

Limiting the Byers invention as, I think, it must be limited, I find nothing in the defendant's device which should be held to infringe. I cannot hold that anything in the Byers patent enables the complainants to enjoin the defendant from using the alleged offending device, or from contributing to its sale or use. It seems clear to me that defendant's structure is not constructed according to the detailed claims of the Byers patent. It has nothing which, to my mind, should be held to be the pocket or box constituting the leading feature of the Byers invention. The use of cheek-plates and the other elements which it employs are old. Their combination in the construction of the defendant, in my opinion does not present the device described in the Byers patent and drawings. I am constrained to hold that defendant's device does not infringe the Byers patent.

Inasmuch as I have held that the patent in suit is not infringed, the result will be that the bill must be dismissed; and it is not necessary to consider other questions presented in the record.

A decree may be presented dismissing the bill, with costs for the defendant.

VICTOR TALKING MACH. CO. v. STRAUS et al.

(District Court, S. D. New York. March 23, 1915.)

PATENTS ⊂=212—LICENSES—POWER TO IMPOSE RESTRICTIONS.

A grant, for a fixed royalty paid in advance, of the right to use a patented article during the full term of the patent, when it is to become the property of the licensee if he has observed the terms of the license, is equivalent to a "sale," and the owner of the patent, having received full payment of the price, fixed by himself, cannot by a provision of the license restrict the right of the licensee to transfer the same for whatever consideration he may see fit. This is so, even though the patentee still has the right under its form of license to require the transferee to purchase from itself certain things adapted for use with the patented article.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 312-314; Dec. Dig. ⊂=212.

For other definitions, see Words and Phrases, First and Second Series, Sale.]

In Equity. Suit by the Victor Talking Machine Company against Jesse Isador Straus, Percy S. Straus, and Herbert W. Straus, individually and as copartners trading as R. H. Macy & Co. On motion to dismiss bill. Motion sustained.

Fenton & Blount, of Philadelphia, Pa. (Frederick A. Blount and Hector T. Fenton, both of Philadelphia, Pa., of counsel), for complainant.

Wise & Seligsberg, of New York City (Edmond E. Wise, of New York City, of counsel), for defendants.

AUGUSTUS N. HAND, District Judge. This is a motion to dismiss the bill of complaint, brought under rule 29 of the new equity rules (198 Fed. xxvi, 115 C. C. A. xxvi). The suit is for infringement of patents.

The complainant alleges that it is the owner of various patents covering the Victor talking machines and sound records, and that it has manufactured under these patents, and has appointed licensed dealers, with the right to convey the license to the public to use its machines and sound records only when a royalty has been paid of not less than $200 for the use of a machine, and of not less than that noted on the record for the use of a sound record. Every machine and sound record has accompanying it a notice of license to the foregoing effect, and also to the effect that the patented article is to be used only with the machines, sound boxes, sound records, and needles manufactured by the complainant. The license also provides that it is good only when the label containing the notice of license is attached to the machine. It likewise provides that the title to the patented goods remains in the Victor Talking Machine Company for the term of the patent having the longest term to run, and that upon the expiration of such patent the goods shall become the property of the licensee, if he shall have observed the conditions of the license. The license further provides that, upon violation of any of the terms of the license, the Victor Talking Machine Company may upon repayment of the amount of the

royalty, less 5 per cent. per annum for the use, retake the patented goods from the user. The complaint does not charge the defendants with having used the patented goods without labels, or with needles other than those manufactured by the complainant, but charges as the sole act of infringement that the defendants, though lawfully in possession of the patented articles, have exceeded the limited use granted by the license, in that they have sold the articles outright, in some cases for less than they have paid for the same to the licensed dealers, and are threatening to continue this course. The complainant alleges that by its system of marketing its patented machines and sound records it is enabled to obtain the benefit of its patents "at a minimum of cost to the licensee."

The real purpose of the license is obviously to maintain the market for the talking machines and sound records at the prescribed royalty, and the essential point involved is whether such a limitation of the use in the mode I have described is within the rights of the owner of the patents. I may say at the outset that, if the patentee has such a right under the patent law, there can be no doubt that this court, and not the state court, is the proper tribunal to adjudicate the issue between the parties. I also think that no provision of the Sherman Act or Clayton Act affects the matters at issue.

The infringement charged is for selling when defendants are alleged to possess nothing more than a nonassignable right to use. The whole dispute is as to the extent of the monopoly granted by the patent. There is no combination shown in restraint of trade or to fix prices, nor any contract substantially lessening competition. The only question is whether a patentee, who has once received his royalty covering the use of the patented article during the entire life of the patent, can by his license prevent the transfer of the use by his licensee in a case where upon the expiration of the patent there is a sale of the machine itself to the ultimate possessor, conditioned upon the observance of the terms of the license. If the patentee has such a right, I think an attempt to sell the machine in derogation of the license for a limited use is an infringement, and a remedy for infringement lies in the United States court, which has general jurisdiction over patent causes. As was said in Henry v. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, the complainant might have waived the tort and sued upon the contract of license itself; then the remedy would be at law in the state court. But he has chosen naturally the more adequate remedy. This being so, the issue is reduced to whether the right declared upon is one given by the patent law.

In the case of Henry v. Dick Co., the license read as follows:

"This machine is sold by the A. B. Dick Company, with the license restriction that it may be used only with the stencil paper, ink, and other supplies made by A. B. Dick Company, Chicago, U. S. A."

In that case, Sidney Henry sold to Miss Skou a can of ink suitable for use upon the patented mimeograph with knowledge of the above license agreement and with the expectation that it would be used in connection with said mimeograph. The court held by a divided vote of four to three, the Chief Justice and Justices Hughes and Lamar dis-

senting, that the act of Henry constituted an infringement of the patent.

In the case of Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, the notice of license was as follows:

"This size package of Sanatogen is licensed by us for sale and use at a price not less than one dollar ($1.00). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent * * * under which Sanatogen is manufactured. * * * A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation."

The Supreme Court decided this case by a divided vote. Mr. Justice Day, who did not sit in the case of Henry v. Dick, wrote the opinion, and the Chief Justice, Justice Hughes, and Justice Lamar (who dissented in the Dick Case) and Justice Pitney constituted the majority, and Justices McKenna, Holmes, Lurton, and Van Devanter, who were the majority in the Dick Case, constituted the minority. The patent law grants:

"To the patentee, his heirs or assigns, for the term of seventeen years, * * * the exclusive right to make, use, and vend the invention." R. S. § 4884 (Comp. St. 1913, § 9428).

The majority of the court in Bauer v. O'Donnell, supra, held that the patent law did not, under the exclusive right secured by the statute to "vend" a patented article, grant the right "to dictate the price at which subsequent sales of the article may be made" when a sale has once taken place. It is to be noticed that the license agreement in that case attempted to limit the use to cases in which a price of $1 should be paid upon all sales, and contained a clause revesting title in the patentee wherever the license agreement should be violated in this respect. The most striking difference between that case and the case at bar lies in the fact that here compliance with the license in respect to price or royalty is made a condition precedent to the passing of title, while in Bauer v. O'Donnell such compliance was made necessary to prevent the revesting of title by a condition subsequent.

This difference seems to me only formal. In fact, I can see no distinction between permanently parting with the use for a stipulated sum and parting with the title to a patented article, so far as the right to restrict the price to the consumer is concerned. But, if there is such a difference, it cannot, I think, be determined by whether the condition of the passing of title is precedent or subsequent, if in each event the title is designed ultimately to be in the licensee, provided he has paid the designated price. It will be said that a further difference between this case and Bauer v. O'Donnell lies in the fact that there the use granted was confessedly assignable, because the license agreement contemplated successive sales, while here the licensee was given no right, express or implied, to transfer the use. The point, however, upon which that case turned, was that the patentee had no further interest in the use, and, unless the licensee violated some provision of the license, he had parted with his interest in it because he had received the entire royalty. Such is the exact situation here.

The complainant, however, most urgently argues that the case of Henry v. Dick is not overruled and should determine my action in its favor. In Bauer v. O'Donnell that case is distinguished by Mr. Justice Day upon the ground that there the use of the machine granted was limited, in that it was to be with other articles than the patented apparatus. To quote his exact language:

"There is no showing of a qualified sale for less than value for limited use with other articles only, as was shown in the Dick Case. There was no transfer of a limited right to use this invention, and to call the sale a license to use is a mere play upon words."

In other words, the Dick Case must be restricted to the facts there presented, and cannot, in view of the later case of Bauer v. O'Donnell, be extended to cover a case like the present, when the patentee has permanently parted with the entire right to use and has no longer any interest in the royalties from subsequent sales. If the defendants should use the machines without complainant's needles, the rule laid down in the Dick Case would apply, but no such infringement is alleged. In other words, the interest of the licensor in the use is exhausted, except as to its right to have the machine used with the unpatented needles of its manufacture. As Mr. Justice Day further said in Bauer v. O'Donnell:

"The jobber from whom the appellee purchased had previously bought, at a price which must be deemed to have been satisfactory, the packages of Sanatogen afterwards sold to the appellee. The patentee had no interest in the proceeds of the subsequent sales—no right to any royalty thereon or to participation in the profits thereof. The packages were sold with as full and complete title as any article could have when sold in the open market, excepting only the attempt to limit the sale or use when sold for not less than one dollar. In other words, the title transferred was full and complete, with an attempt to reserve the right to fix the price at which subsequent sales could be made."

In the case of Bauer v. O'Donnell, I think the court felt the same difficulty in supporting the attempted restriction that courts have often found in giving effect to conditions that are repugnant to the general terms of a conveyance or devise. If this were a case of first impression, I might feel that no sufficient reason exists for holding that a patentee could not attach such limitations to the future use of his patented goods as he might choose, irrespective of whether he had received a full royalty or not. I think, however, the case of Bauer v. O'Donnell holds to the contrary.

I can, after careful consideration, see no difference, except a purely formal one, between that case and the one under consideration, and for this reason I am of the opinion that the bill must be dismissed.

PORTLAND WOOD PIPE CO. v. SLICK BROS. CONST. CO. et al.

(District Court, D. Idaho, S. D. April 19, 1915.)

1. COURTS ⟸264 — UNITED STATES COURTS — JURISDICTION — DIVERSITY OF CITIZENSHIP—COUNTERCLAIMS.

In a suit by a nonresident of the district to foreclose a mechanic's lien, in which the contractor and a subcontractor, resident citizens of the district, are made defendants, and the subcontractor by a cross-bill asserts a lien upon the property, the court has jurisdiction over a counterclaim by the contractor against the subcontractor for moneys advanced and supplies furnished the subcontractor on account during the progress of, and for use in carrying on, the work, though the amount of the counterclaim exceeds the amount due the subcontractor, and has jurisdiction to render judgment against the subcontractor for the balance, under the rule that, where the court has jurisdiction of the controversy exhibited by the complaint, it may assume jurisdiction to adjudicate incidental issues raised by cross-bills between defendants, regardless of citizenship or the amount in dispute, especially in view of equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), providing that the answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and Rev. Codes Idaho, § 4185, providing, relative to counterclaims arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, that if defendant omit to set up such a counterclaim he cannot afterwards maintain an action against the plaintiff therefor.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec. Dig. ⟸264.]

2. COURTS ⟸347 — UNITED STATES COURTS—COUNTERCLAIM — NECESSITY OF PLEA.

Equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), providing that the answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, is mandatory, and such a counterclaim must be pleaded, or it will be deemed to have been abandoned.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⟸347.]

In Equity. Suit by the Portland Wood Pipe Company against the Slick Bros. Construction Company and others, in which one Comerford filed a cross-bill. On motion to dismiss the counterclaim of the Construction Company to such cross-bill. Motion denied.

Edwin Snow and Harry Keyser, both of Boise, Idaho, for cross-complainant.

Richards & Haga, of Boise, Idaho, for defendant Slick Bros. Const. Co.

DIETRICH, District Judge. [1] The question submitted is of such character that it may be stated in the abstract, without particular reference to the concrete facts of this case. In a suit for the foreclosure of a mechanic's lien, brought by a nonresident of the district as plaintiff, to enforce a claim for material furnished for the construction of an irrigation system within the district, not only against the owner, but also the contractor and a subcontractor, as defendants, resident citizens of the district, if the subcontractor in a cross-bill asserts a lien claim upon the property for a balance of more than $10,000, alleged

to be due for work done, and in answer thereto the contractor sets up a counterclaim for moneys advanced and supplies furnished on account to the cross-complainant during the progress of and for use in carrying on the work, and prays for an affirmative money judgment by reason thereof for approximately $8,000, and if upon a trial of the issues the court finds that there is due the contractor a large balance on such account, after fully offsetting all that is justly due to the cross-complainant, has the federal court jurisdiction to give judgment for this balance, seeing that both parties are residents of the district?

The cross-complainant recognizes the general principle that, where the court has jurisdiction of the controversy exhibited by the complaint, it may assume jurisdiction to adjudicate incidental issues raised by cross-bills between the several defendants, regardless of the citizenship of the parties or the amounts in dispute. Lilienthal v. McCormick, 117 Fed. 89, 54 C. C. A. 475; Rickey Land & Cattle Co. v. Wood, 152 Fed. 22, 81 C. C. A. 218; United States v. Mackay (D. C.) 214 Fed. 137, 153; Craig v. Dorr, 145 Fed. 307, 311, 76 C. C. A. 559. And he further concedes that in so far as the counterclaim constitutes a mere set-off, and is used only as a defense, it may be brought forward by the contractor to defeat his claim. But he contends it cannot be made the basis of affirmative relief, for to that extent neither it nor the judgment prayed for is germane to the plaintiff's cause of action or affects the property upon which the plaintiff seeks to establish a lien. In other words, the court may—such is the contention—adjudicate a part of the counterclaim, but is without jurisdiction of such balance as is not used as a set-off.

No case is cited by either side in which the precise point has been decided. My first impression was that there is much merit in the cross-complainant's contention; but upon reflection I have become convinced that it is unsound, and for reasons which may be very briefly explained. In the first place, it necessarily means the splitting of a single cause of action, and subjects both parties to the burdens and hazards of two suits for the trial of a single controversy, namely, the just amount, if any, of the contractor's account against the cross-complainant. To be safe it was necessary for the contractor here to plead and prove all the items of its account, for it could not foresee what ones, if any, the court would ultimately allow, or how many thereof would be required fully to offset the cross-complainant's claim. Moreover, in using the counterclaim only as a set-off, it might very well become necessary, not only to split the account, but also to split some particular item therein, in order to secure an amount which would exactly balance the sum found to be due the cross-complainant. And suppose that here, after full hearing, and after both parties have had their day in court, some items of the counterclaim are disallowed and others allowed, under the cross-complainant's theory the contractor could at once bring suit upon the whole account, giving credit only for the amount used as a set-off, and at the trial thereof neither could the plaintiff (the contractor) plead res adjudicata as to any item here found to be due, nor could the defendant (the cross-complainant) plead such a defense as to any item here found not to be due.

Again, let us suppose that in this case the larger part of the counterclaim were rejected, and just enough were found to be due thereon to overcome the claim of the cross-complainant, in such case the contractor could immediately commence an action in the proper court to recover all the items so rejected, and if, as contended, we are without jurisdiction except as to items comprised in the set-off, our findings would be no bar to, and would not even constitute evidence of the invalidity of, the claim. Surely a principle the practical application of which is attended with such onerous results cannot have judicial sanction. It becomes manifest that the reason which underlies the rule above referred to, by which auxiliary proceedings fall within the jurisdiction of the court regardless of the citizenship of the parties thereto, operates in like manner to extend our jurisdiction to this counterclaim. This rule was established to avoid the necessity of attempting to administer justice by litigating controversies piecemeal, and the reasons for here taking cognizance of Comerford's cross-bill in the absence of diversity of citizenship between the parties are not greater than or different from the reasons for taking cognizance of Slick Bros.' counterclaim interposed in the answer thereto. It is essential to the complete settlement of the controversy initiated by the commencement of the principal suit that we adjudicate both.

[2] An additional, if not an entirely distinct, consideration: General equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) provides that "the answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit." Under this rule it was the duty of Slick Bros. to plead "any counterclaim arising out of the transaction which is the subject-matter" of Comerford's cross-bill, and admittedly the counterclaim under consideration is of that character. This requirement is thought to be mandatory, and therefore such a counterclaim must be pleaded, or it will be deemed to have been abandoned. Marconi W. T. Co. v. National E. S. Co. (D. C.) 206 Fed. 295, 298; Salt's Tex. Mfg. Co. v. Tingue Mfg. Co. (D. C.) 208 Fed. 156; Electric Boat Co. v. Lake T. B. Co. (D. C.) 215 Fed. 377, 384; U. S. Ex. B. Co. v. H. G. Kroncke Co. (D. C.) 216 Fed. 186. The practice thus provided for is not an innovation; it had been established by the Codes in many jurisdictions before the rule was adopted. Sections 4184 and 4185 of the Revised Codes of Idaho provide that:

"If the defendant omit to set up a counterclaim in the cases mentioned in the first subdivision of the last section [causes of action arising out of the transactions set forth in the complaint as the foundation of the plaintiff's claim], neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

Construing this rule, as I do, as being in harmony with this statute, it follows that Slick Bros. were bound to set up their entire counterclaim and litigate it in this suit or waive it. If, therefore, we take cognizance of the cross-bill, we must, unless we are willing to do an injustice, also take cognizance of the counterclaim.

The motion to dismiss the counterclaim will be denied.

GLOVER MACH. WORKS v. COOKE JELLICO COAL CO.

(District Court, E. D. Kentucky, at London. March 19, 1915.)

No. 309.

REMOVAL OF CAUSES ⟸74—PARTIES ENTITLED TO REMOVE—RIGHT OF PLAINTIFF.

Under Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1913, § 1010), providing that any suit of a civil nature arising under the Constitution or laws of the United States, etc., of which the District Courts are given original jurisdiction, which may be pending in any state court, may be removed by "the defendant or defendants therein" to the District Court of the United States for the proper district, that any other suit of a civil nature of which the District Courts are given jurisdiction may be removed by "the defendant or defendants therein, being nonresidents," that when, in any suit mentioned in that section, there shall be a controversy wholly between citizens of different states and which can be fully determined as between them, one or more of the "defendants" actually interested in such controversy may remove the suit, and that, when there is a controversy between citizens of the state in which the suit is brought and a citizen of another state, "any defendant being such citizen of another state" may remove the suit when it shall be made to appear that from prejudice or local influence he will not be able to obtain justice in the state courts, and section 29 (Comp. St. 1913, § 1011), requiring the petition for removal to be filed before defendant is required by the laws of the state or rule of the state court to answer or plead to plaintiff's declaration or complaint, and providing that the parties removing the cause shall within 30 days after the filing of the transcript in the federal court plead, answer, or demur to the declaration or complaint, in an action in the courts of the state of which the defendant is a resident by a nonresident plaintiff to recover less than $3,000, the filing of a counterclaim for more than $3,000 does not entitle plaintiff to remove the cause, as, though he is placed in a defensive position as to the counterclaim, he is still the plaintiff, and not a defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 130, 131; Dec. Dig. ⟸74.]

At Law. Action by the Glover Machine Works against the Cooke Jellico Coal Company. On motion to remand to the state court. Motion sustained.

COCHRAN, District Judge. This cause is pending before me on motion to remand. At the time the petition for removal was filed, I take it, the suit was one between the Glover Machine Works as plaintiff and the Cooke Jellico Coal Company as defendant. Though originally brought by the Lowery National Bank, upon the filing of the intervening petition of the Glover Machine Works, it was substituted as plaintiff for the bank.

The suit was brought upon two promissory notes, for $500 each, executed in part payment for a locomotive sold by the works to the coal company. The defendant filed a counterclaim, as well as an answer. In the counterclaim, on account of alleged fraudulent representations in connection with the sale of the locomotive, it sought to recover $1,000, paid on the contract of purchase, and $6,000 damages. Thereupon the plaintiff, the Glover Machine Works, filed its petition

for removal of the suit to this court, and it is upon this petition that it is here. The ground of removal is the diversity of citizenship between the plaintiff, a citizen of Georgia, and the defendant, a citizen of Kentucky.

The question raised by the motion to remand is whether a plaintiff in a suit in a state court, in which diversity of citizenship between the parties thereto exists, and the amount in controversy is less than $3,000, being a nonresident of this state, can remove the suit to the federal court on the defendant's filing a counterclaim therein in which he seeks to recover of plaintiff more than $3,000. The question depends entirely on the provision of the removal statute. If it provides that in such a case a plaintiff can remove, it can do so; otherwise, it cannot. This is fundamental.

Section 28 of the Judicial Code provides what suits are removable, and who may remove them; and section 29 provides how removable suits may be removed by the party entitled to remove them. The first sentence of section 28 provides that any "arising under" suit, of a civil nature at law or in equity, of which the federal District Courts are given original jurisdiction, then pending or thereafter brought in any state court, may be removed by the defendant or defendants therein to the federal District Court for the proper district. This sentence provides for the removal only of any suit of such character, and that only by the defendant or defendants therein. The second sentence provides for the removal of any other suit of a civil nature at law or in equity, of which such courts are given jurisdiction, then pending or thereafter brought in any state court, to such court by the defendant or defendants therein, being nonresidents of that state. This sentence provides for the removal only of any such suit, and that only by the defendants therein being nonresidents of the state where the suit is brought. The two provisions differ as to the party who may remove the suit thereby made removable. In the first one, it is the defendant or defendants therein. In the second one, it is the defendant or defendants therein being nonresidents of the state where the suit is brought. In neither case is the plaintiff therein given the right of removal. In both the right of removal is confined to the defendant or defendants therein. The third sentence provides for the removal of a suit in which there is a separable controversy and confers the right of removal upon "either one or more of the defendants actually interested in such controversy." The fourth sentence provides for the removal of a suit on account of prejudice or local influence and confers the right of removal on "any defendant." In every case, therefore, in which provision is made for the removal of a suit by section 28, the right to remove is confined to the defendants therein. In no contingency whatever is the right to remove conferred on a plaintiff.

This would seem to settle the question in hand. The removing party here is the plaintiff in the suit, and not the defendant. It is true that the works is in a defensive position as to the counterclaim; but it is still the plaintiff therein, and the coal company is the defendant. Because of the counterclaim there are not two suits. There is still but one suit. And it is the defendant in that one suit who is a non-

resident of the state who has the right of removal. The works is a nonresident of the state, but it is not the defendant in the suit. It is the plaintiff. The coal company is the defendant. The existence of the counterclaim does not change the relation of the parties to the suit. The works is still the plaintiff and the coal company the defendant. That the right of removal is confined to the defendant in the suit, and does not extend to a plaintiff in a defensive position, seems to be recognized by section 29. It provides that the petition for removal shall be filed "at the time or at any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff," and that the parties removing the cause shall within 30 days after the filing of the transcript in the federal court "plead, answer or demur to the declaration or complaint in said cause." This all looks to the defendant in the suit being the removing party, and not the plaintiff in any contingency.

The question seems to me to be foreclosed by the decision of the Supreme Court in the case of West v. Aurora, 6 Wall. 139, 18 L. Ed. 819. It is true that that case arose under the Judiciary Act of 1789. But under that act, as under this, the right of removal was confined to the defendant. And, if no removal could have been had under that act by a plaintiff in such a case as we have here, a fortiori it cannot be had under the Judicial Code. That Code continues substantially the provisions of the act of 1887–88. That was an amendment of the act of 1875. By that act the right of removal was given to the plaintiff, as well as defendant. By the amendment the right of removal by plaintiff was taken away, and it was limited to the defendant. In no contingency was it recognized that the plaintiff should have the right to remove, except in a suit between citizens of same state claiming under grants of different states. The object and purpose of the amendment was to cut down federal jurisdiction. And much has been made of this circumstance in construing the amendment. Smith v. Lyon, 133 U. S. 315, 320, 10 Sup. Ct. 303, 33 L. Ed. 635; In re Pennsylvania Co., 137 U. S. 451, 454, 11 Sup. Ct. 141, 34 L. Ed. 738; Fisk v. Henarie, 142 U. S. 459, 467, 12 Sup. Ct. 207, 35 L. Ed. 1080; Hanrick v. Hanrick, 153 U. S. 192, 197, 14 Sup. Ct. 835, 38 L. Ed. 685. It is true, also, that in West v. Aurora the suit could have been originally brought in the federal court, whereas this suit could not. But I do not think that this difference renders that case nonapplicable here. It was held by the Fifth Circuit Court of Appeals in the case of Waco Hardware Co. v. Michigan Stove Co., 91 Fed. 289, 33 C. C. A. 511, that it applied in such a case as we have here and that the case was nonremovable. The authorities to the contrary, of which Price & Hart v. T. J. Ellis & Co. (C. C.) 129 Fed. 482, is one, do not persuade me that the case is removable. And in Moon on Removal of Causes, § 148, it is said:

"The right of a plaintiff to remove a suit from a state court in which it was begun to a Circuit Court of the United States was taken away by the Amendatory act of 1887–88 (with an unimportant exception). The general right to remove a suit is now given only to a defendant or defendants. A plaintiff does not become a defendant, and so entitled to remove a suit, because the defendant files a set-off, counterclaim, cross-bill, or other pleading

asserting a cause of action or demand in reconvention against the plaintiff. This was so decided under the act of 1789, and the weight of authority is to the same effect under the present act."

The motion to remand is sustained.

UNITED STATES v. ROCKEFELLER et al.

(District Court, S. D. New York. April 16, 1915.)

CRIMINAL LAW ⊂⊃622—TRIAL—SEVERANCE.

In a prosecution of the directors of a railroad company for the violation of the Anti-Trust Act, where it appeared that a suit had been several years before instituted against the corporation, charging it with violating that act in making certain combinations, which suit had later been dismissed by the Attorney General for the stated reason that the Legislature of the state which was most affected by the principal combination had enacted a law permitting such combination under certain conditions and restrictions, intended to safeguard the rights of the people, and that the other combinations had been declared ultra vires and were being discontinued, the directors, who had been elected to the board after the discontinuance of the former suit, are entitled to a separate trial, since the evidence as to them would be different, and their defenses different, and might be antagonistic to the defense of the other directors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380-1383, 1385, 1386, 1388-1390; Dec. Dig. ⊂⊃622.]

William Rockefeller and others were indicted for a violation of the Anti-Trust Law, and defendants Baker and others apply for a severance. Applications granted.

See, also, 221 Fed. 462.

H. Snowden Marshall, U. S. Atty., of New York City, and R. L. Batts and Frank M. Swacker, Sp. Asst. Attys. Gen. (Robert P. Stephenson, Asst. U. S. Atty., and James W. Osborne, Asst. U. S. Atty., both of New York City, of counsel), for the United States.

Spooner & Cotton, of New York City, for defendant Baker.

Morgan J. O'Brien, of New York City, for defendants Cuyler, Milligan and Maxwell.

L. C. Krauthoff, of New York City, for defendant Vail.

HUNT, Circuit Judge. The several applications made by the defendants Baker, Milligan, Maxwell, Cuyler, and Vail for a severance are granted. None of the five moving defendants was a director of the New Haven Company prior to May 22, 1908. Defendant Baker was elected a director on February 11, 1910. Defendant Cuyler was elected on October 26, 1910, and defendants Vail, Maxwell, and Milligan on May 18, 1911.

It appears that upon May 22, 1908, the Attorney General of the United States filed a bill in the United States Circuit Court in Massachusetts against the New Haven Company and others, charging violations of the Anti-Trust Law of the United States, and that on June 26, 1909, by direction of the Attorney General, the above referred to suit was discontinued. On June 25, 1909, the Senate of the United

States passed a resolution, and on the same day the Attorney General made a reply thereto. Copies of such resolution and the reply thereto are referred to by counsel who have presented these motions. The substance of the resolution of the Senate was a direction that the Attorney General inform the Senate whether the legal proceedings against the New York, New Haven & Hartford Railroad Company and the Boston & Maine Railroad Company for violation of the Anti-Trust Law had been dismissed, and, if any statement had been given out by the Attorney General, that he attach a copy of such statement to his reply to the resolution, and to inform the Senate when such proceedings were begun and instituted. The Attorney General, under date of June 25, 1909, replied that he had directed the United States Attorney for the district of Massachusetts to dismiss the legal proceeding brought by the United States against the New York, New Haven & Hartford Railroad Company and the Boston & Maine Railroad Company for violation of the Anti-Trust Law and that he had given out a statement touching the matter, copy of which statement he inclosed with his communication to the Senate. He advised the Senate that the proceedings were begun by the filing of a bill in equity in the Circuit Court for the District of Massachusetts on May 22, 1908.

The copy of statement which accompanied the letter of the Attorney General was dated June 24, 1909. It referred to an act of the Legislature of Massachusetts just theretofore approved, creating the Boston & Maine Railroad Holding Company, and giving authority to the new corporation to acquire and hold the stock and bonds of the Boston & Maine Railroad Company, and authorizing any railroad corporation theretofore incorporated under the laws of Massachusetts to acquire and hold the stock and bonds of the Boston Holding Company. Further substance of the statement was that the purpose and effect of the Massachusetts statute, as publicly announced and contemplated by its terms, was to authorize the consolidation of the Boston & Maine and New York, New Haven & Hartford Railroad Company by the Boston Holding Company first acquiring control of the Boston & Maine Railroad Company, and then by the New York, New Haven & Hartford Company acquiring the control of the Boston Holding Company; that the Massachusetts statute also provided that the stock of the Boston & Maine to be acquired by the Holding Company should not afterwards be sold without express authority from the Legislature; that the stock of the Holding Company, if acquired by the New Haven road, should not be sold without authority of the Legislature; that the commonwealth of Massachusetts might, by legislative action, upon one year's notice, take for its own use, by purchase or otherwise, all the stock and bonds of the Holding Company upon certain terms designed to protect creditors and secure just compensation, the whole plan and purpose being to promote the consolidation of the Boston & Maine with the New Haven Company and to provide for their operation hereafter under one management, with safeguards to protect the interests of the people of Massachusetts; that in view of the fact that the suit of the government then pending against the New Haven and the Boston & Maine Companies for violation of the Anti-Trust Act rested almost

entirely upon a claim that those companies had already consolidated by means of stock ownership, and since the state of Massachusetts was most directly affected, and since the laws of that state now expressly authorize such consolidation, the Attorney General had determined to dismiss the suit by the government. The statement then went on to say that in the suit brought complaint had been made that the New Haven Railroad had acquired a number of trolley lines in Massachusetts and adjoining states, and that this was a combination in restraint of interstate commerce, but that, since the suit by the government had been determined upon, the Supreme Court of Massachusetts, in a case involving the right of the New Haven to acquire trolley properties in Massachusetts, had decided that that railroad company had no such power, and that the company had been parting with such trolley properties. The Attorney General in the statement expressed his conviction that, whatever might have been the merit of the claim when the suit was begun, there was not, at the time he made the statement, any such element of competition in interstate commerce by reason of such ownership of trolley lines as would justify a further prosecution of the suit by the government. The statement concluded by saying that the Attorney General had directed that the case of the government against the New York, New Haven & Hartford Railroad Company and the Boston & Maine Company should be dismissed at once.

There is no dispute, at present, at least, of the statements made by counsel for these defendants that each defendant believed that, at the time he entered the board of the New Haven Company, all controversies with the government of the United States, and all questions of violations of the Anti-Trust Law, had been finally disposed of; and it would seem that no investigation or controversy concerning the subject was pending at that time. Such a situation may well have induced the belief that the board of directors would be, to a great extent, engaged in working through whatsoever complications had arisen in connection with the concerns of the New Haven Company resulting from transactions and causes which had arisen prior to the election of any one of these defendants, and it may be that each of these defendants went upon the board with the purpose of protecting the interests of the stockholders and of the corporation itself. At all events, enough appears to justify the view that the questions to be presented on the trial of these several defendants will probably be materially different from those which will be involved in the trial of the other defendants, with whom they have been jointly charged. Nor is it difficult to foresee possible serious antagonism between the positions of defense to be taken by these defendants and others charged jointly. Indeed, counsel for the United States frankly state that such a situation may arise, and that they do not oppose the severance applied for.

I therefore think these defendants ought not to be required to go to the inconvenience and expense incidental to the preparation for a long trial, which will probably extend to many matters in no way related to any one of themselves.

In re FORESTIER.

(District Court, N. D. California, First Division. February 9, 1915. On Appointment of Successor, March 30, 1915.)

No. 8668.

1. BANKRUPTCY ⊂=132—TRUSTEES—REMOVAL—GROUNDS.
A trustee in bankruptcy, who was employed in the office of the attorney for an assignee for the benefit of creditors, who had been conducting the business of the bankrupt prior to bankruptcy, and who employed such attorney to act for him, though the interests of the estate might conflict with the interests of the assignee, would be removed.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 190; Dec. Dig. ⊂=132.]

2. BANKRUPTCY ⊂=123—TRUSTEES—ELECTION—REPRESENTATION OF CREDITORS BY DISQUALIFIED ATTORNEY.
Where a trustee in bankruptcy was removed because of his close relations with, and his retainer of, an attorney who was attorney for an assignee for the benefit of creditors, conducting the business of the bankrupt prior to bankruptcy, with whose interests the interest of the estate might well conflict, such attorney should not be permitted, on the election of a new trustee, to act for any creditor, and the vote of any creditor persisting in selecting such attorney should be disregarded; and hence, where such attorney, through another, voted a majority of the claims for a person opposed by a minority of the claims, the referee properly refused to approve his selection.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 171–179; Dec. Dig. ⊂=123.]

3. BANKRUPTCY ⊂=126—TRUSTEES—SELECTION BY REFEREE.
Though in such case the referee properly disapproved the selection of the trustee voted for by the creditors represented by such attorney, the referee erred in selecting a trustee himself, as he has power to make such selection only when the creditors fail to act.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 182, 184, 187; Dec. Dig. ⊂=126.]

In Bankruptcy. In the matter of Edward H. Forestier, bankrupt. On petition for removal of the trustee, and on review of an order of the referee appointing a new trustee. Trustee removed, and order appointing new trustee reversed.

Claribel David and Wm. H. Chapman, both of San Francisco, Cal., for petitioner.

Henry A. Jacobs, of San Francisco, Cal., for trustee.

On Petition for Removal of Trustee.

DOOLING, District Judge. [1] It appears from the petition and answer that E. H. Forestier, in February, 1913, made an assignment for the benefit of his creditors to one A. V. Davidson, but that such assignment, a copy of which accompanies the petition, did not comply, or purport to comply, with any of the requirements of the Civil Code of the state of California, and for that reason was void. It further appears that the assignee conducted the business of the bankrupt for a period of over a year from the date of such assignment with the con-

sent of the creditors, including petitioner; that in July, 1914, an adjudication was made declaring Forestier a bankrupt, and that later M. L. Mayers was appointed trustee; that Mayers is employed in the office of H. A. Jacobs; and that H. A. Jacobs is and has been attorney for both Mayers, the trustee, and Davidson, the assignee.

It is further averred in the petition that an action should be instituted by the trustee against the assignee to recover the property conveyed to him by the bankrupt, and that such assignee has sold and disposed of the property for a very trifling and inadequate consideration. These last averments are denied by the answer. Whether or no an action should be commenced by the trustee against the assignee is a matter not necessary now to be determined. But this court cannot look with favor upon a trustee who selects as his attorney the attorney of an assignee with whose interests the interests of the estate may conflict, nor upon an attorney who undertakes to act for such possibly conflicting interests. The question is not, do these interests necessarily conflict, but may they conflict? It is the duty of the trustee to recover from the assignee all the property of the estate. If he and the assignee and the common attorney for both of them are in such close relation as appears to be the case here, so close, indeed, that the referee refuses to award any fee to the attorney, because he has been acting as attorney for the assignee, rather than as attorney for the trustee, it is sufficiently clear to the court that the trustee is not in a position to clash with the assignee over the question of what the latter should turn over to the estate.

In the present case the court is not passing upon the question as to whether or not the trustee should recover more from the assignee than the latter admits to be due, but laying down a general rule, applicable to all cases, that neither the trustee nor his attorney shall place himself in such position in relation to another as to give any color to a suggestion that they are not acting in the interests of the estate alone. Whenever they do so place themselves, the only remedy is to remove the trustee.

It is therefore ordered that upon consideration of the petition and answer, and for the reasons alone that are hereinbefore suggested, the trustee be removed.

On Appointment of Successor.

Wm. H. Chapman and Claribel David, both of San Francisco, Cal., for objecting creditor.

Ornbaun & Fraser, of San Francisco, Cal., for trustee.

On February 9th an order was made by this court removing the then trustee, M. L. Mayers, because he was in the office of H. A. Jacobs, and had retained the latter as his attorney, although he was attorney for an assignee of the bankrupt with whose interests the interest of the bankrupt's estate might well conflict. A meeting of the creditors having been thereafter called by the referee for the purpose of electing a new trustee, Mr. Jacobs was present, and through another voted a majority of the claims for Charles B. Blessing as trustee; a minority in amount being voted for W. E. Sachs. Upon objection, the referee

refused to approve the election of Mr. Blessing, but instead appointed Mr. S. Pinchower. This action of the referee in appointing a trustee is now before the court for review.

[2] The referee very properly refused to approve the selection of a trustee in the choosing of whom Mr. Jacobs either directly or indirectly participated. I endeavored to make it plain in the order removing the former trustee that the practice of representing more than one interest will not be tolerated on the part of any attorney. An attorney who persists in doing so, or in endeavoring to do so, has either very little understanding of his obligations as an attorney or very little regard for them. If a suggestion from the court will not suffice to cause the attorney to refrain from participating directly or indirectly in a matter wherein he has been held to be disqualified to act, the court is driven to exercise its powers in a more drastic manner. It is therefore ordered that in any matters now pending or hereafter to arise in this proceeding H. A. Jacobs shall not be permitted to participate, either directly or indirectly, on behalf of any of the creditors of the bankrupt's estate. If any creditor persist in attempting to have Mr. Jacobs represent him, directly or through another, in any proceeding looking to the election of a trustee, the claim of such creditor will be disregarded in such election. I have no disposition to interfere with a creditor in the selection of his attorney; but if a creditor persist in selecting an attorney whom the court has held to be disqualified, by reason of his employment by an antagonistic interest, such attorney will not be heard.

[3] As to the other phase of this case, I have no doubt that the trustee selected by the referee is a proper person; but the question here is not one of policy, but of power, and it is only where creditors fail to act that the referee may make the selection.

The order of the referee appointing Mr. Pinchower is reversed, and the referee directed to call another meeting of the creditors for the selection of a trustee.

BOYLE v. ST. LOUIS & S. F. R. CO. et al.

(District Court, E. D. Arkansas, W. D. April 5, 1915.)

No. 1638.

CARRIERS ⇐12—STATE REGULATION OF RAILROAD RATES—REASONABLENESS OF RATES.

On the hearing of a suit by a railroad company to enjoin enforcement of Act Ark. Feb. 9, 1907 (Laws 1907, p. 9), fixing maximum passenger fares at 2 cents a mile, and Standard Distance Tariff No. 3, promulgated by the State Railroad Commission June 4, 1908, reducing freight rates, the results obtained by averaging the earnings and expenses of the company in the state during four years, allocating them between its interstate and intrastate business on the basis of specific and elaborately collected reports of employés in all branches of the service during a test period of two months, demonstrated that the annual net earnings of the company from all of its intrastate business were but little more than 2 per cent. on the agreed valuation of its property devoted to such use,

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

all of which were produced by its passenger business. The passenger fare established by the company was 3 cents a mile, and a test of a 2½-cent rate for 18 months showed that if the statutory rate of 2 cents should be put in force, the result of the company's intrastate business would be a deficit. *Held*, that such evidence entitled the company to an injunction restraining the enforcement of both the act and order of the commission, subject to the right of the estate to apply for further orders to meet changed conditions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. ⊂⊃12.]

In Equity. Suit by Sidney E. Boyle against the St. Louis & San Francisco Railroad Company and others. On final hearing. Decree for complainant.

John M. Moore, of Little Rock, Ark., for plaintiff.

Joseph M. Hill, of Ft. Smith, Ark., for the Railroad Commission.

TRIEBER, District Judge. This is a bill to enjoin the enforcement of what was designated as Freight Distance Tariff No. 3, promulgated by the State Railroad Commissioners of the State of Arkansas, and also the two cents a mile passenger rate established by an act of the General Assembly of the state of Arkansas in 1907. The bill was filed in July, 1908. The usual allegations that, for the intrastate traffic in Arkansas, these rates are noncompensatory to an extent that they are confiscatory are relied on to sustain the bill. For convenience the plaintiff will be referred to in this opinion as the Company, and the defendant as the State.

A temporary injunction was granted and a new tariff of freight rates adopted under the supervision of the court, which raised the freight rates above those established by the tariff enjoined, and restored the passenger rate of three cents a mile. In 1909 an agreement was made between the State and this Company that the hearing of the cause be postponed until the final determination of similar actions instituted by the St. Louis, Iron Mountain & Southern Railway Company and the St. Louis Southwestern Railway Company, and a further stipulation that the Company should make a test of the passenger rate at 2½ cents per mile, for the purpose of determining what the effect of such a rate would be on the net earnings of the Company. For 18 months, in the years 1909 and 1910, the Company made the passenger rate for intrastate traffic 2½ cents per mile in the state of Arkansas, and then claimed that the test showed that that rate was not remunerative, and restored the 3 cents rate. In due course of time the other cases were heard in this court, and then appealed to the Supreme Court of the United States, where it was finally held that the evidence failed to show the invalidating facts by such definite and convincing proof as would justify the court to override the action of the State upon constitutional grounds, and the bills were directed to be dismissed without prejudice. Allen v. St. L., I. M. & S. Ry. Co., 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625. The opinion in that case was delivered on June 16, 1913. The week before, June 9, 1913, the opinion in the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, had been filed.

After the opinions of the Supreme Court in these and other rate cases reported in 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, had been filed, the general managers of a number of the western railroads, including this Company, met in conference with a number of prominent railroad officials, chief engineers, auditors, statisticians, comptrollers, and general attorneys, to devise a formula for the purpose of dividing valuations and expenses between intra and inter state, and freight and passenger traffic, upon the basis suggested by the Supreme Court in the Rate Cases, namely, by basing the division independently of revenue, but solely as found in the use that is made of the property by each. As a result of their labors a formula was prepared to be used in the apportionment of revenue, expenses, and valuation of property to intra and inter state passenger and freight traffic. As this formula is a document of 39 closely printed pages, and the different formulæ have been, in many matters, amended to meet the conditions prevailing on the road of this Company in the state of Arkansas, it is not practical to insert it in full in this opinion. It is filed as Exhibit 1, and may be treated as a part of this opinion. To explain it briefly, there was a division of the expense between line and terminal, which was apportioned between freight and passenger and between intra and inter state traffic. Bases were prescribed for the apportionment of revenue to state freight and passenger service, and to interstate traffic. To divide the expenses, formulæ were prepared to ascertain separately the actual cost of maintenance of way and structures, maintenance of equipment, traffic expenses, transportation expenses, and general expenses. For each of these, formulæ were made covering every item pertaining to them, respectively. Thus, for maintenance of way and structures there are 23 different items to be considered, nearly every one of them subdivided into smaller units, and for some other items even a larger number of subdivisions was made, while in others a smaller number. The formulæ for dividing between line and terminal expenses contains 116 items.

Immediately after this formula had been made, the Company made preparations for the final hearing of this case, and prepared the necessary statistics in conformity with this formula. As no separate records had previously been kept by this or any other Company of every item of expenditure pertaining to intra and inter state and freight and passenger traffic, and especially such records as would enable them to make the allocations and apportionments so as to conform to the rule established by the Supreme Court in the Rate Cases, it was necessary to make special tests of the use which was made of every branch of the road, by ascertaining the separate items of expense of intra and inter state passenger and freight business, which could not be accurately determined from its records, as previously kept. These tests were made during the months of November and December, 1913, less than five months after the decisions in the Rate Cases had been announced. In order to make these tests accurately, printed blank forms were prepared by the Company, with printed instructions to the employés on the back of the form, on which they were to report every item of cost and the use made thereof, whether for freight or passenger, intra or inter state traffic. Copies of these forms and instructions are filed as exhib-

its to the Company's testimony. These data could only be obtained with accuracy concurrently with the operation of the road. From the reports made on these forms it was ascertained what character of freight and in what quantities each train, freight, passenger, mixed, and through, carried within the state and the expense connected therewith. To obtain this information clerks were placed upon every train running in Arkansas during the entire two months of November and December, 1913. Special yard clerks, employed for that purpose, were placed at the termini of all through freight runs to record and report all of the contents of the trains, and when they arrived and left. The conductors in charge of through freight trains were required to record the character and quantity of freight, distance hauled, the freight picked up by and set out of the train at each station between the termini of the run. The yard clerk at the arriving terminal of that train was required to fill in on the report handed to him by the conductor, and which the conductor had received from the clerk at the departing terminal, all the data showing what was received there, and what was set off on that train; they were also required to record what time was consumed in unloading and loading, as well as switching, in each yard, and by these means the data for the factors, representing quantity and quality of traffic carried on the different trains, were obtained. Similar records were required to be made as to all other matters connected with the cost of the other divisions of the formula.

For the passenger traffic, the division of expenses, both line and terminal, between straight passenger traffic, baggage, mail, and express, Pullman, and dining cars, was made on the "car foot mile" basis. The actual consist of cars in every passenger train was analyzed, and the number of lineal feet in each train, assigned to the service, were determined, the measurement of the space assigned in each car to each class of service being multiplied by the number of miles that car ran in Arkansas.

The same analysis which was made of the freight traffic was made of the passenger train traffic; analysis of the number of stops and terminal delays; time devoted by yard engines to the various classes of service; the time of yard and station agents' work; the time of station employés devoted to the various classes of service. All were worked up in the same detail and reported on the ground where the operation occurred. The results of the passenger investigation were ascertained from these reports and filed as Exhibit 12 by the Company.

To obtain the necessary data to allocate the expenses of maintenance of way, the section foremen on the entire road in the state of Arkansas were required to keep, during the months of November and December, 1913, a strict and correct account of the entire labor and material expenditures. An experienced man would be sent out on the road, who would sit down with each section foreman, take his time and material books, of which he rendered a report each month to the superintendent, and classify each track over which each individual section foreman had charge, according to its use as a line track or terminal track or common to line and terminal. If it was used exclusively for the freight terminal service it was marked as a freight terminal track; if it was used

exclusively for line service it was marked as a line track. The straight line tracks, which were common to freight and passenger, were treated separately for each. He was then required to enter on each track section (five or six miles), each day, a division of his labor and that of the men employed under him, and also the material used as between these different classes of track. His time and material books were fitted to the tracks which he had in his charge, each of the tracks being numbered. When his reports came in they were classified, and in that way the actual maintenance of way expense for these two months obtained, and then subdivided between freight and passenger tracks and line and terminal tracks. The same method was applied to the buildings, crossings, and other matters which are in charge of section foremen. As to the bridges, buildings, and similar structures, the Company always kept regularly structure reports, in which the charges for the repairs or maintenance are kept separately, and there it was only necessary to classify these according to the use, as between line and terminal, intra and inter state, and freight and passenger. If the expense was for the freight platform it would be charged to the freight terminal, and the same process followed whatever use was made of it. As the main line between the states was used in common by freight and passenger service, it was divided between them according to the use; for the freight service the engine ton miles was used. They divided the expense of maintenance of way between that which is charged to direct wear and tear by reason of the running of trains and that which accrued from the elements. Mr. Hamilton, the company's accountant, fully explained the reasons for adopting this basis, which it is not deemed necessary to set out here. After making these explanations he stated that not a single item was left to conjecture, but allocated according to its use as ascertained in the manner stated.

In order to obtain the station expenses during the two months mentioned, every station agent within the state was required to make a study and keep a daily record of the time he and each of his employés devoted to freight service or passenger service, to handling of mail and express, or telegraph service, and report at the end of the month. The wages of the station agent and his employés were divided on the same basis as the freight and passenger, etc., by each employé or particular class of employés engaged in the same nature of work. He sent out some of the best men to instruct the agents before the work was begun, having them meet at central points for instruction. These reports, when received, were carefully examined and tabulated. In this manner it is claimed there was obtained a correct report of the actual use of the station force made by state and interstate freight and passenger service, and the number of shipments each agent received and forwarded during these two months. The wages of the freight clerks who were engaged in the handling, recording, and waybilling the expenses of the freight consignments were divided between state and interstate in accordance with the number of consignments of each class received and delivered at each individual station.

The warehouse force is shown separately in these reports, and they were divided on the basis of the number of tons of less than car load

freight, state and interstate, received at and forwarded from that particular station. Instead of simply dividing the total station expense in the state and arbitrarily assigning them to freight and passenger, the actual cost and performance, state and interstate at each station, was localized.

The expense for terminal charges was localized to the state where the terminal is local, and that state was compensated for it. To obtain the proper data the cost per ton of terminal service within the state was determined for freight and passenger by ascertaining the average cost of a ton of freight each mile and the average cost to line cost of a passenger one mile. This was reduced to the cost per mile and the mileage thus ascertained according to the number of terminals in the state. Every entry on the company's books affecting every item of revenue was analyzed. All switching absorptions made by the Company were analyzed and attached to the specific haul on which that switching was absorbed. If the switching operation was on intrastate business it was deducted from the intrastate, and the same with interstate absorptions. The station portion of the terminal expense was divided on the basis of the actual tonnage handled in and out of each individual station during the two months. Each individual yard was treated separately, and the expense of that yard treated separately. Actual account was kept of how much time each local freight train in the state switched, thus enabling them to ascertain the exact time devoted to switching and loading and unloading freight at each station by the agent at that point. These reports show how long the train stopped for other purposes, such as taking coal and water, meeting and passing trains and getting orders, and these were charged to line. By segregating the actual performance of the local and through trains it was found out how much time each devoted to this terminal, and the expense was divided on the basis of that time. As local freight trains but very seldom have the use of a switch engine, the engine of the train doing the switching was charged to terminal service.

For passenger terminal expenses no switching or loading nor unloading expense was charged, as that is unnecessary. The first sixteen exhibits of the Company give summaries of each of these items of expense for these two months.

The expenses of intrastate passenger traffic were divided between intrastate passenger miles actually determined within that period and the cost per passenger mile for all expenses by this method arrived at. The same method was followed for the interstate, and thus the excess cost relation of the two determined. The excess cost of the intrastate passenger on the basis of use of the property, it is claimed on behalf of the Company, was found to be 15.43 per cent. more than that of the interstate passenger, and for the freight service the intrastate was found to be 319.58 per cent. greater than the through.

Comparisons were made of the test period commencing with the year ending June 30, 1913, and working back to the last four months of the year 1907, and that comparison, it is claimed, shows that the test period was reflective of and practically the same as for the other

years. The difference was slightly in favor of the State, as under this formula the State of Arkansas was only charged with about 98.98 per cent. of expenses as compared with the former formulæ of 100 per cent. The witness selected the year 1912 as a type of all the years preceding it for the purpose of comparison. He took the amounts which had been reported to the State Railroad Commission, and which had been ascertained to be the exact earnings and expenses for the State on the basis of the old formula, and equated them on the basis of applying the two formulæ, the old and new, and the result was practically the same. The method adopted is thus explained:

"The Company, in preparing its reports to the Arkansas Railroad Commission during the years ended June 30, 1910, 1911, 1912 and 1913, used a formula for the allocation of revenue and expenses to that State, which was uniformly applied throughout all those years. It also had in use, uniformly through all the years mentioned, a formula for the division of expenses between freight and passenger service for the purpose of its own operating comparisons. To accomplish a reassignment of earnings and expenses to Arkansas for these years under the new formula, in time to prepare for the trial, and to avoid the enormous expense incident to reworking all the voluminous details, it was felt that a proper showing of the earnings and expenses in Arkansas divided between the freight and passenger services for the years mentioned might be made by determining the relation of the results obtained for the year ended June 30, 1913, from an actual application to the earnings and expenses of the railroad of the new formula and the formulæ formerly used in making reports to the State Railroad Commission, dividing expenses between freight and passenger for the purpose of operating comparisons, and by equating the earnings and expenses reported to the State Railroad Commission, and as divided between freight and passenger, on the basis of the percentage relation of the results as applied to the new formula and the result of applying the Railroad Company's old formulæ to the earnings and expenses of the year ended June 30, 1913, in minute detail. That is to say, if a comparison of the results obtained under the new formula with the results obtained under the application of the old formulæ showed that in the year ended June 30, 1913, the new basis assigned to Arkansas or to freight and passenger on a given time of earnings and expenses, 102 per cent. of the amount assigned for the same item under the new formulæ to the amount assigned under the old formulæ for the years ended June 30, 1910, 1911, 1912, and the four months ended December 31, 1907, then they have been increased 2 per cent. If, on the other hand, the amount assigned in the year ended June 30, 1913, under the new formula was 98 per cent. of the amount assigned under the old formulæ in that year, the amount assigned under the old formulæ in the prior periods was reduced 2 per cent. This equation was applied only to such items as could not be actually allocated to Arkansas, or between freight and passenger, and could only be so allocated by means of a detailed analysis or prorate. Such items as permitted of actual direct allocation, without analysis or prorate, were directly allocated in each of the years, namely, intrastate freight and passenger revenues, mail and express earnings, and special service train revenue. For the year ended June 30, 1908 (which included the four months ended December 31, 1907), when they had not made any assignment of earnings and expenses to Arkansas, but had reported to the Railroad Commission of that state the earnings and expenses of the entire railroad, it was necessary, in order to carry out the plan hereinbefore outlined, to assign expenses to Arkansas and between freight and passenger for the four months ended December 31, 1907, on a basis of the railroad's old formulæ used in making such assignments and division in the years ended June 30, 1910, 1911, 1912, and 1913. It was then practicable to make the same equation of earnings and expenses for the four months ended December 31, 1907, as was made for the years ended June 30, 1910, 1911, 1912, and 1913."

Mr. Simson, the State's accountant, criticizes this method of equation, as in his opinion a proration or subdivision which depends upon special information taken outside of the period to which it is to be applied, and which is of such a nature as cannot be verified in its total, is not a proper basis for division, unless it is shown that all the conditions are identical in both periods. In criticizing the results as shown in the Company's Exhibit 27a he says:

"Had the percentages of difference of the subclassifications, that is, the individual interstate commerce reports, been worked out, and the percentages applied to these individual accounts, the equated figures for the four months ended December 31, 1907, would have differed from the equation as totalized by $7,397.80, the equation as individualized would have been less than is the equation of subtotals."

After this testimony of Mr. Simson's had been given, Mr. Hamilton made the equation by the individual Interstate Commerce Commission accounts as suggested by Mr. Simson, and assumed the Company's material burden from the freight to the passenger side, and the result of this equation was that, instead of assigning to Arkansas $7,397.80 less, as Mr. Simson thought would be the case, there would have been $8,400.38 more assigned to the State, but in his opinion his Exhibit 27a is correct, and he was of the opinion that the traffic in Arkansas should not be charged with that additional sum. No rebuttal was offered by Mr. Simson or any other witness as to that statement. In the opinion of the court, if correct factors are used, and the court finds that they were, this method of equation will secure results as nearly correct as is possible, when no separate accounts of the cost of the two classes of traffic have been kept.

Mr. Hamilton, the witness who testified as to these matters, was in charge of that work with a large number of others employed by him, and he explained that to obtain this information the road in Arkansas was divided into divisions, with a head clerk for each of them to supervise the others. These reports were then sent to Mr. Hamilton, and his force tabulated them under his supervision, and from them the various exhibits, which were introduced in evidence in the case, were prepared. In order to make these exhibits correctly an analysis was made of all the different items, so that they could be properly allocated according to the use made of them. The same methods were employed for the purpose of ascertaining the exact cost according to the use of locomotives, cars, coaches, and everything in any wise connected with the transportation department. Apportionments of the passenger traffic were made by car foot miles as stated, their use being subdivided between sleeping cars, day cars, baggage, dining, mail, business, and other cars under their respective numbers, and as to state and interstate passengers.

After these exhibits had been introduced on behalf of the Company all the reports upon which they were based, all the records kept by the Company, and the work sheets which had been used by the statisticians in the preparation of the various summaries, as shown by the exhibits filed, were submitted to and examined by the accountants for the State, and the same course was pursued with the exhibits filed by the State, the work sheets and data being submitted to the accountants

for the Company. While some few errors were found in the exhibits of each they were corrected, or, as stated by the accountants, "ironed out," and new exhibits filed by each side, which both parties agree are mathematically correct, but each criticizes the methods and bases employed by the other in preparing these final exhibits. The case was submitted on the corrected exhibits.

On behalf of the State, while attacking the formula used by the Company as incorrect, no formulæ as to how the different apportionments should, in their opinion, be made were presented, but all its exhibits are based upon the same formula used by the Company and the records of the Company, but divided according to the methods its accountants considered proper, except that instead of separating the Arkansas business from that of the entire system, the accountants for the State assumed that there was no difference in the cost of operation in the state of Arkansas from that in the other states. Nor was any distinction made in the difference of cost between inter and intra state business either in the state of Arkansas or any other part of the entire system. Why no such separations were made is not explained by any of the witnesses for the State.

The position of the learned counsel for the State in the argument, as stated by him, was that the burden to establish, by proper evidence, that the rates sought to be enjoined were noncompensatory to the extent of being confiscatory was upon the Company; and, if it failed to adopt the right bases from which the court can be clearly convinced that the rates are confiscatory, relief must be denied to the Company.

When the hearing first began considerable evidence was introduced on the part of the Company to establish the value of its road in the state of Arkansas, but later a stipulation was entered into between the parties agreeing that for the purpose of this case the average value per year of the property in the state of Arkansas for the years 1910, 1911, 1912, and 1913 was $17,924,441.75, the value fixed by the state taxing board, and that the gross earnings in the state for the four years had been $16,688,486.86, divided as follows:

	Intrastate.	
Freight.	Passenger.	Total.
$1,045,182.50.	$1,634,913.09.	$2,680,095.59.
	Interstate.	
$10,150,834.01.	$2,990,732.40.	$13,141.566.41.

In addition there was, during that period, earned from mail and express from both classes of traffic, intra and inter state, $866,806.86, making the total $16,688,486.86. It was also shown by the undisputed evidence that these were normal years, and by dividing these items by the factor 4 the average total gross earnings in the state for one year amount to $4,172,121.71.

As to the intrastate traffic it is shown by the evidence that during those years the higher freight tariff, adopted after the temporary injunction had been granted, and which is referred to by all the witnesses as the "court tariff," was charged, and a passenger rate of 3 cents per mile, instead of the 2 cents rate, established by the statute, with the exception of the 18 months above referred to, when only 2½ cents per

mile was charged, while the interstate passenger rate was 3 cents per mile all the time; that by an exact computation, taken from the waybills, freight charges, and passenger reports, it appears that had the tariffs which were enjoined by the interlocutory injunction been charged, the income from the intrastate business in the state would, during that four-year period, have been $456,103.72 less, divided as follows: Freight, $20,389.53, passenger, $435,714.19. Deducting this difference, it is claimed on the part of the Company that there was an actual loss on the intrastate business in the state of Arkansas, for these four years, of $122,651.26, or for each year, $30,662.81; that upon the entire business in the state, freight and passenger, intra and inter state, the Company made a net profit on the stipulated valuation equal to 5.63 per cent., which would have been slightly greater but for the loss caused on the intrastate business.

It is also shown by the evidence, and the court so finds, that the months of December and November, 1913, were normal months for that road in the state of Arkansas as reflective of the year's business. By this is not meant that the earnings or expenses of these two months were exactly one-sixth of the entire year, but that the relation between the different articles of traffic and expenses based on the traffic are substantially the same as for the entire year, and this was verified, it is shown by the witness Hamilton, by comparing them with the four last months of 1907. It was also shown that, although the traffic during those four months constituted a little over 36 per cent. of the entire year's business, the expense, as well as the use, was reflective of the entire year. The reason the months of November and December, 1913, were used for the purpose of making the test, it is explained, was that until after the opinion in the Minnesota Rate Case had been announced, other bases had been used by all the railroads, including this Company, which were disapproved by the Supreme Court in that case; that in order to obtain the facts to conform to the rules established by the Supreme Court's opinion in the Rate Cases reported in 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, it was necessary to prepare a proper formula, which was done, as heretofore explained, and also to prepare forms on which the necessary information was to be noted as ascertained; also to create the force necessary to obtain the data and record them on these forms in conformity with these instructions to the employés, and thereby secure accurate information from which to prepare the statistics for the hearing of this cause under the new formula.

In this connection it is proper to state that in none of the exhibits, the Company's nor the State's, is the year ended June 30, 1909, included. The cause of this omission is that for the purpose of equating, the reports of the Company made to the Arkansas Railroad Commission were used, and no such reports were required to be made until the year ended June 30, 1910. The statistics, as shown by the exhibits filed by both sides in this cause, are for the years ended June 30, 1910, 1911, 1912, and 1913.

The criticisms by the State of the formula used by the Company are found in the testimony of Mr. L. S. Mayer and Mr. L. N. Simson. Mr. Mayer is the auditor of the Corporation Commission of the State of

Oklahoma, in charge of the division of statistics and accounts. His experience, as shown by his testimony, is that he worked as a section hand on the Burlington Road during three months in the summer for a number of years; the third or fourth year he was promoted to the position of timekeeper on the section; he worked about six months each year for two years and then became a freight brakeman on the Iowa Central, remaining there for about six months. He then worked in the machine shops of the Burlington Road as a laborer and then a machine helper, and finally was employed in the office keeping time. He then was employed in the chief dispatcher's office, handling car distribution, and doing general clerical work in that office and that of the superintendent. In June, 1908, he went to the Chicago & Alton Road, where he did similar work, and for a short time during the rush period was acting as assistant trainmaster at Springfield, Ill.; he then was connected with the maintenance of way and bridges department, and for the last three years has been auditor of the Oklahoma Commission. He is not a civil or mechanical engineer, and has had no experience in these fields. His experience is set out so fully here for the reason that his competency, as well as his impartiality as a witness, were seriously attacked by counsel for the Company. He was the only witness who testified as an expert on behalf of the State on the matters not connected with the accounting. His criticism is of the following bases used in the formula of the Company's Exhibit No. 1: The engine ton miles which was used by the Company's accountants in determining the use of the roadbed for freight, because the engines are classed for potentiality and but seldom carry as much of a load as is assigned to them by the classification. He also criticizes the formula used for passenger trains, which is not based on potentiality, but on the car miles handled, as the number of cars frequently varies. He criticizes the theory which is used for the division of transportation expenses because he says it is cumulative and affects the division of the property injuriously, so far as the State is affected. The division of yard and station expenses between line and terminal is severely criticized by him. In his opinion the terminal should be on actual tons using the cars and not by throwing them in a pool. The same criticism he also applies to some of the station expenses and to wrecks. The division between line and terminal at division points is criticized, and also the division of the cost of maintenance and equipment. The test period made in November and December, 1913, is, in his opinion, not indicative of the normal business for the year, and therefore should not be considered as fair or proper.

As to the engine ton mile basis adopted by the Company, the court is of the opinion that it is the best method that can be adopted to obtain results as accurately as in a matter of this nature is possible. While it is true that only when conditions are ideal the freight haul is 100 per cent. of the potentiality of the engine, the evidence shows that this ideal condition never prevails. It also appears from the evidence that if the load is light the train travels faster and thus correspondingly reduces the cost, and this applies especially to the through freight trains. Besides, by applying this basis to the entire

traffic, it can do no injustice to any of it. One of the elements of the greater cost of handling local freight than through is the fact that it carries a much less proportion of the engine potentiality. The evidence shows that while local trains on this road in Arkansas only carry 67 per cent. of the engine potentiality, the through trains carry 90 per cent., an item which adds to the greater cost of local freight trains.

Aside from this, the potentiality of the engines is very much affected by many other conditions, among them, grades, trestles, and bridges, cold weather, snow and rain. The evidence shows that this Company has two main branches of road in the state of Arkansas, one running north and south in the western part of the state, and the other running east and west in the northern part of the state. In the former, which is a mountainous country, the grades are considerable, while the latter runs for a large part through river bottoms, with many bridges and trestles, partly subject to overflow from the Mississippi and St. Francis rivers, and during the rainy season is seriously affected as to the potentiality of the locomotives. But, leaving these out of view, if Mr. Mayer's contention were sustained, it is shown by the evidence of Mr. Hamilton that calculations, based upon actual investigations, show that if Mr. Mayer's views were adopted it would result in a loss to the intrastate traffic, as of the element of expense charged to freight, the intrastate is only charged with 4 per cent., and that of passenger would be 30 per cent. Nor would the contention of Mr. Mayer that only 10 per cent. of the expense of maintaining the track is caused by the use, and the other 90 per cent. by the elements, change the result to any extent, as the difference would only be a 2 per cent. decrease of the charge to the freight and increase the same amount to the passenger. On the other hand, if the cost of maintenance of way is raised to 25 per cent. and that due to the elements reduced to 75 per cent., as is claimed by some of the witnesses for the Company to be a proper division, the result would be practically the same as that on the basis adopted by the Company according to its formula.

That the passenger trains are not based on engine potentiality, but car miles, is clearly right, for the trains are made up to accommodate that traffic, and the expense should be regulated by the number of cars drawn, even if there are not sufficient passengers to fill every seat. The Company cannot provide the passengers, but must provide the cars.

The criticism of the apportionment of property values in the state between state and interstate on the relation of transportation expenses is that the raising of any item of expense in one class of service puts more property valuation on the state for intrastate business. But the same objection applies to all allocations of expense, for when the common factor is wrong the result is bound to be wrong also. The question, therefore, comes back to the main issue, are the exhibits used by the Company based on correct or incorrect bases, upon the determination of which depends the claim of the Company that the rates sought to be enjoined are noncompensatory and confisca-

tory? The criticism of Mr. Mayer of the division of yard and station expenses made by the formula of the Company is based on the fact that what is called terminal expense is only a part of it. He says that:

"Under the formula used, all business passing through the junction from branch line points is line, and all of the expense going to foreign roads or coming from it is terminal"

—thus causing, as he claims, the intrastate traffic to bear, not only the expense of its own terminals, but those of the interstate. After Mr. Mayer had testified on that point the accountants for the Company made an investigation of the effect upon the results, if Mr. Mayer's plan had been followed. The investigation was made at Fayetteville, Ark., which is on the main line and also the terminus of two branches, and one of the largest stations of the Company in Arkansas, with the result that under Mr. Mayer's formula intrastate traffic would have been charged with almost 100 per cent. more than it was under the Company's formula. This evidence is uncontradicted, and the figures charged on the work sheets, which were submitted to the accountants for the State, are conceded to be mathematically correct. The difference between the two contentions is that Mr. Mayer is of the opinion that every division point should be considered as a terminal in the sense of origin or delivery. On the other hand, the contention of the Company is, and their calculations are made on that theory, that such terminal service was an incident to the transportation from origin to destination, and had nothing to do with the receipt, handling, storing, or delivery of the freight, which constitute terminal expenses. In the opinion of the court the formula of the Company on that item is correct, that it is a haulage, and not a terminal charge. The error of Mr. Mayer, in the court's opinion, is that he confounds the yard and station expenses with the terminal. In the one instance it is a part of the haul, while the latter is that of receiving, storing and delivering.

The formula for the maintenance and cost of equipment is found on pages 9a and 9b of Exhibit 1 of the Company. This has also been severely criticized by the State. The witnesses introduced by the Company testified to the correctness of this formula. In addition to the Company's own employés it introduced Mr. W. E. Symons, whom the testimony shows to be a mechanical engineer of great experience and high reputation in connection with that branch of the railway service, not only in operating, but designing, cars and locomotives. The high standing of Mr. Symons is evidenced by the fact that in some few matters he criticized the formula prepared by the railroad managers, which was used as the basis of the Company's Exhibits, and thereupon changes were made by them in accordance with his suggestions. For the last few years he has retired from active railroad service and acts as consulting engineeer. He also acts frequently as arbitrator in cases of damages growing out of injuries to freight cars and locomotives on different lines. The confidence reposed in him is shown by his employment as consulting engineer by the leading roads of the country, to aid them in improving their equipment, owing to his knowledge and experience from the thorough and minute investi-

gations made by him of causes and results. Among his employments was that of securing information with respect to the actual expense of repairing locomotives, freight and passenger cars. It was claimed by Mr. Simson, who is an expert accountant and stands high in his profession, that the bases adopted by the Company are wrong, and those found in an article by Mr. Berry should be adopted. Mr. Symons testified that in his opinion 80 per cent. of the expense of repairing freight cars is due to rough treatment, and only 20 per cent. to the use of the car under normal conditions as to use; that after allocating or subdividing each expense item between line and terminal, the result was the allocation of 75.7 per cent. to terminal and 24.3 per cent. to line; but having in mind certain damage done to cars in line work which he estimated at 10 per cent., he deducted that from the terminal, and added it to line, making the final figures 65 per cent. to terminal and 35 per cent. to line. He files as an exhibit a summary of division of freight car repairs between the line and terminal, based on an investigation on four lines, the Santa Fé, Rock Island, the Missouri, Kansas & Texas, and this road, as confirming his conclusions. He also files as exhibits photographs of damaged cars, showing the damage done by rough treatment, and another exhibit shows how he subdivided the different parts of a car in making his investigations. Repairs to freight cars he assigns 35 per cent. to line and 65 per cent. to terminal. Repairs to passenger coaches he assigns 82.5 per cent. to line service and 17.5 per cent. to terminal. Locomotive repairs he assigns to local freight engines 60 per cent. to line and 40 per cent. to terminal; to through freight engines 68.4 per cent. to line and 31.6 per cent. to terminal; to local passenger engines 64 per cent. to line and 36 per cent. to terminal; through passenger engines 71 per cent. to line and 29 per cent. to terminal. Typical passenger trains 82.5 per cent. to line and 17.5 per cent. to terminal, including through and local trains. In his testimony he states in detail how his investigations were made, and his reasons for each subdivision. He filed itemized statements of the different parts of each item which he considered, and the reasons for his conclusions. The higher cost charged by him to terminal for locomotives than for cars he explained to be due to the fact that:

"The engine performs more work entering and leaving terminals than any other unit in the train; the application of the brakes being more destructive to the engine."

On the part of the State, Mr. Simson, who frankly admitted that he is only an accountant, with no knowledge or experience of any kind in the management or operation of railroads, prepared his statements of these costs from the tables used by Mr. Berry in a paper prepared by him and read at a meeting of the American Railway Engineer and Maintenance of Way Association held in 1904, on the subject of Reduction of Gradient and Elimination of distance curvature and rise and fall on the Union Pacific Railroad. Mr. Berry is very eminent in his profession as a civil engineer engaged in construction work, but as he admits that he did not possess the necessary knowledge as a mechanical engineer, he adopted the tables prepared by Mr. A. M.

Wellington and Prof. Webb (of neither of whom Mr. Simson had ever heard) affecting operating expenses, and from these tables Mr. Simson assigns:

	Line.	Terminal.
For engine repairs	58.48%	41.52%
Passenger cars	63.88%	36.12%
Freight cars	61.72%	38.28%

In making these figures Mr. Simson does not express any opinion as to whether the tables he used were correct or not, as he admits his lack of knowledge to form such an opinion. He finds that the Company's method is 24.5 per cent. in excess of terminal and a similar per cent. too little for line expenses. The tables used by Mr. Berry did not make any division between line and terminal, but Mr. Simson, taking the different items, allocated them between line and terminal as he assumed they should be, although he admits that he knew nothing of this matter. In his testimony he states:

"I found nothing in Mr. Berry's tables to guide me in making a line and terminal division in any of his subdivisions of cost of repairs. Mr. Berry had no line or terminal division in mind in his paper."

Coming back to Mr. Wellington's tables, Mr. Symons testified that:

"These tables were first published in 1877; that the data for them were secured from the Atlantic & Great Western Railway, which was first a broad gauge road and then was changed to standard gauge; that the freight cars then used were flimsy as compared with those of the present day, and cost about $500. The equipment then in use [freight cars, locomotives, and coaches] has no application whatever to present day conditions."

He further says:

"As an illustration, Mr. Wellington assigns a certain percentage of contributing causes to making up and starting out trains. It was customary, in those times, for an engineer and fireman to get up in the morning and build a fire in the locomotive, and while steam was raising they would get their breakfast; then they came back and switched out their trains, and after they had switched a long time, they took their train and proceeded over the road. There are no such conditions nowadays at all. There were very few yards in those days except the yards that were used by the trains when they came in at the end of the run. Mr. Wellington's tables were based upon conditions that have so completely changed, both with reference to railway operation and with respect to the character of equipment and the business of handling it, that it would not be applicable at all, although the fundamental principles are good, and Mr. Wellington was one of the brightest and ablest railway men the country ever produced. His book has a front place in my library, and I prize it highly; his tables on equipment, however, are completely out of date. That road is now a part of the Erie Railway. In making an examination of the equipment and facilities for its maintenance of the Erie Railway in 1907 it was necessary for me to personally inspect every car, or some of each series of cars, on hand; among the cars still carried on the Company's schedule of equipment were some of these old 20 and 25 ton wooden box cars, originally the property of the Atlantic & Great Western. They were being used for boarding or camp cars. I recommended that they scrap all of them and write them off the books. They were good cars in their day, but there is no such equipment used now, and a distribution of contributing causes of repairs to equipment, based upon cars or locomotives of that type, and upon conditions of that period, is not a good rule to attempt to copy now. Another very important feature was that in those times all cars had what was called a link and pin coupler, making it necessary for the brakeman to go between the cars to where he made the coupling, and they were handled very carefully compared to what they

are now. Since the automatic coupler has come into use, and it is unnecessary for trainmen to go between the cars, the destructive effect of such has gone up enormously. It did not obtain in those days. If it had the cars would not have been there for me to have seen them in 1907."

In view of Mr. Simson's testimony that the Wellington tables used by Mr. Berry furnished no data for making a division between line and terminal, and that he had no practical knowledge whatever on the subject, the further fact that conditions have so materially changed since Mr. Wellington prepared his tables that they are inapplicable to present-day rolling stock of railways, and the testimony of Mr. Symons and that of the other witnesses who testified on that subject, Mr. Simson's calculations on that subject, as shown by his exhibits, are of no value whatever.

On the part of the State it is contended that the reduced passenger rate of two cents a mile would stimulate that traffic to such an extent that the intrastate business would be the gainer, or at least not a loser. For the interstate passenger business the Company charged three cents, and in order to ascertain what the effect on that claim is, a test was made for the month of August, 1913, which, it is claimed, shows that while it increased the intrastate business it did it at the expense of the interstate business. (The two cents rate went into effect on this road in July, 1913.) In order to get the exact factors, train auditors and collectors were, after the two cents rate was put in effect, put upon all trains crossing the borders of the state, with instructions to make a detailed check of all passengers who bought tickets or paid fares on the train at the boundary stations of the state. These reports show that there was an abnormal increase in the purchase of tickets at these boundary stations. The record shows the following increases at some of the boundary stations:

	Total Number of Ticket Sales and Cash Fares Paid.
Osborne, Ark.	
August, 1912	8
June, 1913	12
August, 1913	142
Rogers, Ark.	
August, 1912	2,532
June, 1913	2,999
August, 1913	4,321
Arkinda, Ark.	
August, 1912	176
June, 1913	137
August, 1913	935
Mammoth Springs, Ark.	
August, 1912	656
June, 1913	349
August, 1913	1,684
Yarbro, Ark.	
August, 1912	577
June, 1913	345
August, 1913	810
Summers, Ark.	
August, 1912	118
June, 1913	91
August, 1913	554

In the interior stations the increase was not so marked, still noticeable. In Jonesboro and Hoxie, Ark., the increase was 33 per cent.; in Ashdown, Ark., 31 per cent., and Wilson, Ark., 28 per cent. That in these interior stations a very large part, if not all, of this excess is attributable to the fact that the state rate was only two cents, while the interstate was three cents per mile, is beyond question. Take Jonesboro as an illustration. That city is about midway between the Tennessee and Missouri borders. A great deal of its traffic is with Memphis, Tenn., which is separated from Arkansas by the Mississippi river. A person going from Jonesboro to Memphis, by purchasing a ticket to Bridge Junction on the border of the state, would pay 2 cents a mile and 25 cents for crossing the bridge to Memphis, but if he purchased a through ticket to Memphis, that being an interstate trip, he is charged with the rate filed with and approved by the Interstate Commerce Commission, 31 I. C. C. 532 (where it was held that the 3 cents per mile interstate passenger rate in Arkansas was not unreasonable, although the intrastate rate was 2 cents per mile), 3 cents a mile to Bridge Junction and 25 cents for the bridge fare. The same thing would apply to those who went west to Missouri points. By purchasing a ticket to the last station in Arkansas he would pay 2 cents; he would then pay the 3 cents rate to the first station in Missouri, which, under the statutes of Arkansas, can be paid on the train, without any additional charge; then from the first station in Missouri to his destination he would again pay the 2 cents per mile prevailing in that state. The same condition exists at Hoxie, which is a short distance west of Jonesboro, and no doubt at almost every station in the state to some extent. As the western branch of this road crosses state lines a number of times, the effect is naturally considerable.

It is also shown that while the intrastate passenger business increased for the last six months in 1913 when the 2 cents rate was in force, from 16.31 per cent. for the year ended June 30, 1913, to 19.06 per cent., the interstate decreased during that period from 47.67 per cent. to 39.89 per cent. The evidence also shows that for the year ended June 30, 1910, while the 2½ cents rate was in force, the receipts from passenger traffic were, intrastate, $362,485.87, and interstate, $661,-500.07. For the year ended June 30, 1913, when the 3 cents rate was in effect, the receipts from passenger traffic were, intrastate, $415,-183.99, and interstate $775,599.41. Had the 3 cents rate for intrastate traffic been in force in 1910 the receipts from that traffic would have been $434,983.94, or $19,799.05 more than for 1913, while the interstate passenger traffic for 1913 shows an increase of $114,099.34.

From the evidence the court finds as a fact that the 2 cents rate does not stimulate passenger traffic, except at the expense of the interstate. People are not in the habit of traveling merely because rates are lower. It is probably different when special reduced rates are made for certain occasions, but in such cases it is the special occasion which causes it.

There is also a criticism of the method by which the terminal expenses are charged by the Company. The accountant for the Company made the cost of terminal for each ton of freight 36.486 cents, and

for passenger 8.677 cents, which is shown by the State's accountant to be erroneous and admitted by the Company's accountant, if the division of expenses is based upon tons and passengers. The corrected figures upon that basis should be 31.319 cents per ton of freight and 5.443 cents per passenger. What the actual terminal expenses in Arkansas are is undisputed; both accountants using the same figures, but differing in the methods of division. The Company arrived at its figures on the basis of time devoted by its employés in stations, yards, and train service, regardless of the number of tons or passengers handled, while the State used the latter factors. But in results there is no difference. Mr. Simson, the State's accountant, who prepared these tables, testified on his direct examination:

"The difference cuts no figure in this matter. There is no stress upon that. It is just brought out in the accuracy of the matter."

And again on cross-examination on this subject he testified:

"The result of these errors is that in the intrastate revenues the assignment of passenger and freight revenues to Arkansas is not affected, but in the interstate revenues the mileage allowance is excessive by 11 miles on each ton, and a like excess of 2½ miles for each passenger. * * * The 31 cents allowance on freight and the 5 cents allowance on passenger are merely computed from the basing data that the Company used, to show the error in the method. * * * In other words, the 31 cents was not intended to be considered as a correct terminal allowance of revenue, but was merely computed to illustrate the correctness of the method."

Again, in reply to the question:

"If you based that [referring to the allowance of the terminal being excessive] upon the proposition that the application of that to the traffic units of the entire system, would it exceed the total expenses of the system?"

—he replied:

"That would depend upon the accuracy of the Company's statistician as to the freight and passenger, and freight one mile and passenger mile, but we see no reason to question that. Q. Assuming they are correct, then that is your opinion? A. Yes, sir. Q. What effect do these changes in the interstate revenue, as illustrated by the examinations you have given, have upon the intrastate revenues in Arkansas? A. None whatever. Q. Don't you know that the passengers and tons were not used [by the Company] in any way to divide between line and terminal? A. Apparently this exhibit [referring to Exhibit 6 of the Company] so shows. Q. And do not the exhibits based on Exhibit 1 also show that? A. I presume so. I have not examined them for that particular point, and I don't remember. Q. Assuming they do, were the passenger and tons used in dividing between line and terminal? A. I think not. Q. Would not the reconstructive costs of ascertaining under your method exceed the actual cost if it cost more to earn a dollar in the state of Arkansas than on the entire line as a matter of actual fact? A. It would."

It therefore appears from the testimony of the accountants for both sides that this difference in the terminal figures has no relation whatever to the ultimate correctness of the Company's exhibits or to the equating proportions used by the Company to give effect to its new formula, so far as the State is affected, while Mr. Simson's formula would result in increasing the Company's showing of cost charged to the intrastate business in Arkansas.

To review all the evidence, which is quite voluminous, would serve no useful purpose. In fact, the court has set out more of the testimony

than is necessary in this case. The court had the benefit of the able arguments of counsel, which lasted almost two weeks; they were taken down stenographically and furnished to the court in typewritten form; the evidence was reduced to writing in splendid form, and an index of every subject furnished the court. The testimony, as well as the arguments, have, after arranging them on each subject, been read and reread with the greatest care, and every part of it, although not referred to herein, carefully considered, and the conclusion reached that the formula used by the Company in the presentation of this case, allocating the cost of inter and intra state freight and passenger business of the road in the state of Arkansas, according to its use, enabled it to determine the facts as near correctly as a matter of this kind can be. Upon the whole evidence the court finds, omitting for the present the earnings from mail and express, but adding that item later, the average annual income and expense of Company's intrastate business in the state to be:

	Freight.	Passenger.	Total.
Operating revenue	$261,295.63	$408,728.28	$670,023.91
Operating expenses	$268,983.42	$317,677.36	$586,660.78
Total net earnings			$ 83,363.13

The average net earnings from mail and express for a year for the entire business in the state, intra and inter state, are $21,075.97; apportioning them to the intrastate business in the state upon the same basis the other net earnings were applied, they add to the intrastate net income $5,910.89, making a total of $89,274.02, as the annual net earnings from all intrastate traffic in the state, while charging 3 cents per mile for passengers, except during the 18 months when 2½ cents per mile was charged, and the higher rates under the so-called "court tariff."

By adopting the four-year period for averaging the earnings and expenses we are able to get a fairer result than by merely selecting one year, which may be affected by peculiar conditions then prevailing. A four-year period, when the years are fairly normal, will reflect more accurately the traffic and cost.

The evidence, based upon an actual investigation of the records, conductors' reports, and waybills, all the passenger and freight earnings from intrastate business, without making any allowance for the 2½ cents passenger rate which was used during 18 months, shows the average earnings per year from the intrastate traffic would have been $114,025.93 less if the rates in controversy had been charged. Deducting this sum from the net intrastate earnings leaves a deficit on intrastate earnings of $24,751.91.

It is also proper to call attention to the fact that it appears from the evidence that in ascertaining the effect of the 2 cents rate, it was applied to all passengers, no deductions being made for children, who paid half fare, nor for the lower rates charged to meet competitive conditions from other roads which have a shorter line to some of the stations of this Company, the well-recognized rule being that the shortest mileage between two points establishes the rates for all com-

petitive lines. This is therefore more favorable to the intrastate than the real facts warrant.

What the effect of the 2½ cents rate during the 18 months was has not been shown by any of the testimony or exhibits, but it is shown that for that part of the year 1913 when the 2 cents rate was in effect the difference between the revenue earned from intrastate business in Arkansas and what would have been earned if the 3 cents rate and the "court tariff" had been in force would have amounted for a year to $140,264.55, or $26,238.62 more per year than for the average of the four years which is used by the court in this case. But, in view of the results reached, it is immaterial to consider this difference.

Nor would the percentage of earnings in the state from intrastate as well as interstate business, if applied to the intrastate, show a result which would enable the Company to earn a reasonable return on its investment, which, in the opinion of the court, for the reasons stated in its opinion in the former Arkansas Rate Cases (C. C.) 187 Fed. 290, 348, should be 7.5 per cent. in normal years. The net earnings from all sources in the state, state and interstate, for the average period, are found to be 5.63 per cent. per annum. This leaves out of consideration the difference in cost between the intra and inter state business, which certainly amounts to something, for reasons which require but little discussion; the short haul, the more frequent stops, the additional terminal expense, all add to the expense of the intrastate. But, assuming the same percentage of cost for both classes of traffic, intra and inter state, there must still be a deduction for the diminution in the revenue of the intrastate, which would have resulted if the rates sought to be enjoined had been in force. Taking these into consideration, the result will be, including the mail and express earnings, as follows: The net average annual earnings in the state of Arkansas from all sources were $1,122,463.21; the agreed valuation of the road in the state is $17,924, 441. (These figures are the result of the four years, 1910, 1911, 1912, and 1913 average.) This would make a net profit on all the business in the state of 6.26 per cent. Adopting the same bases for the intrastate would make the

Profit on the valuation of the road in the state assigned to intrastate business	$198,249.25
Deducting the decrease which would have resulted if the enjoined rates had been charged	$114,025.93
Leaves a net profit from intrastate traffic of	$ 84,223.32

—which is equivalent to 2.65 per cent. on the valuation of $3,166,-921, the value of the road in the state allocated to the intrastate traffic according to its use.

Nor would the result differ materially if we accept the figures of the State's accountants and apply them to the intrastate business of Arkansas, although they are made on the basis of the net earnings of the entire system, an assumption without any basis to support it. The system traverses six states in addition to the states of Arkansas, Kansas, Missouri, Oklahoma, Tennessee, Alabama, and Illinois; the mileage of the entire system is 4,746.32 miles, of which only 597.5 miles are in Arkansas, a slight fraction less than 12.58 per cent. The evidence

shows that conditions in Arkansas differ very materially from some of the other states. Not only is there a difference in grades, bridges, embankments, and topographical conditions which add materially to the cost of operation, but there is a great difference in the density of traffic, which is an important factor in the cost of operation of trains. The density of traffic on the entire system, as shown for the year 1913, is 663,000 ton miles against 545,000 ton miles on the freight side, and 97,000 against 75,000 passenger miles on the passenger side in Arkansas. On the line of the system of this Company between Kansas City, Mo., and Ft. Scott, Kan., the density is over 3,000,000 tons to the mile, and the average of the entire system is materially reduced by reason of less density in the states of Arkansas and Oklahoma. On that part of the road a train hauling from 3,000 to 4,000 tons makes the same speed as a train in Arkansas hauling 600 tons, and the wages of the train crew are practically the same in each. While density of traffic does not affect revenue per ton mile, it gives greater revenue per mile of road. Nor does it make any allowance for the shorter hauls in Arkansas than on the entire system. The undisputed evidence shows that the average haul of all freight in Arkansas, as shown by the reports to the Arkansas Railroad Commission for 1913, was 78.85 miles, and on the entire system 166.21 miles. The average passenger haul in this state is 23.66 miles and for the system 43.65 miles. For the four months ending December 31, 1907, the ton miles hauled in Arkansas was a fraction over 89 per cent. and passengers 81 per cent. as compared to the entire line. In 1913 the difference was 19 per cent. on freight and 30 per cent. on passengers. This includes inter, trans, and intra state traffic. As the intrastate haul in Arkansas of freight as well as passenger is much shorter than the inter and trans state, the difference in its cost is of course still greater. How this traffic density affects the cost of fuel and wages, the two biggest items of the cost of transportation, is shown by the Company's Exhibit 55.

No allowance is made for the extra cost of intrastate, although the Company's claim, as hereinbefore stated, is that it is considerably more. That it must be more requires no expert's testimony. The more frequent stops and starts, causing damage to the engines and cars; the fact that the local trains have to do their own switching at all intermediate stations, causing a loss of time, for which compensation is made to the train crew; the receipt and delivery of freight in smaller lots, which one of the witness for the Company illustrates by saying:

"If one ton of freight is handled at one station, and five tons at another, the difference in cost is negligible, but when divided between the entire tonnage and mileage, adds considerable to the less. The time taken to load or unload five tons will be nothing like five times as much as receiving or unloading one ton."

Many other matters as shown by the evidence, and hereinbefore mentioned, contribute to the additional cost of local trains when compared to the through, which only receive and deliver freight at terminals in large quantities, with switch engines to do the switching. Still, Mr. Simson makes no allowance whatever for them.

How seriously the shorter haul affects terminal expenses is shown by an illustration made by Mr. Nay when he says:

"If the terminal expense is 30 cents per ton on a haul of 30 miles it will make 1 cent a ton for every mile, while if the haul is 60 miles it will only amount to one-half cent a mile."

This also applies to yard expenses, which are affected by the tonnage handled, depending, to a great extent on the density of traffic. How these expenses vary in different yards is shown by the evidence. The costs in the yards at Fayetteville and Jonesboro were carefully investigated, and it was found that while the rough cost of handling each car at Fayetteville is 14.5 cents, in Jonesboro it is 35 cents, while on the entire system it is 23.2 cents, for a five-year period. Only by ascertaining the actual cost or expense of each yard in the state can the exact cost in the state be found, and this was ascertained by the Company during the two-month test period.

The cost of maintenance of way and structures in Arkansas is shown by the uncontradicted proof to have been, for the four months ending December 31, 1907, $463 per mile, and on the whole system $377, and practically the same proportion is found for the years 1908, 1910, 1911, 1912, and 1913, the greater cost in Arkansas being caused by difference of climatic and topographical conditions, some of the system being operated over a level country without grades, while in Arkansas a large part of it is over river bottoms, and another part in a mountainous section. This is shown by Exhibit 52 of the Company.

The calculations made by Mr. Simson in his Exhibits K1 and Z1 are based only on the four last months of five years on the entire system, while the valuation is that based on the year 1907, the lowest of any year and far below the average. By this method he reduces the percentage of traffic for these periods from 36.98 per cent., which it actually was, to 36.34 per cent., which it was not in fact. Exhibit O of Mr. Simson is based on a formula spoken of as Mr. Douglas', discarded in this case because found to be erroneous by Mr. Simson, and admitted to be so by the Company's accountant. His Exhibit J1 shows the net earnings based on the four last months in 1907 to be 6.62 per cent. Exhibit M1, which is based solely on the last four months for the years ended June 30, 1908, 1910, 1911, 1912, and 1913, shows an average profit of 6.89 per cent., or an average of the two exhibits of 6.75 per cent. In these exhibits, as in all others of Mr. Simson's, no allowance is made, as stated before, for difference in cost, taxes, density of traffic, shorter hauls shown to exist in Arkansas when compared with the entire system, nor any difference in cost between state and interstate, but the road in Arkansas is treated as part of the entire system, and the assumption acted on that the cost is the same on every part of the system, and also for intra and inter state business, an assumption wholly unwarranted, and opposed to all the evidence in the case.

Nor does he make any allowance for decreased earnings, which would have resulted from the State's rates, sought to be enjoined by this action. But adopting his conclusions that the profit of 6.75 per

cent. should be applied to the value of the road in the state of Arkansas, it would show for the intrastate business net earnings $213,767.16; deduct from this the loss of earnings, if the lower rates which were enjoined had been charged, and which should be deducted, $114,025.93 a year, there is left a net profit from all sources, according to his calculations, the sum of $99,741.23 from intrastate traffic, which would make a small fraction over 3 per cent. on the investment assigned to intrastate traffic, $3,166.921.

Nor do Exhibits AA and BB of the State, which show, the former 7.69 per cent. and the latter 8 per cent. net profit on the valuation, make any distinction in cost between state and interstate, nor allow for the decrease in earnings, which would have resulted from the rates in controversy. But even on that basis, deducting from the intrastate the difference between what was earned and what would have been earned under the lower rates, leaves as a net profit on the intrastate business less than 4 per cent.

The valuations of the road in Arkansas in all calculations made by the court are those agreed on by the State and the Company, and are 27 per cent. less than was claimed by the Company, as shown by the evidence of its chief engineer before the stipulation as to value was made. The reduced valuation was the basis of the exhibits of both parties, as amended, and which were used as evidence at the hearing and in this opinion.

Mr. Simson found an error in the assignment of earnings to Arkansas made by the Company for the four months ended December 31, 1907, amounting to $23,080.62 for that period. This was caused by the old formula (Douglas' formula) wherein there had been erroneously assigned for the year 1907 $72,107.48 earnings to Tennessee which should have been assigned to Arkansas. The error is admitted, but it only applied to the four-month period in 1907, which is not included in the four-year period used by the court in its calculations, and therefore does not affect them. The learned counsel for the State, in the argument, stated that the court's attention is called to it, not on account of its effect on the result, but to show the error of trying to take one period and transpose it to another.

Claims of other errors in the Company's statistics have been carefully considered by the court, but found to be not sustained by the evidence, or so insignificant in amount that they could not affect the final result to the extent of 1/100 of 1 per cent.

A matter of surprise to the court in this case is the fact that the only charge for depreciation made by the Company is one-fourth of 1 per cent. a year on locomotives and rolling stock, and nothing whatever for depreciation of the embankments, ties, rails, bridges, stations, platforms, and property other than locomotives and rolling stock. In the court's opinion this one-fourth of 1 per cent. a year allowed for depreciation of rolling stock is wholly insufficient, as it would indicate the life of the rolling stock to be 400 years, certainly too small, no matter how well kept. But there being no proof of any depreciation except this one-fourth of 1 per cent. none other has been allowed or considered by the court.

In view of the conclusions reached by the court, and what was decided in the Minnesota Rate Case in relation to the Minneapolis & St. Louis R. R. Co., 230 U. S. 469–473, 33 Sup. Ct. 729, 57 L. Ed. 1511, and Norfolk & Western Ry. Co. v. Conley, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. Ed. ——, it is unnecessary to make any other special findings than those made, or to divide between freight and passenger traffic, as the court finds that the rates enjoined yield no profit whatever on the intrastate business, but, on the contrary, show a loss.

As no claim was made for the State, and no evidence whatever introduced to show that the road is not properly and economically managed, or that it was not built to meet a public demand, or what may properly be called a public necessity, the court has assumed that there was no ground for such claims, as otherwise they would have been charged by the able counsel for the State, and evidence to sustain them introduced.

The plaintiff is entitled to a decree making the temporary injunction perpetual.

As conditions may change in the future, which would justify the State to put in force the rates now enjoined, the court will retain jurisdiction of the cause, so that the State may apply for further orders to meet the changed conditions, if desired.

MUDGE et al. v. McDOUGAL, Tax Collector.

(District Court, E. D. Arkansas, E. D. April 29, 1915.)

1. TAXATION ⟹608—REMEDIES FOR WRONGFUL ENFORCEMENT—INJUNCTION.
Kirby's Dig. Ark. § 7180, providing for the recovery of taxes erroneously assessed, not referring to overvaluation of the property taxed, but only to jurisdictional defects, and being a less adequate remedy than an injunction, does not provide such an adequate remedy at law as will preclude enjoining the collection of a tax based upon a systematic overvaluation of railroad property.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. ⟹608.]

2. TAXATION ⟹608—COLLECTION—REMEDIES FOR WRONGFUL ENFORCEMENT—INJUNCTION.
A court of equity may enjoin the collection of a tax based upon a systematic overvaluation of railroad property, both by general law and especially in view of Const. Ark. art. 16, § 13, and Kirby's Dig. Ark. § 3966, providing that an injunction may be granted to restrain illegal tax assessments.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. ⟹608.]

3. COURTS ⟹371—FEDERAL COURTS—ENFORCEMENT OF RIGHTS UNDER STATE LAWS.
Where a state statute creates or provides a new right cognizable in equity, the national courts will enforce it.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 972–976; Dec. Dig. ⟹371.]

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4. TAXATION ⟸476—ASSESSMENTS—BOARDS OF EQUALIZATION.
Where a state statute limited the session of county boards of equalization to the period between the second Monday in September, and the meeting of the county court on the fourth Monday in October of each year, a board of equalization became functus officio after such date, and could not thereafter reduce assessments of property in the county.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 845–849; Dec. Dig. ⟸476.]

5. TAXATION ⟸608—LEVY AND ASSESSMENT—DISCRIMINATION.
Where the Arkansas tax commission had assessed the property of railroad corporations on a basis of 50 per cent. of their actual value in conformity with the customary assessments upon all other property, a reduction by a county board of equalization in the assessments on all the property in the county, except that of the railroads, of 50 per cent., and the issuance of a warrant to the collector authorizing him to collect on that basis, while the taxes charged to the railroads remained as before, was a discrimination, authorizing an injunction against collecting the tax.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. ⟸608.]

6. TAXATION ⟸468—ASSESSMENT—REDUCTION.
Under Kirby's Dig. Ark. §§ 6899, 6906, requiring all taxable property to be listed and valued as of June 1st of each year, a county board of equalization cannot reduce assessments on the ground of depreciation in value of property subsequent to that date.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 837; Dec. Dig. ⟸468.]

7. TAXATION ⟸611—COLLECTION—INJUNCTION—RAILROAD PROPERTY.
That Laws Ark. 1911, p. 233, approved May 4, 1911, requires the property of railroads in the state, excepting buildings and side tracks, to be assessed as a unit, was no obstacle to an injunction against the collection of a tax by a county tax collector, based upon an assessment of the property of a railroad at 50 per cent. of its actual value, while all other property in the county was assessed at 25 per cent. of its actual value.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1242, 1245–1257; Dec. Dig. ⟸611.]

In Equity. Bill for injunction by Henry U. Mudge and Jacob M. Dickinson, receivers of the Chicago, Rock Island & Pacific Railway Company, against J. F. McDougal, Tax Collector of St. Francis County, State of Arkansas. On application for temporary injunction. Injunction granted.

The plaintiffs seek by this proceeding to enjoin the defendant, as tax collector of St. Francis county, state of Arkansas, from collecting or attempting to collect taxes on the property of the railway company on a basis of more than 50 per cent. of the assessment as shown upon the tax books. The allegations in the bill are that under the laws of the state of Arkansas a commission, known as the Arkansas tax commission, exists, whose duty it is to ascertain each year the value of all property of railroads and other corporations, including, so far as railroads are concerned, tracks, rolling stock, water and wood stations, passenger and freight depots, offices, furniture, and all other property, real and personal, owned by each railroad running through or in the state of Arkansas; that after ascertaining the value of such property the commission is directed to appraise the same, and before the 1st day of September each year to certify to the assessor of each county in which said railroad is located the value of so much of said railroad tracks and other property as is located in that county, whereupon the assessor of each county is required to list and assess the railroad property in said county in accordance with the certificate of the tax commission; that on or about the 1st day

of September, 1914, the Arkansas tax commission, acting under and in pursuance of the authority of law, ascertained the value of the railroad property of the plaintiffs located in St. Francis county to be $2,279,358; that at and prior to the time of making and certifying out said assessment by the tax commission it had been the custom of the assessor of St. Francis county, as well as the assessors of all other counties in the state, to assess all property other than railroad property, for the purpose of taxation, at 50 per cent. of its actual value, and the tax commission therefore made the assessment of plaintiff's railroad property for the year 1914 at 50 per cent. of its actual value, and certified the same to the proper officer of St. Francis county as of the value of $1,139,679 for said county, and the property was thereupon placed by the assessor of said county upon the assessment books of said county at said sum of $1,139,679; that after the assessment had been certified by the Arkansas tax commission, and extended upon the tax books of St. Francis county, the board of equalization of said county on the 28th day of October, 1914, directed the county clerk of said county to make a reduction of 50 per cent. in the assessment of all property of St. Francis county, real and personal, except that of railroads and all other corporations, which were assessed by the state tax commission, which said reduction was by the county court of said county approved, and thereupon the county clerk, in making out the tax rolls, carried out the instructions of said board of equalization of St. Francis county, and made the reduction of 50 per cent. in the assessment of all the property of said county except that of railroads and other corporations whose assessment is made by the state tax commission; that as a result of said action of the board of equalization of said county, and of the county clerk in making out the tax books, all the property in said county subject to taxation, except railroad property, is assessed for the year 1914 at not more than 25 per cent. of its actual value, while the property of the plaintiffs in that county is assessed for taxation for the year 1914 at 50 per cent. of its actual value; that said assessment of plaintiffs' property, and the attempted collection of taxes thereon, is in violation of article 16, section 5, of the Constitution of Arkansas, and also section 1 of the fourteenth amendment to the Constitution of the United States; that the defendant, as tax collector, is demanding of the plaintiffs the payment of the taxes in full upon said assessment, and threatens to return the property of plaintiffs as delinquent and subject it to the penalties provided by law; that the plaintiffs are willing and ready to pay all just and legal taxes upon such valuation as may be legal and just and equal and uniform with the valuation placed upon other property in said county; that if it be assessed on a uniform basis with other property in said county it would be assessed at 25 per cent. of its actual value, as ascertained by the Arkansas tax commission, which would be $569,840, and it offers to pay the defendant the full amount of the taxes based upon such valuation.

Thos. S. Buzbee, of Little Rock, Ark., for plaintiffs.
James P. Clarke, of Little Rock, Ark., for defendant.

TRIEBER, District Judge (after stating the facts as above). This cause came on for hearing on the application of the plaintiffs for a temporary injunction, and was heard on the complaint, certified copies of the action of the board of equalization, and the testimony of Hon. F. E. Brown, one of the members of the Arkansas tax commission.

[1] Counsel for the defendant objects to the jurisdiction of this court, sitting as a court of equity, to grant any relief, claiming that there is a complete and adequate remedy at law given by section 7180 of Kirby's Digest. That section provides:

"In case any person has paid or may hereafter pay taxes on any property, real or personal, erroneously assessed, upon satisfactory proof being adduced to the county court of the fact, the said court shall make an order refunding to such person the amount of the county tax so erroneously assessed and paid, and, upon production of a certified copy of such order to the auditor, he shall

draw his warrant on the state treasurer for the amount of state tax erroneously assessed and paid. Such warrant shall be paid out of the appropriation to pay moneys arising from the erroneous assessment and collection of taxes. But in case there shall be no appropriation, or the appropriation shall have been exhausted, then the auditor shall issue a certificate of indebtedness therefor."

This objection is untenable for several reasons. That section, as construed by the Supreme Court of Arkansas, applies only if the erroneous assessment is caused by a defect that is jurisdictional in its nature, and does not refer to the judgment of the assessing officers in fixing the amount of the valuation of the property. As stated in Clay County v. Brown Lumber Co., 90 Ark. 413, 420, 119 S. W. 251, 254:

"If the property paid on was exempt from taxation, or if the property was not located in the county, or if the tax was invalid, or if there was any clear excess of power granted, so as to make the assessment beyond the jurisdiction of the assessing officer or board, then the provisions of Kirby's Digest, § 7180, give the owner a remedy for a refunding of such taxes thus erroneously paid. But a remedy is not given by this section to the party aggrieved by reason only of an excessive assessment or overvaluation of his property."

[2] Aside from this, the Constitution as well as the statutes of Arkansas expressly provide that an injunction may be granted to restrain illegal and unauthorized taxes and assessments by county, city, or other local boards or officers. Section 3966, Kirby's Digest; article 16, § 13, Constitution of Arkansas. The latter provides:

"Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."

Section 3966 of Kirby's Digest provides:

"The judge of the circuit court may grant injunctions and restraining orders in all cases of illegal or unauthorized taxes and assessments by county, city or other local tribunals, boards or officers."

The Supreme Court of Arkansas, in construing these provisions of the Constitution and statute, has uniformly held that by the provisions thereof chancery courts have the power to inquire into the validity of all taxes and assessments, and to enjoin the collection thereof when found invalid. Vaughan v. Bowie, 30 Ark. 278; Brodie v. McCabe, 33 Ark. 690; Cole v. Blackwell, 38 Ark. 271; St. L. S. W. Ry. Co. v. Kavanaugh, 78 Ark. 468, 96 S. W. 409; Little Rock v. Barton, 33 Ark. 441; Dreyfus v. Boone, 88 Ark. 353, 114 S. W. 718; Merwin v. Fussell, 93 Ark. 336, 124 S. W. 1021.

[3] Where a statute of a state creates a new right, or provides a new right cognizable in equity, the national courts will enforce that right. Cummings v. National Bank, 101 U. S. 153, 157, 25 L. Ed. 903; Darragh v. H. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609; U. S. Mining Co. v. Lawson, 134 Fed. 769, 67 C. C. A. 587, affirmed 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65; Brun v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154. Besides, as stated in Atchison, T. & S. F. Ry. Co. v. Sullivan, 173 Fed. 456, 97 C. C. A. 1, of a statute of Colorado like section 7180:

"But, even if it be conceded that this section is applicable, the remedy is not as adequate as an injunction."

Nor would the rule be different, even in the absence of such provisions as are found in the Constitution and statutes of Arkansas, as has been determined a number of times by the United States Circuit Court of Appeals for this Circuit. In Atchison, T. & S. F. Ry. Co. v. Sullivan, supra, the court said:

"A systematic and intentional under or over assessment of one or more classes of property in violation of the law, whereby one or more classes of property is to be made to bear an undue proportion of the burden of taxation, presents a good cause of action for relief from the payment of the unjust part of the proposed tax."

Numerous authorities are cited to sustain the conclusion reached. This principle was reaffirmed by that court less than a year ago in Wells Fargo & Co. v. Johnson, 214 Fed. 180, 130 C. C. A. 528, and Lacy v. McCafferty, 215 Fed. 352, 354, 131 C. C. A. 494. This is the rule established in Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903, and followed since then by all the national courts.

[4] It is next contended that the action of the board of equalization was absolutely void, for the reason that the statute limits the sessions of the county boards of equalization to the period between the second Monday in September and the meeting of the county court on the fourth Monday in October, and any action taken by the board of equalization after that time is absolutely void; that the fourth Monday in October, 1914, was October 26th, and as the action of the board of equalization, reducing the assessment of the property in the county 50 per cent. was taken on October 28th, its action was therefore, it is claimed, a nullity. That the board of equalization had become functus officio before October 28th is the proper construction of the statute. Waters-Pierce Oil Co. v. Roberts, 96 Ark. 92, 131 S. W. 205.

[5] But the allegations in the complaint go further, and allege that in conformity with the action of the board, the county clerk, in making out the tax books, did reduce the assessments on all the property in that county, except that of the railroads, 50 per cent., and the warrant to the collector only authorized him to collect taxes on that basis of valuation, that is, on 25 per cent. of the actual value of the property, while the taxes charged to the plaintiffs' property, and to be collected by the defendant, unless restrained, is on the basis of 50 per cent. of its actual value, a discrimination clearly entitling plaintiffs to relief, if a court has the power to grant it.

[6] It is also claimed on behalf of the defendant that by reason of the conditions in that county and other counties of the state of Arkansas, where the principal product is cotton, the value of property had decreased more than 50 per cent. since the assessment was made by the assessor, which the law requires to be made as of June each year. But as the statutes of the state require all property to be listed and valued as of June 1st each year (sections 6899 and 6906, Kirby's Digest), a depreciation of value at a later date cannot be taken into consideration by the board of equalization. Besides, if the values of all other property of the county, real and personal, decreased to such an extent, is the value of the property of railroads not also affected by it? Evidently the board of equalization was of that opinion, for in the order making the reduction it is stated:

"Except that of the railroads and other corporations which are assessed by the state tax commission, because that commission has sole jurisdiction thereof."

This clearly shows that the only reason the board did not reduce the railroad assessment was that it had no jurisdiction to do it; the state taxing board having exclusive power to assess that species of property.

[7] The most serious objection raised on behalf of the defendant is that the laws of Arkansas require the property of railroads in the state to be assessed as a unit. Act 251, Session Acts of 1911, p. 233, approved May 4, 1911, contains, among other provisions:

"Sec. 12. * * * In valuing the property of every railroad the commission shall take into consideration the entire railroad, whether all or only a part of it is in this state.

"Sec. 13. The commission shall determine in the case of each railroad it assesses the value per mile of the main track, the value per mile of the side track, turnouts, the value of each building and the value of the average stock of materials, including machinery and repair shop stores, timber, ties and rails carried the next year next preceding the year the assessment is made and the value per mile of the rolling stock owned by the road at assessing time. For the purpose of finding the value of the rolling stock of railroads in this state the commission shall take the total value as stated in the schedule of the rolling stock of each of the respective railroads of this State filed and prepared in accordance with the requirements of this act, and divide the same by the number of miles in the entire length of such railroad and the result shall be the value per mile of the rolling stock of such railroad for purposes of taxation, and the value per mile of such rolling stock so ascertained shall be multiplied by the number of miles or fraction of miles thereof lying and being in any county, and the product thereof is the sum to be taxed in such county.

"Sec. 14. The buildings and side tracks of railroads shall be assessed as real estate, and each building or side track shall be assessed in the incorporated town or district where located. Main track shall also be assessed as real estate, and it shall be apportioned for assessment and taxation between the several towns and school districts through which the railroads run according to the actual mileage in each town and district. Rolling stock shall be assessed as personal property, and it shall likewise be apportioned between the several towns and districts through which the railroad runs, according to the actual mileage in each town and district. Materials and stores shall be assessed as personal property in the town or district where located on the first Monday in June the year for which the assessment is made."

"Sec. 18. When the Arkansas tax commission shall have ascertained the value of the property of any railroad as herein provided or of the companies and corporations whose assessment is provided for in section 3 of this act, the valuation shall be entered in detail in a record to be kept by the commission for that purpose. Before the first day of September of each year it shall be the duty of the commission to certify out through its chairman and secretary to the assessor of each county in which any railroad is located, or other company or corporation may be doing business, so much of said value as is located in said county and in the several districts and towns in said county. The assessor shall enter upon the proper records the assessments so certified to him."

"Sec. 20. The return of the railroad companies and other corporations whose assessment is provided for by section 3 of this act, shall not be held to be conclusive as to the value of the property returned, but the Arkansas tax commission may make such assessment of such property as it may deem just and equitable."

It is therefore claimed that to grant the relief asked in the instant case would destroy the unit valuation, and therefore is not permissible. While the railroad property is required to be assessed as a unit, the

buildings and side tracks are required to be assessed in the incorporated town or district where located, as provided by section 14 of the act.

The laws of Colorado on this subject are practically the same as those of Arkansas. The state board of equalization is required to assess the railroad property of each railroad in the state as a unit, and to apportion the assessment to the counties of the state on a mileage basis. The assessor of each county is required to assess other taxable property in his county, and these two assessments are placed upon the tax list and subjected to the same levies. These Colorado statutes were construed in Atchison, T. & S. F. Ry. Co. v. Sullivan, supra, which is precisely in point, as the facts were practically the same as in the case at bar, that while the state board assessed the property of the complaining railway company at 55 per cent. of its value, the assessor of Bent county assessed other taxable property in that county at not more than 25 per cent. of its actual value, and also omitted from his assessment considerable taxable property in that county, with the knowledge and consent of the other county officials; that he did so pursuant to a rule adopted by the county officers, and did so systematically and intentionally. It was held that this was an unjust discrimination in taxation against the property of the complainant, and for that reason the railroad company was entitled to an injunction against the collection of the taxes in that county, enjoining the collection of that portion of the tax which resulted from the illegal discrimination. The opinion in that case was delivered by Judge Sanborn and covers the subject so fully that but little need be added.

In Chicago, B. & Q. Ry. Co. v. Board of Commissioners of Atchison County, 54 Kan. 789, 39 Pac. 1039, the identical question was before the Supreme Court of Kansas, the statutes of that state governing assessments being practically the same as those of this state, and the same conclusion reached as in Atchison, T. & S. F. Ry. Co. v. Sullivan. The court said:

"We do not think the courts are powerless to prevent such a gross discrimination in the assessment and taxation of property as is shown in this case, where one class of property is assessed and taxed at its actual value, and all the other property in the same county is assessed and taxed at only 25 per cent. of its value. The rule favored in this case permits the state and the county to collect from the plaintiff its just share of the public burden, and prevents the unfortunate consequences which would result if all the taxes levied were declared void. Upon payment to the county treasurer of the taxes tendered, or their deposit into the District Court for his use, the plaintiff will be entitled, * * * to an injunction to restrain the collection of the illegal excess of the taxes levied."

To the same effect are Taylor v. Louisville & Nashville Ry. Co., 88 Fed. 350, 31 C. C. A. 537; Central R. R. Co. v. Mayor, etc., of Jersey City (D. C.) 199 Fed. 237, affirmed 212 Fed. 76, 128 C. C. A. 532; Louisville & Nashville Ry. Co. v. Bosworth (D. C.) 209 Fed. 380.

If the contention of the learned counsel for the defendant were sustained, it would be in the power of the taxing officers of the state to discriminate against railroad companies in spite of the constitutional provision of Arkansas that:

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct,

making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value." Article 16, § 5, Constitution of Arkansas.

For if it is within the power of the assessing officers of one county to do so, why may not every county through which this railroad or any other runs pursue the same course, and thus place upon all the property of the railroad companies twice as great a burden of taxes as upon other property in the same county? That this may not be done has been expressly decided in Ex parte Ft. Smith & Van Buren Bridge Co., 62 Ark. 461, 36 S. W. 1060. In that case it was held:

"The real property of Crawford county, with few exceptions, was assessed, it appears, for 1895, at one-half its market value. The bridge of appellants was one of the exceptions. The board refused relief against this wrong, and its owner appealed to the county court. Was it entitled to relief? It may be said that, inasmuch as its property was not assessed above its true value, it had no right to complain. But this is not true. It had the right to demand that no unequal burden be imposed upon it by taxation. * * * The Constitution provides that this burden shall be apportioned among them according to the value of their property, to be ascertained as directed by law. When, therefore, the property of a few is taxed according to its value, and of all others at one-half its value, then the few are required to contribute double their portion of the burden. This is manifestly a wrong, and justice demands that it be redressed, whenever it can be done conformably to the laws."

In the instant case this reduction of assessment was made, not only of the real estate in the county, but all property subject to taxation, except the property not within the jurisdiction of the board of equalization. The undisputed facts in this case show that all the property of St. Francis county, except that of railroads, was assessed at 25 per cent. of its value, while that of plaintiffs was assessed at 50 per cent. of its value, thus throwing upon it a burden twice as great as upon the property of others.

The plaintiffs are entitled to a temporary injunction, to be granted upon condition that they pay all the taxes due upon an assessment of 50 per cent. of that made by the Arkansas tax commission, and the execution of an injunction bond.

In re RUSSELL WHEEL & FOUNDRY CO. et al.

In re DETROIT BODY CO.

(District Court, E. D. Michigan, S. D. March 29, 1915.)

No. 2929.

1. BANKRUPTCY ⊂=63—ACTS OF BANKRUPTCY—ADMISSIONS BY BANKRUPT—"PERSON."

Under Bankr. Act July 1, 1898, c. 541, § 1a (19), 30 Stat. 545 (Comp. St. 1913, § 9585), defining "persons" as including corporations, except where otherwise specified, and section 3a (Comp. St. 1913, § 9587), providing that acts of bankruptcy by a person shall consist of the acts therein specified, including the admission by the bankrupt in writing of his inability to pay his debts and his willingness to be adjudicated a bankrupt on that ground, a corporation, though solvent, may make such admission of

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

its inability to pay its debts and its willingness to be adjudicated a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸63.

For other definitions, see Words and Phrases, First and Second Series, Person.]

2. BANKRUPTCY ⟸63—CORPORATIONS—DIRECTORS—POWERS.

It being the law in Michigan that the board of directors of a corporation may make an appointment for the benefit of creditors, the board of directors of a corporation organized under an act of that state providing that corporations so organized shall be controlled by a board of directors elected by the stockholders, except when otherwise provided in the articles of association, had power to commit the fifth act of bankruptcy, consisting of the admission in writing of the bankrupt's inability to pay its debts and willingness to be adjudicated a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸63.]

3. BANKRUPTCY ⟸63—CORPORATIONS—DIRECTORS—POWERS.

The power of the board of directors of a corporation to commit the fifth act of bankruptcy, by admitting in writing the inability of the corporation to pay its debts and its willingness to be adjudicated a bankrupt, depends upon the powers of the directors under the laws of the state issuing the corporate charter.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸63.]

4. BANKRUPTCY ⟸65—INVOLUNTARY PROCEEDINGS—DEFENSES—SOLVENCY.

Solvency is no defense to a petition in bankruptcy charging the fifth act of bankruptcy, consisting of the admission in writing of the debtor's inability to pay its debts and its willingness to be adjudicated a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 121; Dec. Dig. ⟸65.]

5. BANKRUPTCY ⟸100—EFFECT OF ADJUDICATION—DISSOLUTION OF CORPORATION.

An adjudication in bankruptcy does not dissolve a corporation or terminate its existence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. ⟸100.]

In Bankruptcy. In the matter of the petition of Russell Wheel & Foundry Company and others to have the Detroit Body Company adjudicated a bankrupt. On motion to strike an answer from the files and for an order of adjudication. Motion granted.

Clark, Lockwood, Bryant & Klein, of Detroit, Mich., for petitioners.
Robert M. Brownson, of Detroit, Mich., for Union Trust Co.

TUTTLE, District Judge. On March 11, 1915, an involuntary petition was filed praying that the Detroit Body Company, a Michigan corporation, be adjudicated bankrupt. Aside from formal matters, the petitioners allege that they are creditors having provable claims, over and above securities held by them, aggregating $15,564.05; that the bankrupt is insolvent, and that on March 2, 1915, it committed an act of bankruptcy, to wit:

"While insolvent admitted in writing its inability to pay its debts and its willingness to be adjudicated bankrupt on that ground."

No other act of bankruptcy is alleged in the petition.

Within the time required by the rules and practice of the court, the

Union Trust Company, receiver of the F. B. Ensley Company, a creditor of the bankrupt, entered its appearance in opposition to the adjudication, and on March 18, 1915, filed its answer to the petition. This answer alleges that the Union Trust Company, as receiver, is a creditor of the bankrupt in the sum of $19,784.65. It denies that the petitioning creditors have claims which are unsecured in the sum of $15,564.05 which are provable, but it fails to deny an indebtedness aggregating $500 or more. The answer further denies that the bankrupt is insolvent, or that it committed the act of bankruptcy alleged, and it asks for the judgment of the court in the premises.

On March 23, 1915, the petitioning creditors filed their petition herein, asking for an order requiring the Union Trust Company, receiver, to show cause why its answer should not be stricken from the files and an order of adjudication made. This petition, so far as material, shows that at the time of the filing of the original petition for adjudication they caused to be filed with the clerk of the court, as a part of the record and proceedings, the original minutes of the meeting of the board of directors of the bankrupt corporation, admitting the inability of the bankrupt to pay its indebtedness and its willingness to be adjudicated bankrupt on that ground; that an inspection of the court's records would have shown to the intervening creditor the passing of such resolution by the board of directors. The petition also alleges that the Union Trust Company, receiver, has attached and garnished property and money of the bankrupt; that the bankruptcy proceedings were brought to prevent said Union Trust Company, receiver, from obtaining a preference; and that the intervention of said creditor is for the purpose of delay and for no other purpose.

An order was duly issued requiring the Union Trust Company, receiver, to show cause why its answer should not be stricken from the files and an adjudication made. The minutes of the meeting of the board of directors of the bankrupt corporation show that all of the members of the board waived notice of a special meeting called to be held March 2, 1915, for the purpose of admitting the inability to pay debts and willingness to be adjudicated bankrupt; that all of the board of directors were present, and that a resolution was adopted as follows:

"It was therefore moved by Mr. ——— and seconded by Mr. ——— that the Detroit Body Company, a Michigan corporation, do admit in writing its inability to pay its debts and its willingness to be adjudicated a bankrupt on that ground, and that the president and secretary be and the same are hereby authorized and empowered to execute in writing an admission in accordance with this resolution," etc.

This motion was unanimously adopted and signed by the president and secretary.

The Union Trust Company filed its answer to the order to show cause, alleging, so far as material to the issues, that its answer should not be stricken from the files and an adjudication made:

(1) Because the Detroit Body Company receiver did not commit the act of bankruptcy alleged; that the board of directors of the bankrupt had no authority, either under its by-laws or the Michigan laws, under its charter or otherwise, to make the admission which constitutes the act of bankruptcy

alleged; that the stockholders never authorized such action; also that the bankrupt is not insolvent.

(2) Because the Detroit Body Company is a solvent corporation, and on information and belief it alleges that the assets are of the value of $350,000, and exceed the liabilities by upwards of $75,000.

(3) Because on December 22 and 23, 1914, the president of the bankrupt corporation made statements to the Bradstreet Company and to R. G. Dun & Co. respectively, that the assets exceeded the liabilities by $112,000 to $122,000; that the financial condition of the corporation is not materially different now than in December, 1914.

(4) Because the resolution of the board of directors within the purview of the bankruptcy law is void and of no binding effect on the corporation for the following reasons: (a) The corporation is solvent. (b) The board of directors of a solvent corporation have no authority under the Michigan statutes to make the admission relied upon. (c) The directors of a solvent corporation, being trustees, have no right or power to destroy its existence or dispose of all its assets without express authority from the stockholders. (d) The directors have no authority and no power to dissolve a corporation, except in the manner specifically provided by law.

The answer further sets forth that the Union Trust Company, receiver, has garnished three banks and two motor car companies, in suits in the Wayne circuit court, but denies that any attachments have been issued. It denies that its answer is for purposes of delay. It alleges that the cause is at issue, that it is necessary that an appraisal of the property of the bankrupt be made, and that the bankrupt be required to produce in court its books, papers, and records.

The answer does not deny that the petitioning creditors have claims aggregating $500 and upward, over and above all securities held by them, and this question was not presented on the hearing and is therefore not in issue. The pleadings, although lengthy, present but one question for determination, viz.:

"May the board of directors of a solvent corporation, organized and doing business under the laws of Michigan, commit the act of bankruptcy defined in section 3a (5) of the Act of Congress relating to bankruptcy, viz., 'admit in writing its inability to pay its debts and its willingness to be adjudicated a bankrupt on that ground'?"

The answer to this question determines every issue raised by the pleading. If the answer be "Yes," then the answer should be stricken from the files and an adjudication made. If "No," then a trial should be had, if there is any question, other than the legal one, to be determined.

[1] Section 1a (19) of the Bankruptcy Law defines persons as "including corporations, except where otherwise specified." Section 3a of the Bankruptcy Law provides that "acts of bankruptcy by a person shall consist," etc. Then follow five distinct acts of bankruptcy, the commission of any one of which by a person (and therefore by a corporation) constitutes a reason for the filing of an involuntary petition. The second and third acts of bankruptcy can be committed only by a person (corporation) where it is insolvent within the meaning of section 1a (15). The first, fourth, and fifth acts of bankruptcy may be committed by a solvent person or corporation, as well as by an insolvent.

It necessarily follows that a solvent corporation may "admit in writing its inability to pay its debts and its willingness to be adjudicated a bankrupt on that ground," and such admission is just and sufficient

cause for an adjudication upon the filing of a petition by the necessary creditors and within the period of four months after such admission. For the purposes of this case it must be conceded, though that fact is in no wise determined, that the bankrupt is, within the meaning of the Bankruptcy Law, a solvent corporation.

[2] If a solvent corporation may commit the fifth act of bankruptcy, may its board of directors, if a Michigan corporation, make such admission? The determination of this question involves an inquiry into the powers of boards of directors of Michigan corporations, for the reason that an admission such as that in question must be an act of the corporation. In re American Guarantee & Security Co. (D. C.) 192 Fed. 405, 27 Am. Bankr. Rep. 640; In re Gold Run Mining, etc., Co. (D. C.) 200 Fed. 162, 29 Am. Bankr. Rep. 563. Under decisions of the Supreme Court of this state a corporation has power, through boards of directors, to make an assignment for the benefit of creditors. Covert v. Rogers, 38 Mich. 363, 31 Am. Rep. 319; Boynton v. Roe, 114 Mich. 401, 407, 72 N. W. 257; Richardson v. Rogers, 45 Mich. 591, 8 N. W. 526.

Under section 35 of the act under which the bankrupt is organized (Pub. Acts 1903, No. 232):

"Said corporation shall be controlled by a board of directors elected by the preferred and common stockholders, except when otherwise provided in the articles of association or amendments thereto."

The directors of a corporation, acting as a board, may borrow money for corporate purposes and issue evidences of indebtedness therefor, such as bonds or notes, and may secure the same by mortgage on the property of the corporation. Detroit v. Gas Co., 43 Mich. 594, 5 N. W. 1039; Joy v. Plank Road, 11 Mich. 155–164.

[3] While the decisions in the various federal courts are at variance regarding the question at issue, there is a uniformity of opinion that the question is to be determined after and from a consideration of the powers of directors under the laws of the state issuing the corporate charter. Black on Bankruptcy (1914) § 145; In re Quartz Gold Mining Co., 157 Fed. 243, 19 Am. Bankr. Rep. 667; Van Emon et al. v. Veal, 158 Fed. 1022, 85 C. C. A. 547; In re Home Powder Co. v. Geis, 204 Fed. 568, 123 C. C. A. 94, 29 Am. Bankr. Rep. 580; In re Riley, Talbot & Hunt, 15 Am. Bankr. Rep. 159 (Mich.); In re C. Moench & Sons Co., 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240 (N. Y.); In re Rollins Gold & S. M. Co. (D. C.) 102 Fed. 982, 4 Am. Bankr. Rep. 327; Collier on Bankruptcy (10th Ed.) 107, 108; Remington on Bankruptcy (1910) vol. 3, §§ 44, 167.

In Re Riley, Talbot & Hunt, supra, Referee Davock, of this district, reporting to District Judge Swan upon an involuntary petition referred to him, to take testimony and report the findings of fact and his conclusions of law thereon, found as a matter of law that a board of directors had authority to commit the fifth act of bankruptcy and bind the corporation by such action. 15 Am. Bankr. Rep. 159. Referee Davock's report was approved and confirmed by Judge Swan, and that decision has never been again questioned in this district. No decision has been made on the question involved by the Circuit Court of Ap-

peals of this circuit. This decision settles and determines the law in this district, and would determine the question without further inquiry or comment, but for the contention made by the learned counsel for the intervening creditor that the rule laid down by Referee Davock and approved by Judge Swan is contrary to the cases of In re Bates Machine Co., 1 Am. Bankr. Rep. 129, 91 Fed. 625 (Judge Lowell), and In re Quartz Gold Mining Co., supra, a case decided by the Circuit Court of Appeals of the Ninth Circuit.

In Re Bates Machine Co., supra, a decision by Lowell, District Judge, it is held that under the statutes of Massachusetts governing corporations a board of directors may not bind a corporation by its action in committing the fifth act of bankruptcy. The opinion is based upon an interpretation of the statutes and decisions in Massachusetts that: (1) A board of directors cannot make an assignment for the benefit of creditors. (2) Section 127 of chapter 157 of the Public Statutes of Massachusetts provides that corporations may apply by petition, signed by an officer duly authorized by a vote of a majority of the corporators (stockholders) present and voting at a legal meeting called for the purpose, for the initiation of proceedings in insolvency against the corporation. Speaking of the above statutory provision, Judge Lowell gives his reasons for his opinion as follows:

"This act of the corporation, thus regulated by statute, seems to me very closely analogous to the expression of the corporate willingness to become a bankrupt, required by the Bankrupt Act; and, as the statute provides that a corporation shall not be adjudged insolvent upon its voluntary petition unless that petition has the authority of the stockholders, it follows that the declaration of willingness to become a bankrupt, upon which are based the proceedings in bankruptcy, must also be authorized by the stockholders, whether those proceedings be in form voluntary or involuntary."

Judge Lowell appears also to have been led to the conclusion reached by him by the further fact that when the decision was made no corporation could file a voluntary petition, and the facts in the case led him to suggest that the proceedings were an attempt to evade the provisions of section 4 of the Bankruptcy Law providing that corporations should not have the benefits of the act.

In Re Quartz Gold Mining Co., 157 Fed. 243, 19 Am. Bankr. Rep. 667, affirmed by the Circuit Court of Appeals in Van Emon et al. v. Veal, 158 Fed. 1022, 85 C. C. A. 547, it was held that, under the powers given to boards of directors of corporations by the laws of Oregon, a board of directors had no authority to bind the corporation by an admission under the fifth act of bankruptcy. It is urged by counsel for the intervening creditor that the question here to be determined is ruled by the above decision. In the Quartz Gold Mining Co. Case Judge Wolverton bases his conclusion that a corporation may not, through its board of directors, commit the fifth act of bankruptcy, wholly on the reasoning in the case of In re Bates Machine Co. and on the provisions of the laws of Oregon governing corporations, viz.:

"Any corporation organized under the provisions of this chapter * * * may, at any meeting of stockholders which is called for such purpose, * * * authorize the dissolution of such corporation, and the settling of its business and disposing of its property," etc.

Judge Wolverton, reviewing the cases of In re Bates Machine Co., supra, In re Mutual Mercantile Agency (D. C.) 111 Fed. 152, 6 Am. Bankr. Rep. 607, In re C. Moench & Sons Co., 12 Am. Bankr. Rep. 240, 130 Fed. 685, 66 C. C. A. 37, and other cases, concludes that the doctrine in Re Bates Machine Co. that a corporation which cannot, through its board of directors, make a common-law assignment, cannot, through such board, commit the fifth act of bankruptcy. The opinion of Judge Wolverton was adopted by the Circuit Court of Appeals, on appeal, as its opinion, and the ruling affirmed.

On the other hand, many courts have decided that a board of directors of a corporation may commit the fifth act of bankruptcy and bind the corporation by such act. In re Mutual Mercantile Agency, 6 Am. Bankr. Rep. 607, 111 Fed. 153; In re Moench & Sons Co., 12 Am. Bankr. Rep. 240, 130 Fed. 685, 66 C. C. A. 37; Cresson & Clearfield Coal & Coke Co. v. Stauffer, 12 Am. Bankr. Rep. 573, 148 Fed. 981, 28 C. C. A. 609; In re Peter Paul Book Co. (D. C.) 5 Am. Bankr. Rep. 105, 104 Fed. 786; In re Kelly Dry Goods Co. (Wis. D. C.) 4 Am. Bankr. Rep. 528, 102 Fed. 747; In re M. M. & Co., 1 Am. Bankr. Rep. 421, 91 Fed. 630; In re Lisk Mfg. Co. (D. C.) 167 Fed. 411, 21 Am. Bankr. Rep. 674; Home Powder Co. v. Geis (C. C. A. 8th Cir.) 29 Am. Bankr. Rep. 580, 204 Fed. 568, 123 C. C. A. 94.

A review of all of the cases sustaining the rule that a board of directors may make the admission which constitutes the act of bankruptcy here in question would avail little, if anything. The cases all agree that the board of directors may make such admission if, under the laws of the state, they could make an assignment for the benefit of creditors and thereby commit the fourth act of bankruptcy. Some cases go even further. The differences between the cases from the several districts are therefore more apparent than real. As previously suggested, a board of directors of a Michigan corporation may make, or authorize the making of a common-law assignment. It follows that a board of directors in Michigan, under the reasoning in all of the adjudicated cases, can commit the fifth act of bankruptcy.

[4, 5] One other contention by the intervening creditor should be considered. It is insisted that the bankrupt in this case is solvent, and that a board of directors of a solvent corporation cannot take any action to dissolve or wind up the affairs of such corporation, nor to destroy its existence or dispose of all its assets. This contention is fully met by the fact that solvency is no defense to a petition charging the fifth act of bankruptcy (West Co. v. Lea, 174 U. S. 594, 19 Sup. Ct. 836, 43 L. Ed. 1098), and also that an adjudication in bankruptcy does not dissolve a corporation or terminate its existence. Morley v. Thayer (C. C.) 3 Fed. 737; Chem. Nat. Bank v. Hartford Dep. Co., 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595.

I am clearly of the opinion that, under the laws and decisions of Michigan, a board of directors of a corporation may commit the fifth act of bankruptcy, the act set forth in the petition for adjudication. There being no question raised as to the facts, and this being the only question involved, it follows that the motion to strike the answer from the files and for an adjudication of bankruptcy should be granted.

Orders will be entered in accordance with the foregoing.

THE STEAM DREDGE NO. 6.

(District Court, S. D. New York. March 2, 1915.)

1. SHIPPING ⊂=203—LIMITATION OF LIABILITY—CONSTITUTIONALITY OF STATUTE.

Const. U. S. art. 3, § 2, providing that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, authorizes Congress to vest a court of admiralty with jurisdiction of all cases of injuries by vessels or those in charge of their navigation, whether maritime or nonmaritime, and Rev. St. § 4283, amended by Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (Comp. St. 1913, §§ 8021, 8028), limiting the liability of owners for losses sustained or acts committed without their privity or knowledge, although as construed by the Supreme Court it extends to nonmaritime torts, is within such authority and constitutional.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 637; Dec. Dig. ⊂=203.]

2. NAVIGABLE WATERS ⊂=19—GAS MAIN ACROSS RIVER—LAWFULNESS OF STRUCTURE—"PUBLIC PLACE."

Under Laws N. Y. 1886, c. 248, giving the right to lay gas mains in streets, avenues, squares, and public places Harlem River is a "public place," and a gas main laid therein by authority of the city, and which does not interfere with navigation, is a lawful structure.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59–63, 67–72; Dec. Dig. ⊂=19.

For other definitions, see Words and Phrases, First and Second Series, Public Place.]

3. NAVIGABLE WATERS ⊂=16—NAVIGABLE PORTION OF RIVER—SILT.

Silt and soft mud settled on the solid bottom of a river are a navigable part of the river.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 43–49, 51–53; Dec. Dig. ⊂=16.]

4. SHIPPING ⊂=81—LIABILITY OF VESSEL OWNER—INJURY TO SUBMARINE STRUCTURE BY DREDGE.

The owner of a dredge, which, while dredging Harlem River, broke or injured a gas main laid on the bottom of the river with her spuds, *held* not liable therefor, on the ground that neither the owner nor master knew of the presence of the main, nor did they have reasonable notice to put them on inquiry.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 341, 344, 345, 347; Dec. Dig. ⊂=81.]

In Admiralty. Proceeding by the R. G. Packard Company, owner of Steam Dredge No. 6, for limitation of liability, wherein the Standard Gaslight Company is claimant. Petition granted.

Alexander & Ash, of New York City, for petitioner.
Shearman & Sterling, of New York City, for claimant.

HAZEL, District Judge. This is a proceeding by the R. G. Packard Company, as owner of Dredge No. 6, for limitation of liability, wherein an answer has been interposed by the Standard Gaslight Company, asserting a claim for damages to a gas main negligently caused by petitioner. Prior to the filing of the petition, an action at law had been instituted by the Standard Gaslight Company to recover damages, which

action was enjoined in this proceeding, and monition issued requiring appearance and proof of claim, as provided by admiralty rule 56 of the Supreme Court. While the dredge in question, which was 112 feet long and 36 feet 10 inches wide, was engaged in dredging material from the Harlem River at Lincoln avenue in the borough of the Bronx, near a water-front dump of the street cleaning department of the city of New York, a 20-inch gas main in the bed of the river, owned and used by claimant to supply gas to its customers, was severely crushed and broken.

Before passing to the merits on the question of negligence on the part of the petitioner, several preliminary objections to the right to limit liability will first be considered. Claimant contends that the injury was not caused, as provided by section 4283 of the Revised Statutes of the United States, amended by section 18 of the act of June 26, 1884, without the privity and knowledge of the owner, and that therefore there can be no exemption from liability; but I think this objection is not sustained by the evidence. Although Clark, the petitioner's superintendent, directed the dredge to the locality where the dredging was done, and gave notice prior thereto at the department of docks and ferries of the petitioner's intention to begin dredging, yet his entire connection with the work was prior to the actual dredging operation, which, as the evidence shows, was in the immediate charge of the master and crew. Neither Clark nor the owner was on board the dredge when the gas main was broken, and, if there was negligence in lowering the spuds of the dredge, such negligence was attributable to the master and crew, and not to the owner or superintendent. In re Rapid Transit Ferry Co. (D. C.) 124 Fed. 786.

The assumption that the negligent lowering of a spud of the dredge was not the proximate cause of the injury, and that there were prior acts of negligence by the superintendent, as, for example, the failure to notify the proper department of the intention to begin dredging, which were imputable to the petitioner, is likewise not sustained by the evidence, for the witness Trout testified that as engineer of the department of docks and ferries he had charge of all dredging operations in the municipality, and that, at Mr. Clark's request to notify representatives of submarine structures that he would begin dredging at a specified time, he notified certain companies and interests owning submarine structures at the point of dredging, but that he did not notify the claimant, as he did not know of the existence of a gas main in the bed of the river at that place. There is nothing to show that Clark knew of the gas main in question, or knew that his notice of intention to begin dredging should have been given to the department of water supply, which is claimed, under the city charter, to have direct control over gas mains in streets and public places. Clark was not chargeable with negligence for placing reliance on Trout's statement that he would notify interested parties; nor was there, in my opinion, such privity and knowledge on the part of the petitioner as to bar limitation of its liability. Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110; see also The San Pedro, 223 U. S. 365, 32 Sup. Ct. 275, 56 L. Ed. 473, Ann. Cas. 1913D, 1221.

[1] It is next contended that the injury to the gas main was not due to a maritime tort, and that therefore section 4283 et seq. of the Revised Statutes do not apply, and this court is without jurisdiction. I am relieved from extensively examining into this contention by the decision of the Supreme Court in Richardson v. Harmon, supra, wherein it was held that under section 18 of the act of June 26, 1884, an addition to section 4283 of the Revised Statutes, owners of vessels may limit their liability arising from nonmaritime torts, and such proceeding by the owner is in its nature exclusive of any separate action on account of the ship. This was a radical departure from section 4283, which concededly applies only to maritime torts. Counsel urges that Congress had no power to extend the admiralty jurisdiction to nonmaritime torts, and that consideration should specially be given that point as in the Richardson Case the question of the constitutionality of section 18 was not presented; but I do not think there is any doubt of constitutional power to extend the act to nonmaritime torts. I believe that a proper construction of article 3, § 2, of the federal Constitution, which provides that judicial power shall extend to all acts of admiralty and maritime jurisdiction, includes the right of Congress to vest a court of admiralty with jurisdiction of all injuries caused, without the privity or knowledge of the owner, by the negligence of the vessel or those having charge of her navigation. Butler v. Boston & Savannah Steamship Co., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017.

Counsel also says that, under the interstate commerce clause, section 18 of the act of June 26, 1884, cannot be sustained, as it would seem to apply equally to interstate and intrastate commerce, and asserts that the dredge in question was not engaged in interstate commerce. This contention however is unpersuasive, for though the dredge had no motive power, and was not engaged in the transportation of property from one state into another, she nevertheless was used at the time of the mishap in deepening the waterway for vessels engaged in interstate commerce and was carrying her machinery from place to place, and was therefore subject to maritime liens and risks. North American Dredging Co. v. Pacific Mail S. S. Co., 185 Fed. 698, 107 C. C. A. 620.

[2] The next question is whether the gas main was a lawful structure. It is unnecessary to examine the many authorities cited on both sides of this proposition. I do not doubt that the Standard Gaslight Company had a right to lay its mains through streets and public places for the purpose of conducting gas from one point to another in the city of New York. By chapter 248 of the Laws of 1886 is conveyed the right to lay mains in streets, avenues, squares, and public places; and a reasonable interpretation of the words "and public places" includes the Harlem River, which, under the doctrine announced by the Court of Appeals of this state, in the Matter of The City of New York, 168 N. Y. 134, 61 N. E. 158, 56 L. R. A. 500, was no less a highway than any of the public streets of the city. The record discloses that the claimant had permission from the proper authorities to lay two 10-inch pipes, from the bulkhead at Second avenue across the Harlem River, and thence through the bulkhead at Lincoln avenue to the north side of the river. Instead of two mains, only one main was laid—a main

of obviously greater diameter than that specified in the license or permit; but such deviation, even though unauthorized, would not in my opinion relieve the petitioner from liability for breaking the main, if it were shown that it was broken through the negligent operation of the dredge, although such deviation is to be considered upon the question of interference with the reasonable use of the river for navigation.

[3] At the point of breakage, the gas main was laid 20 feet 8 inches below the mean level of the water, sloping down a little towards the Manhattan side of the river; but, as the dredging was to be done to a depth of 18 feet 6 inches only, I am disinclined to hold that the gas main was unlawfully maintained, or that it was an impediment to navigation. It was the duty of the claimant to lay its gas main in such a manner as to prevent its being struck by vessels navigating the river, and to give reasonable warning of its presence either by conspicuous signs or some other adequate means. The evidence shows that the main was not imbedded in the river, but was laid on the bottom at a point where dredging operations were more or less frequently required, and injury to it from dipper dredges, or the spuds of dredges, was a danger which should have been guarded against, either by notice or by imbedding it in a trench at the bottom of the river. It is true there was much silt and soft mud around on all sides of the gas main, but this was inadequate to protect it from boats or dredges using the alveus of the river, as it is called in Fergusson v. Union S. S. Co., Victorian Law Reports, 279. It has often been decided that silt and mud are a navigable part of a river, and on this point it will suffice to quote from the opinion of Judge Addison Brown in The City of Richmond (D. C.) 43 Fed. 85. He said:

"The use by steamers in this harbor of the undefined margin of silt between the solid ground and clear water is necessary. Every inch that can be utilized is needed, and should be scrupulously preserved for the uses of navigation, as against all unnecessary interference. Any unnecessary interference with the free movements of vessels is, in my judgment, an 'obstruction to navigation,' within the meaning and intent of the act of Congress."

See, also, Omslaer v. Philadelphia Co. (D. C.) 31 Fed. 354, and Blanchard v. Western Union Tel. Co., 60 N. Y. 510.

[4] There is much dispute over the questions of whether the break in the gas main was due to the careless manipulation of the spuds of the dredge by the crew, and whether the petitioner had knowledge of the precise location of the gas main; but it will not be useful to attempt to harmonize the contradictory testimony on these points. The evidence bearing thereon, when considered in connection with the surrounding circumstances, indicates a strong probability that the gas main was crushed or broken by contact with one of the spuds of the dredge. It is not shown that the appliances for releasing the spuds were defective, or that there was failure to exercise ordinary care in lowering them, or that the petitioner had knowledge or notice of the proximity of the gas main.

Testimony was introduced to show that upon the bulkhead on the Bronx side of the river, where the main was broken, there was a large sign about 7 feet high and 4 feet 6 inches wide, which had painted upon it in conspicuous black lettering the words, "Warning. Cables

Crossing. Do not Anchor;" and another sign which had painted upon it the words, "Water Main Crossing. Don't Anchor;" while on the Manhattan side of the river, about 547 feet from where the dredging occurred, there was a sign 5 feet 10 inches high by 2 feet 10 inches wide, placed on the elevated railway structure, bearing the words, "Pipe Crossing. Don't Anchor." The witnesses Wang and Driscoll, pilots of boats navigating the Harlem River and thoroughly familiar with the locality in question, testified that the last-mentioned sign could be observed for only a short distance going down the river, and could not be seen at all from the Bronx side, because of obstructions on the opposite bank, and that it was weather-beaten, and the lettering not clearly legible. Such signs did not, in my opinion, sufficiently apprise the master of the dredge of the presence or precise locality of the gas main in question, and were principally to prevent anchoring in their vicinity.

The presence of representatives of several concerns maintaining submarine structures at this point in the river, whose duty it was to warn the dredge whenever she came near such structures, while perhaps not relieving the master of the dredge from taking notice of the signs, nevertheless tended, I think, to create a presumption that the owners of all submarine structures were represented, and would admonish him of danger to their property. Indeed, the master of the dredge testified that it was customary for the said representatives, and one Spooner, an official from the department of docks and ferries, to prompt him to cease operations whenever the dredge came too close to such submarine structures, and to renew them when the water pipes or cables were cleared.

It is next contended that in breaking the main the master committed a trespass, and is liable, even though negligence is not proven, and many cases are cited in support of this view; but these adjudications, assuming the question open for consideration by this court, for no claim of trespass has hitherto been made herein, do not, I think, apply to the facts under consideration.

Other propositions are put forth, namely, that there can be no right to limit liability where there is but a single claim filed against the vessel, that the dredge was not a vessel, and that the tug which towed the dredge to the place of dredging should also have been surrendered by the petitioner; but the contentions made in support thereof are unsound, and do not require special attention.

My conclusion is that the petitioner was without fault; that neither the petitioner nor the master of the dredge knew of the presence of the gas main, or had reasonable notice to put them on inquiry as to its presence in the river; and accordingly a proper decree relieving the petitioner from liability for the injury to the main may be entered, with costs.

T. B. HARMS & FRANCIS, DAY & HUNTER v. STERN et al.

(District Court, S. D. New York. April 15, 1915. On Rehearing, May 3, 1915.)

1. CONTRACTS ⟸138—VALIDITY AT LAW—SPECIFIC PERFORMANCE.
A contract between a music publisher and a composer, which vests in the publisher the exclusive right to publish the composer's work produced within a specified period, and which binds the publisher to exert influence in the interest of the composer, so that he may receive English librettos for composition purposes, and to execute contracts for him with theatrical managers for a commission, and to pay royalties, is valid at law, though equity may not specifically enforce it.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681–700; Dec. Dig. ⟸138.]

2. INJUNCTION ⟸137—TEMPORARY INJUNCTION—ISSUE OF FACT.
Where an issue of fact is raised, the court will not resolve the issue in favor of the party applying for an injunction.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 307–309; Dec. Dig. ⟸137.]

On Rehearing.

3. SPECIFIC PERFORMANCE ⟸25—VALIDITY OF CONTRACT—ENFORCEABILITY.
A contract may be valid, and yet not enforceable in equity.
[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 56–58, 60; Dec. Dig. ⟸25.]

4. CONTRACTS ⟸9—VALIDITY—DEFINITENESS.
A contract is not too vague to be enforceable at law so long as the acts which make up performance are expressed definitely enough so that the court can tell when the promisor has fulfilled, and when he has not, though it may be that the damages arising from failure to perform cannot be measured.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 10–20; Dec. Dig. ⟸9.]

5. CONTRACTS ⟸9—VALIDITY—DEFINITENESS.
A contract between music publishers and a composer, whereby the composer vests in the publisher the exclusive right of publication of all his works composed during a specified period, and whereby the publisher assumes the obligation of exerting his influence in the interest of the composer, so that he may receive English librettos for composition purposes, and may come in contact with the most important theatrical managers, and to execute contracts for him with theatrical managers for a commission, and to pay royalties, imposes on the publisher the duty to do his best to procure for the composer all English librettos and introduce his works to the best managers, and, on the composer writing any music, get it before the best theatrical managers for their perusal, or, if not, to show why he cannot, and, so construed, is not void for uncertainty.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 10–20; Dec. Dig. ⟸9.]

6. COPYRIGHTS ⟸76—INFRINGEMENT—REMEDY IN EQUITY.
Where a composer vests by valid contract in music publishers the exclusive publishing rights of all his compositions for a specified period, neither he nor an assignee with notice of the contract can seek relief in equity for the publishers' infringement of copyright, on the composer and his assignee violating the right of the publishers to give them exclusive publishing rights.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 68; Dec. Dig. ⟸76.]

Suit by T. B. Harms & Francis, Day & Hunter against Joseph W. Stern and Edward B. Marks, copartners doing business under the firm name and style of Joseph W. Stern & Co. Injunction denied.

This is an ordinary action for infringement of copyright, brought by plaintiff, a New York corporation, against defendants, music publishers in New York City, because of publication by defendants of the music of a musical composition composed by one Sigmund Romberg, entitled "Oh, Those Days." Defendants had entered into an agreement with Mr. Romberg in August, 1913, by which he vested in defendants the exclusive publishing rights for all countries of all his works and compositions which he might produce during the course of five years from the date of the contract, and by which defendants assumed the obligation to exert their influence in the interest of Mr. Romberg, in order that he might receive English librettos for composition purposes, and that he might come in contact with the most important theatrical managers, and to conduct business transactions for him, and to collect for him all production royalties due him, and to execute contracts for him with theatrical managers of all countries for a commission, and to pay him royalties. Mr. Romberg repudiated his agreement, and plaintiff claimed to be the owner of the copyright of the composition "Oh, Those Days," by assignment from Mr. Romberg, subsequent to the agreement with defendants.

Max D. Josephson, of New York City, for plaintiff.
Theodore B. Richter, of New York City, for defendants.

LEARNED HAND, District Judge. [1] The defendants' contract was valid at law, though equity would not specifically enforce its performance. Romberg could not be put in jail, if he performed his songs, or if he refused to make an assignment of his literary property; but the obligation to assign was valid, and the obligees might get a judgment for damages at law for his failure to perform. The agreement, though in words of present assignment, could not operate at once, because the subject-matter had not come into existence; but, when Romberg composed the song, it did come into existence, and was at least valid as an executory contract to assign, whether enforceable only at law or not. Furthermore, it operated as a license to the defendants to publish the song, as between themselves and Romberg, and, at least as against any one who took with notice, it was as binding as between Romberg and the defendants. I do not mean to decide how far it would operate as a license independently of such notice, because that question is not presented.

[2] Romberg's first assignee was the Wintergarden Company, and they had ample notice, before the song was composed, that there was some agreement between Romberg and the defendants. Their own agreement with the defendants they appear to have disregarded. It is true that Dreyfus, the plaintiff's president, swears that the plaintiff had no notice of the agreement; but the defendants present the most persuasive evidence to the contrary. In any case the question raises

an issue of fact, which I shall not resolve in favor of the party applying for the injunction.

Motion denied.

On Rehearing.

This cause now comes on for reargument upon a point not originally raised; that is, whether the contract is too indefinite for recognition in a court. The plaintiff's theory is that, although, regarded formally, the contract may appear to bind the defendants to something which they need not have done, substantially it is quite impossible to say what that was, and a court must disregard it.

[3, 4] A contract may be valid, and yet the promisee not able to recover any damages, just as it may be valid, and yet not enforceable in equity. Worthington v. Beeman, 91 Fed. 232, 33 C. C. A. 475. It will not to be too vague or indefinite, so long as the acts which make up performance are expressed definitely enough, so that a court can tell when the promisor has fulfilled, and when he has not; yet it might well be that the damages arising from his failure to perform cannot be measured. United Press v. N. Y. Press Co., 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288; Lambert v. Hays, 136 App. Div. 574, 121 N. Y. Supp. 80.

[5] In this case the formal undertaking of the defendants is:

"To exert their influence in all directions in the interest of Mr. Romberg, in order that Mr. Romberg may receive English librettos for composition purposes, and in order that Mr. Romberg may come into contact with the most important theatrical managers."

In return for this Romberg was to let the defendants make all his contracts for producing rights for a commission of one-third the total royalties, and was to let them publish all his music at fixed royalties. In simpler language, the bargain was that Romberg would give them rights of production and publication at the terms mentioned, if they would do their best to get him all English librettos they could and introduce his works to the best managers. Now, I see no reason why the acts making up the defendants' performance should be thought so indefinite that one could not tell when they took place and when they did not. If the defendants heard of any English libretto, I think they were bound to seek out the librettist, tell him of Romberg, and try to persuade him to let Romberg compose music on the libretto, upon such division of royalty as they might together agree. If Romberg wrote any music, I think the defendants were bound to get it before the best managers for their perusal, or, if they did not, to show why they could not. These seem to me quite explicit obligations. I think it could be ascertained with as much certainty as most other facts whether the defendants had performed them or not. How much they were worth to Romberg is another matter, and one with which I have nothing to do. He thought them of enough value to agree to give the defendant one-third of his royalties for five years and to accept the publication royalties stipulated. He knew just what he was doing, contracted in his own language, and must be held to have know his best interest.

Furthermore, one can easily see how the consideration might have been of the utmost practical value to him. The approaches to either

librettists or managers may well have been quite closed to him, and, if he had talent, he may have needed only an approach to insure his success. The event suggests as much. Whether the defendants actually exploited his necessities in such sense that the contract was unconscionable I do not understand to be raised on this motion. The sole question is whether on its face the contract is void for uncertainty. I think it is not.

The cases cited are not helpful. In some instances the question is whether the promisee has actually made any counter promise whatever, even in form. Moran v. Standard Oil Co., 211 N. Y. 187, 105 N. E. 217; Commercial Wood & Cement Co. v. Northamton P. C. Co., 115 App. Div. 388, 100 N. Y. Supp. 960, per Ingraham, J. (the majority went upon a different point); Goodyear v. Koehler Sporting Goods Co., 159 App. Div. 116, 143 N. Y. Supp. 1046; Smith v. Robson, 148 N. Y. 252, 42 N. E. 677. In other instances, the question is genuinely of the vagueness of the terms. Bluemner v. Garvin, 120 App. Div. 29, 104 N. Y. Supp. 1009; Flaherty v. Cary, 62 App. Div. 116, 70 N. Y. Supp. 951. But even in these, as in other cases interpreting language, precedents are of little value. The rule is well settled, and the difficulties of application arise from the particular language of each contract.

[6] I said in the earlier opinion that Romberg must be understood to have given the defendants a license to print copies of his songs. There is another ground for refusing him an injunction, which would not apply to an action for damages, and upon which I prefer to rest my opinion, without consideration of the question of license one way or the other. It is this: If Romberg's contract was valid at law, as I have decided, neither he nor his assignee with notice come blameless into a court of equity. The legal right upon which they base their claim in equity would, if Romberg had performed his valid obligations, now be vested in the defendants. They are violating that legal right only because he has already violated their right by failing to give them the title, and with it the right to do exactly what they are now doing. His prior wrong is the occasion of the acts of which he complains. In such circumstances, he is in no position to ask for any equitable remedy.

The motion is denied.

STEWART v. HUDSON.

(District Court, E. D. Pennsylvania. April 7, 1915.)

No. 1397.

TRADE-MARKS AND TRADE-NAMES ⊜70—UNFAIR COMPETITION.

Complainant invented an automobile tool for which he applied for a patent. Pending action on his application he commenced manufacturing, and through extensive demonstrations and advertising quickly created a market. Defendant then commenced making and selling the same tool, practically identical in form and appearance, and also using complainant's cuts and other advertising matter. *Held* that, while defendant was within his legal rights in making the tool, his further acts in attempting to

take the business complainant had built up constituted unfair competition, which would be enjoined.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⟸70.]

In Equity. Suit by Milton H. Stewart, trading as the Stewart Accessories Company, against William F. Hudson, individually and trading as the Ford Specialty Company. On motion for preliminary injunction. Granted.

Duane, Morris & Heckscher, of Philadelphia, Pa., for plaintiff.
Winfield S. Walker, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The plaintiff in this case claims to be the inventor of a tool which, as is the confident belief of every inventor, will work a revolution in its special field of operation. If his confidence is justified by the event, he will have produced something which will not only prove to be highly useful, but will bring balm to the troubled souls of that large army of amateur automobilists who daily struggle with punctured tires. Letters patent have been applied for, but have not as yet, and may not be, issued to him. In anticipation, however, of the grant of this right and of the harvest of profits which he believes is assured him, he made and placed his appliance upon the market. He prepared the usual form of literature, with cuts of his device, including illustrative pictures of his own hands applying the tool at its work. The introduction of his invention was made at the New York Automobile Show, where he gave ocular demonstrations of the efficiency of the tool, and generously distributed his literature. He repeated this at the Philadelphia Show. He also advertised in the trade journals, the advertisements exhibiting cuts and illustrations of how the tool was used. He further employed a small army of demonstrators to go to the centers of the automobile trade to show to the automobile public and middlemen the merits of his invention. His purpose was, of course, twofold—to create a demand among automobile owners and convince dealers of the value of the tool, so that they would lay in a supply to meet the customers' demands. His outlay for these purposes was large. Through the exploitation of his device, and the novelty, efficiency, and simplicity of the tool itself, instant recognition of its merits was given, and it became at once known, and acquired, not only a reputation as a good thing, but became known as the plaintiff's special make of tool.

Among others to whom he gave a demonstration of the efficiency of the tool while he had it on exhibition in Philadelphia was the defendant, who was in the business of selling automobile accessories. The defendant provided the plaintiff with a place in which to carry on his educational and advertising demonstration. The result was that the defendant arranged to supply his own customers with the plaintiff's make of tool, and orders were placed with the plaintiff for a supply as fast as they could be manufactured and shipped. A further, and by the plaintiff unexpected, consequence was the defendant had the device made for sale on his own account. The tool which he thus had made

was an exact fac simile of that made by the plaintiff, with two unnoticeable variations, which may be merely variations, or possibly may be deemed additional features. There was also a deceptive change in the name cast upon the implement. The defendant began at once to exploit the tool by advertisements, making use for this purpose of copies of the cuts which the plaintiff had put out. So promptly and expeditiously was this done that in some of the advertising mediums he was in time ahead of the plaintiff. So slavish is the copy of device and advertisements, the inference is irresistible that the defendant must have handed over the plaintiff's make of tool and his advertisements as models to be exactly reproduced. In this respect a case of unfair trade is made out beyond successful denial. There is, and can be, no doubt of the fact that the defendant has taken the plaintiff's device, reproduced, and is selling it on the market which the plaintiff has called into being.

It is not within our province to pass judgment upon the business ethics of the defendant's conduct, unless there has been a trespass upon the plaintiff's legal rights. Every claim of right must have a basis upon which it rests. A claim to legal protection from encroachment by others upon the right to sell a particular device or make of product must rest upon a statutory proprietary right to sell the thing itself, or upon the common-law right to prevent the goods of one from being palmed off upon purchasers as the goods manufactured by another. As applied to the conditions of this case, the one basis of claim presupposes an exclusive right to the device as the invention of the plaintiff; the other assumes the existence of a demand for the particular make of tool as manufactured by him. The argument for the defense in substance is that the plaintiff can lay no claim to control the sale of the device as his invention, because he has not protected it by a patent, and that he has no common-law right in his particular make of tool, because there has not been time for the public to have learned of his particular make, and to have any make of tool known on the market as his tool; in other words, that an infraction of such common-law right involves the thought of deception, and the plaintiff's make of his device has been so short a time before the public that his make as such is unknown to the general public, among whom, in consequence, there cannot be said to be any demand, and that the trade and the middlemen cannot be deceived, because they buy direct from the manufacturers, whose different makes are in consequence known to them.

The fact as to the statutory proprietary right is found with the defendant, and this branch of the argument in his favor must therefore prevail. The other fact cannot, however, be found for him. In the first place, the introduction of the automobile has not only greatly quickened transportation, but, because of the rapid development of the automobile business itself, it has produced such an alertness of mind toward everything connected with it, and a readiness and willingness to accept and adopt novelties, that there is the same relative difference in the speed with which the reputation of builders and others may be acquired and lost, and good wills grow up and decline. Moreover, the question of time relates more to the extent of the market and its value than to the fact of a market, and, in consequence, more to the

amount or extent of the damage done by the encroachment upon it than to the kind of injury done or the fact that injury has been done. A limited market or a modest reputation acquired by a manufacturer for his own particular product is as much entitled to protection as if it were more enlarged or wider spread. Imitation of another's make or brand of manufactured product is as sincere a form of flattery in business affairs as imitation is in other things, because it implies an acknowledgment that the make of goods copied has created a market, and this acknowledgment is evidence of the fact in itself. We therefore find that the plaintiff has created and had acquired a right to the good will or trade property indicated, and that the defendant has trespassed upon this right by intercepting and directing this trade to himself.

Had the defendant contented himself with merely appropriating the inventive idea or features of this appliance, he could not have been convicted of any trespass upon the legal rights of the plaintiff. When, however, he went further, and in addition to the device itself he imitated the very form and shape and appearance of plaintiff's make, and copied also the advertisements, cuts, and illustrations by means of which plaintiff had introduced it to the public, and by which characteristics it had become known as the plaintiff's manufacture, he was guilty of unfair trade, from which he should be required to desist. The slight departure in defendant's marking of the tool made by him from that made by the plaintiff carries the conviction, not that the defendant was seeking to distinguish his make, but that the similitude was meant to deceive, and that the defendant was guiltily conscious of it. Since the output of his first make of tools and of his first advertisements, the defendant has made changes in the latter and in the literature issued, which goes a little toward lessening the deception. He does not, however, go far enough, and plaintiff has the right to a preliminary injunction. It must, however, be expressly limited to enjoining the defendant from selling or advertising such make of the tool in question as may be imposed upon intending purchasers as the make of the plaintiff.

Counsel may submit drafts of a form of decree embodying these views, together with the form of bond required, and a decree will then be entered.

SCHIRM v. DENE STEAM SHIPPING CO., Limited

(District Court, E. D. New York. June 24, 1914.)

1. SEAMEN ⊂=29—INJURY IN SERVICE—LIABILITY OF VESSEL—UNSAFE EQUIPMENT.

The failure to equip with handrails a stationary iron ladder in the engine room of a steamship, which was 8 feet long and nearly perpendicular, *held* not to constitute a want of reasonable care in the equipment of the vessel, which rendered the owners liable for injury to a seaman, who, in descending the ladder, slipped and fell astride one of the

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

rungs; it being at least doubtful whether, owing to the perpendicular position of the ladder, handrails would have added to its safety.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188–194; Dec. Dig. ⟸29.]

2. SEAMEN ⟸29—INJURY IN SERVICE—LIABILITY OF VESSEL—UNSAFE EQUIPMENT.

Evidence that similar ladders on that and other ships were equipped with handrails, while relevant, does not establish the standard of what constitutes reasonable care; that being a question of substantive law, irrespective of actual practice.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188–194; Dec. Dig. ⟸29.]

In Admiralty. Suit by Louis Schirm against the Dene Steam Shipping Company, Limited, owner of the steamship Ferndene. Decree for respondent.

Samuel Evans Maires, of Brooklyn, N. Y., for libelant.

Convers & Kirlin, John M. Woolsey, and M. W. Maclay, Jr., all of New York City, for respondent.

VEEDER, District Judge. The libelant claims damages from the respondent for injuries sustained in falling from a ladder in the engine room of the British steamer Ferndene. The libelant shipped as a donkeyman on the steamer March 23, 1913, the day on which she sailed from England. He was a man of nearly 40 years' experience at sea, during 23 years of which he had served as donkeyman. It was part of his duty as donkeyman to fill and trim the lamps in the engine room. On the Ferndene one of the lamps hung on the water column of the starboard boiler for the purpose of shedding light on the water glass. The engine room was separated from the boiler room by a 'thwartship bulkhead, through which the water column projected. The lamp in question was a little over 2 feet above a 'thwartship beam which ran across the bulkhead; the top of the beam being 8 feet above the engine room floor. The lamp was reached by an iron ladder, the top of which was bolted into the flange of the beam, the bottom resting upon the engine room floor. The ladder is described by all the witnesses as being almost perpendicular. The libelant and other witnesses stated that the bottom was set back a foot or more. The second engineer of the steamer, Tron, who prepared a measured sketch, gives the rake of the ladder as 2 feet 9 inches; but he does not seem to be sure that his measurements are accurate. The rake of the ladder must therefore be taken to have been between 1 foot and 2 feet 9 inches. The ladder was 16 inches wide, and had nine rungs spaced about 11 inches apart. Each rung consisted of two rods, forming a step about 1¾ inches wide.

The libelant trimmed and filled this lamp in the morning and evening each day. On the afternoon of December 10, 1913, in the performance of this duty, he mounted this ladder, on the starboard side of the engine room, with a hand lamp, a pair of lamp shears, and a piece of waste in one hand, and in the other hand a tin of cera wax. He trimmed the lamp in place as he stood on the ladder, and then attempted to descend the ladder, carrying in both hands the articles

which he had taken up. When about half way down the ladder his right foot or overalls caught in a nut or socket on the ladder, his right foot slipped, and he fell astride one of the rungs, in consequence of which he sustained a rupture. No complaint is made of the nut or socket upon which he stumbled. He bases his claim of fault solely upon the fact that the ladder was not provided with a handrail.

The libelant doubtless has, or had, a claim to compensation under the British Workmen's Compensation Act of 1906 (6 Edward VII, c. 58). By section 1, subd. 2b, of that act, the libelant has no option to take proceedings independently of the act, unless "the injury was caused by the personal negligence or willful act of the employer or of some person for whose act or default the employer is responsible." The British Merchant Shipping Act of 1894 requires that the owner of a ship, and the master, and every agent charged with the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage. St. 58 & 59 Vict. c. 60, § 458, subd. 1. The issue to be decided is, therefore, whether the absence of a handrail on the ladder in question constituted personal neglect or willful default on the part of the respondent to use reasonable means to insure the seaworthiness of the ship.

[1] A seaworthy ship has been defined by Baron Parke as being one "in a fit state as to repairs, equipment and crew, and in all other respects, to encounter the ordinary perils of the sea." Dixon v. Sadler, 5 M. & W. 405. As here involved, it is the equivalent of the familiar common-law obligation of an employer to furnish his employé with suitable appliances in a safe place to work. Like that obligation, it is expressed in terms of reasonable care, the care that a reasonably prudent person would take under the circumstances. Here was a ladder only a little over 8 feet in height. As set it was almost perpendicular. A person ascending or descending such a ladder necessarily leans toward it. In this position the sides and rungs of the ladder are in close proximity to his hands; it must be assumed that he grasps one or the other, or at least leans upon them, in using the ladder. They afford at all times ready and efficient means of security. If a ladder is set on such a substantial incline that, in order to maintain his equilibrium, the user is compelled to hold himself away from the ladder, then, of course, he must have a handrail, or something else extending above the ladder, to hold on. With a ladder as nearly perpendicular as this one was, I am unable to understand how a handrail would have added to the libelant's security in using it. It is to be observed, in this connection, that the libelant was injured, not by falling off the ladder, but by falling through it and straddling one of the rungs. It does not appear to me that he would have been any more likely to break such a fall by grabbing a handrail, had there been one.

[2] The libelant relies, however, upon the fact that other ladders in the ship's engine room were equipped with handrails, and upon his testimony that handrails were used on ladders in other ships. It appears that on the port side of this engine room there was a similar ladder for similar use, and on this ladder there was a handrail. The

evidence on behalf of the respondent indicates that the alleyway alongside the ladder on the port side was less restricted than on the starboard side. There were also two longer ladders leading from the deck to the engine room, and another shorter ladder leading to the engine, all of which were provided with handrails. But the ladders leading from the deck were some 15 feet long, and the short ladder was close to the engine machinery. It does not appear just what the rake of these ladders was, but they were described as being similar to the ladder from which the libelant fell. It was also shown that there were sockets for a handrail on the ladder in question. But no handrail had been attached to it on this voyage, and there was none aboard.

This proof of use of handrails on ladders on this ship and on other ships is doubtless relevant to the issue. Such use is relevant as evidence, but it does not establish the standard of conduct. The standard of conduct is fixed by the substantive law, independently of actual practice. What is usually done may be evidence of what ought to be done; but what ought to be done is fixed by the standard of reasonable care, whether it is usually complied with or not, and notwithstanding that other persons may make use of additional precautions. Upon all the evidence, I find that there was no breach of the respondent's duty to use reasonable care in the premises.

This conclusion renders a discussion of the issue of contributory negligence unnecessary. It is plain, however, that the libelant was negligent in using the ladder with both hands full, even if he was not also negligent in trimming and filling the lamp in place.

Other issues raised by the pleadings were not argued and do not require consideration.

The libel is dismissed.

RALSTON STEEL CAR CO. v. NATIONAL DUMP CAR CO.

(District Court, D. Maine. April 22, 1915.)

No. 723.

COURTS ⊂=347—PLEADING—MOTION TO DISMISS—FEDERAL RULES.

A bill in equity, which alleges that complainant entered into a transaction with defendant, as evidenced by a copy of a memorandum made a part of the bill, that it was induced to make the contract by fraud in enumerated particulars, that defendant secretly entered into contracts with competitors of complainant on terms which would operate to complainant's injury and in violation of the contract, that the contract was void for indefiniteness, and that defendant should be enjoined from bringing a multiplicity of suits based on the contract, and from prosecuting a suit already begun in the courts of a sister state, presents issues which cannot be determined on motion, under new equity rule 29, to dismiss the bill, which motion raises questions which would be raised by demurrer, and defendant must answer.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⊂=347.]

In Equity. Suit by the Ralston Steel Car Company against the National Dump Car Company. On motion to dismiss bill. Denied, with leave to answer.

Huggins, Huggins & Hoover, of Columbus, Ohio, and Symonds, Snow, Cook & Hutchinson, of Portland, Me., for complainant.

Loesch, Scofield & Loesch, of Chicago, Ill., and Williamson, Burleigh & McLean, of Augusta, Me., for defendant.

HALE, District Judge. This case is before the court on defendant's motion to dismiss complainant's bill. The motion is presented under new equity rule 29. Under the former equity rules, the questions raised under the motion would have been presented by demurrer.

The bill in equity to which the motion is addressed sets out that complainant corporation is a citizen of Ohio, and defendant corporation is a citizen of Maine; that the jurisdiction of the court depends upon diverse citizenship, and also upon the fact that construction of the laws of the United States is involved, and that the amount in controversy exceeds $10,000.

Complainant alleges:

First. That on April 11, 1912, it entered into a "transaction" with defendant, as evidenced by a certain copy of memorandum marked "Exhibit A," and made a part of the bill; that it was induced to make the contract by fraud in certain enumerated particulars; and that the contract was therefore voidable at its instance.

Second. That defendant has secretly entered into contracts with competitors of complainant, on terms which would operate to its injury, and in violation of the provisions of the contract. Complainant assumes that it has thus alleged a breach of the contract, and that, inasmuch as the contract may be avoided at its instance, defendant may not complain that complainant has broken the contract, as has been claimed in certain suits at law brought by defendant against complainant, based on the validity of the contract; and complainant alleges that it has been released from any liability under such contract.

Third. That the contract is void by reason of indefiniteness and uncertainty in certain essential particulars, and that therefore defendant should be enjoined from bringing a multiplicity of suits based upon the contract, and from prosecuting a suit already begun in a Chicago court.

Fourth. That the contract is illegal and void, because it is in violation of the laws of the United States forbidding combinations in restraint of trade.

Complainant prays:

(1) That the memorandum of agreement of April 11, 1912, may be set aside.

(2) That the defendant may be enjoined from prosecuting further the suit brought by it in a Chicago court, and from bringing any other suits, on account of such agreement.

(3) That defendant be enjoined from prosecuting any suits against complainant in any court of the United States on any of the patents set out in the agreement, and that complainant have further and general relief.

The above is a brief summary of the substance of a long, detailed bill. It is sufficient, however, to bring the contention of the parties before the court.

In support of its motion, defendant contends that the court has no power to enjoin it from prosecuting its suit against complainant in the Chicago court, or from prosecuting other suits; that, if the April contract is void for indefiniteness, such defense can be set up in any action at law brought by defendant against complainant on the contract; that therefore complainant has a complete remedy at law; that the bill shows no ground for relief under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209); that the alleged fraudulent representations are not, on their face, of such a character as to authorize the cancellation of the April contract; that the issues are so plain upon the pleading that the case should be settled upon defendant's motion, without proceeding to answer and proofs.

On its behalf, complainant contends that a reading of the contract of April, 1912, makes it so clear that the contract is void by reason of indefiniteness that the case can be determined finally upon this motion of the defendant, and that a final decree should be entered in favor of complainant, without proceeding to answer and proofs. Without subjecting the bill in equity to minute analysis, I think it clearly is not without equity. I think its averments sufficient to present issues of fact. Under our practice, the federal courts are inclined to allow a case in equity involving important matters to go to issue and proofs, where a doubtful question is raised by the pleadings. It has been the practice to overrule a demurrer, unless it is founded upon an absolutely clear proposition that, taking the allegations to be true, the bill must be dismissed at the hearing. Kansas v. Colorado, 185 U. S. 125, 144, 22 Sup. Ct. 552, 46 L. Ed. 838; Story's Equity Pleadings, page 379; Daniell's Chancery, page 542. This bill of complaint presents certain intricate matters of considerable detail, which, I think, should go to answer and proofs, without prejudice to any question raised by either party touching this motion.

Defendant's motion to dismiss is denied. Defendant may answer under the rules. The matter of costs will be passed upon at the final disposition of the case.

CHASE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 23, 1915.)

No. 4200.

(Syllabus by the Court.)

1. INDIANS ⊂=11—INDIAN LANDS—RESTRICTIONS ON ALIENATION—OPERATION OF TREATY.

The treaty with the Omaha Tribe of Indians of March 6, 1865 (14 Stat. 667), granted to the assignees of land in severalty thereunder an inheritable title in fee simple to their respective tracts, subject to a restriction on alienation to others than the United States and other members of the tribe.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 26; Dec. Dig. ⊂=11.]

2. UNITED STATES ⊂=126—ACTION—FORMAL PARTY—RIGHTS.

When the United States brings an action in which it has no pecuniary interest, in behalf of or for the benefit of a private party, it stands in the shoes of that party, and has no higher or better right.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 115; Dec. Dig. ⊂=126.]

3. CONSTITUTIONAL LAW ⊂=252, 253—DUE PROCESS—INDIANS—VESTED RIGHTS.

Indians, as well as other residents and citizens of the United States, are protected by the fifth amendment to the Constitution against deprivation of property, life, or liberty without due process of law.

No act of Congress or legislative fiat constitutes such due process of law as may impair or destroy a vested right in or title to property.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 728–735; Dec. Dig. ⊂=252, 253.]

4. CONSTITUTIONAL LAW ⊂=52—CONSTRUCTION OF TREATIES—JUDICIAL FUNCTION.

The construction of treaties and the determination of the character and extent of the rights and titles granted thereunder is a judicial and not a legislative function.

The Constitution grants the power and imposes the duty, which may not be renounced, upon the courts to form and enforce their independent judgments upon these questions, although they may differ from the opinions of the Congress or its members.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 50, 52–54, 70, 72–80, 82, 84, 85; Dec. Dig. ⊂=52.]

5. INDIANS ⊂=3—TREATIES—CONSTRUCTION.

Because, when treaties were made with them, the Indians were unfamiliar with the language in which they were written, and with the exact meaning of many of the terms used in them, they must be construed liberally, doubtful expressions must be resolved in favor of the Indians, and the treaties must be interpreted, "not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians."

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 5–7, 11; Dec. Dig. ⊂=3.]

(Additional Syllabus by Editorial Staff.)

6. ESTATES ⊂=5—"FEE-SIMPLE ESTATE"—RESTRICTION ON ALIENATION.

An "estate in fee simple" arises where one has an estate in lands or tenements to him and his heirs forever, and such an estate is not inconsistent with a restriction on alienation.

[Ed. Note.—For other cases, see Estates, Cent. Dig. § 5; Dec. Dig. ⊂=5.

For other definitions, see Words and Phrases, First and Second Series, Fee Simple.]

In Error to the District Court of the United States for the District of Nebraska; Page Morris, Judge.

Action by the United States, as trustee and guardian of the Omaha Tribe of Indians, and of Rose Wolf Setter, a member of said tribe, against Hiram Chase. Judgment for the United States, and defendant brings error. Reversed and remanded, with directions to enter judgment for defendant.

Hiram Chase, of Pender, Neb., and Thomas L. Sloan (William Ross King, of Omaha, Neb., on the brief), for plaintiff in error.

A. W. Lane, Asst. U. S. Atty., of Lincoln, Neb. (F. S. Howell, U. S. Atty., of Omaha, Neb., on the brief), for the United States.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge

SANBORN, Circuit Judge. The question in this case is whether Hiram Chase, the sole heir of the grantee of a tract of 40 acres of land under section 4 of the treaty of March 6, 1865, with the Omaha Tribe of Indians (14 Stat. 667, 668), or Rose Wolf Setter, the sole heir of the grantee of the same land under section 5 of the act for the sale of a part of the reservation of the Omaha Tribe of Indians of August 7, 1882 (22 Stat. c. 434, pp. 341, 342), has the title and the right to the possession of the tract. The facts which condition the answer to this question were set forth and admitted in the pleadings in this action, in which the United States, as trustee for Rose Wolf Setter and for the Omaha Tribe, brought an action and recovered a judgment against Chase for the value, use, and occupation of the land for many years. Those facts are these:

By the treaty of March 6, 1865, the United States agreed to pay the Omaha Tribe $57,000, the tribe agreed to sell and convey a part of their reservation to the United States, the United States and the tribe further agreed that the remainder of the reservation of the Omaha Tribe should be set apart for the purpose of abolishing the tenure in common by which the Omaha Indians held their lands and of assigning the same to them in severalty—

"and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land. * * * Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him, shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs and descendants; and said tracts shall not be alienated in fee, leased or otherwise disposed of except to the United States, or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, or forfeiture, until otherwise provided for by Congress."

Pursuant to this treaty the land in controversy, which was a part of the land reserved thereunder to be assigned in severalty, was duly assigned about the year 1870 by the Secretary of the Interior to Clarissa Chase, a member of the Omaha Tribe, and the mother of the defend-

ant. A certificate was issued to her about the year 1870 by the Commissioner of Indian Affairs "that the said land was so assigned for the exclusive use and benefit of the said Clarissa Chase, her heirs and descendants, and that said tract shall not be alienated in fee, leased, or otherwise disposed of except to the United States, or the other members of the tribe under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale or forfeiture, until otherwise provided for by Congress," and thereafter, in the year 1871, Clarissa Chase took possession of the land, and continued in the open, notorious, exclusive, and adverse possession thereof until she died, about November 1, 1875. Immediately after her death Hiram Chase, who was her only surviving child and her sole heir at law, entered into possession of the land as such, and has ever since continued in the open, notorious, exclusive, and adverse possession thereof, claiming to be its owner.

[1, 2] The claim of the real plaintiff below, Rose Wolf Setter, arises in this way. By the terms of sections 4, 5, and 6 of the act to provide for the sale of a part of the reservation of the Omaha Tribe, etc., approved August 7, 1882 (22 Stat. c. 434, §§ 5, 6, p. 342), Congress provided (1) "that any right in severalty acquired by any Indian under existing treaties shall not be affected by this act;" (2) authorized the Secretary of the Interior to allot in severalty to the Indians of the tribe that portion of its reservation which includes the tracts in controversy in this action, and declared that the "allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March 6, 1865, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs as in said article provided," that certain Indians who have made valuable improvements on specified tracts of land should have respectively preference rights to select them, and that after the allotments were made under the act of August 7, 1882, the certificates issued by the Commissioner of Indian Affairs under the treaty of March 6, 1865, should be null and void, and the Secretary of the Interior should issue patents to the allottees under the act of 1882 to the effect that the United States would hold the land thus allotted in trust for the allottees and their heirs respectively for 25 years, and would then convey the same to them. In 1899 the land in controversy was allotted by the Secretary of the Interior to Reuben Wolf, a member of the Omaha Tribe entitled to an allotment, and, on March 7, 1902, a trust patent for the land was issued to him under the act of August 7, 1882. On August 10, 1899, Reuben Wolf died, and Rose Wolf Setter, the real plaintiff, is his widow and sole heir.

Under this state of facts the question is whether the treaty of 1865 granted to Clarissa Chase a substantial title to or right in the 40-acre tract in question, or a mere revocable license of possession and use thereof. If the latter, the act of 1882 was undoubtedly a sufficient revocation of the license, and the title of Rose Wolf Setter is the superior one. If the former, the act of 1887 is ineffective to impair or destroy the right and title of Chase, and his title and right of possession

must prevail over the claim of Rose Wolf Setter, the Omaha Tribe, and the United States, which has no pecuniary interest in the action or the property involved, and no higher or better right than Rose Wolf Setter, whom it represents. United States v. Beebe, 127 U. S. 338, 346, 8 Sup. Ct. 1083, 32 L. Ed. 121; United States v. Winona & St. Peter R. R. Co., 67 Fed. 969, 972, 15 C. C. A. 117, 120.

[3] If by the treaty of 1865 a substantial right in or title to the land in question was granted to or vested in Clarissa Chase and her heirs, the subsequent act of Congress of 1882 was ineffective to impair or destroy that right or title because:

First, Indians as well as other residents and citizens of the United States are protected by the fifth amendment to the Constitution against deprivation of property, life, or liberty without due process of law. No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed. Choate v. Trapp, 224 U. S. 665, 670, 677, 32 Sup. Ct. 565, 56 L. Ed. 941; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; In re Heff, 197 U. S. 488, 504, 25 Sup. Ct. 506, 49 L. Ed. 848; Cherokee Nation v. Hitchcock, 187 U. S. 294, 307, 23 Sup. Ct. 115, 47 L. Ed. 183; Jackson v. Goodell, 20 Johns. (N. Y.) 188; Lowry v. Weaver, 4 McLean, 82, Fed. Cas. No. 8,584; Whirlwind v. Von der Ahe, 67 Mo. App. 628; Taylor v. Drew, 21 Ark. 485, 487.

[4] Second. Except in political cases, and this case is not a political case, Congress has no power under the Constitution of the United States to affect rights or titles granted by a treaty, or to determine what rights were granted thereby. Nor may the character of the right or interest granted to Clarissa Chase by the treaty of 1865 be determined by the opinion of Congress that that right or interest was revocable and negligible, though it be evidenced by its declaration in the act of 1882 that after the new allotments were made under that act the certificates of right and title issued by the Commissioner of Indian Affairs under the treaty of 1865 should be null and void. The construction of treaties and the determination of the character and extent of the rights and titles granted under them is a judicial, and not a legislative function, and by the Constitution the power is granted, and the duty, which may not be renounced, is imposed upon, the courts to form and enforce their independent judgments upon these questions, although these judgments may differ from the opinions of the Congress or its members. Jones v. Meehan, 175 U. S. 1–32, 20 Sup. Ct. 1, 44 L. Ed. 49; Wilson v. Wall, 6 Wall. 83, 89, 18 L. Ed. 727; Reichert v. Felps, 6 Wall. 160, 162, 18 L. Ed. 849; Smith v. Stephens, 10 Wall. 321, 327, 19 L. Ed. 933; Holden v. Joy, 17 Wall. 211, 247, 21 L. Ed. 523.

[5] Third. Section 4 of the act of 1882 expressly provides:

"That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act."

We turn, therefore, to the treaty of 1865 to ascertain what right or title was granted to Clarissa Chase, and we lay out of consideration here the terms of the certificate issued under that treaty and of the certificate and patent issued under the act of 1882, because their validity

and effect are measured, respectively, by the legal effect of the treaty and the act under which they were respectively issued. A good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe without any act of Congress, or any patent or certificate from the executive department of the United States. Jones v. Meehan, 175 U. S. 1, 10, 20 Sup. Ct. 1, 44 L. Ed. 49; Johnson v. McIntosh, 8 Wheat, 543, 5 L. Ed. 681; Mitchel v. United States, 9 Pet. 711, 748, 9 L. Ed. 283; Doe v. Beardsley, 2 McLean, 417, 418, Fed. Cas. No. 5,497; United States v. Brooks, 10 How. 442, 460, 13 L. Ed. 489; Doe v. Wilson, 23 How. 457, 463, 16 L. Ed. 584; Crews v. Burcham, 1 Black, 356, 17 L. Ed. 91; Holden v. Joy, 17 Wall. 211, 247, 21 L. Ed. 523; Best v. Polk, 18 Wall. 112, 116, 21 L. Ed. 805; New York Indians v. United States, 170 U. S. 1, 18 Sup. Ct. 531, 42 L. Ed. 927; Francis v. Francis, 203 U. S. 233, 237, 239, 240, 27 Sup. Ct. 129, 51 L. Ed. 165. The question in every case is whether or not the terms of the treaty make a present grant of a substantial right to or title in the property. And because, when treaties were made with them, the Indians were unfamiliar with the language in which they were written and with the exact meaning of many of the terms used in them, they must be construed liberally, doubtful expressions must be resolved in favor of the Indians, and the treaties must be interpreted, "not according to the technical meaning of their words, * * * but in the sense in which they would naturally be understood by the Indians." Jones v. Meehan, 175 U. S. 1, 11, 20 Sup. Ct. 1, 5, 44 L. Ed. 49; Kansas Indians, 5 Wall. 737, 760, 18 L. Ed. 667; Choate v. Trapp, 224 U. S. 665, 675, 32 Sup. Ct. 565, 56 L. Ed. 941.

Counsel for the United States argue that there was no consideration for the grant of any substantial right to Clarissa Chase by the treaty of 1865, and that it is therefore not probable that it was the intention of the parties to make any such grant. But before the treaty was made Clarissa Chase had the right in common with all the members of her tribe to the joint use and occupation of all the lands of the tribe. By the treaty she surrendered to the other members of the tribe her right to the common use and occupation of the lands assigned to them in severalty under the treaty, as well as her beneficial right in the lands sold. She did this in consideration of the grant to her in severalty of her tract and the receipt by her tribe of the amounts paid for the lands sold. The consideration was ample to sustain a valid grant or contract. It is contended that the tribe had nothing but the right of possession and occupancy of the land, and therefore the assignment in severalty gave nothing but a right of possession and occupancy of the land assigned in severalty. But the United States had the title to the land and the power to convey it, and by the treaty the United States and the tribe, which together had the title and the right of possession and occupancy, assigned all their interest in the land here in question to the Indian designated by the Commissioner of Indian Affairs, in this case Clarissa Chase, for the exclusive use and benefit of that Indian, her heirs, and descendants, "not to be alienated in fee, except to the United States or other members of

the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior."

[6] An estate in fee simple is where one has an estate in lands or tenements to him and his heirs forever, and such an estate is not inconsistent with a restriction on alienation. Libby v. Clark, 118 U. S. 250, 255, 6 Sup. Ct. 1045, 30 L. Ed. 133. The grant of the treaty was therefore by those who held the title and right of possession of the land, for the exclusive benefit of the assignee, her heirs, and descendants; the treaty declared that when the assignment was approved by the Secretary of the Interior, as it was, it should be final and conclusive, and that the land should not be alienated in fee, except to the United States or the other members of the tribe. This was a grant, by those who had the title and right of possession, of title in fee, because it was a grant by them of the land to the assignee and her heirs forever, and because the restriction upon the alienation in fee, except to those specified, demonstrates the intention to grant the land in fee, with the power to alienate to the United States and the other members of the tribe. The title granted was inheritable, because it was to the assignee and her heirs. It was alienable to the United States and to other members of the tribe, because the restriction upon alienation was specifically to others, and the conclusion is irresistible that the treaty of 1865, interpreted in the sense in which it must have been naturally understood by the Indians and by the white men who made it, was a grant to the Indian assignees, designated by the Commissioner of Indian Affairs to receive lands in severalty thereunder, of the title to their respective tracts in fee, subject only to a restriction upon alienation to others than the United States or the other members of the tribe. Such a title and the right of exclusive possession and use of the tract in controversy in this case was granted to Clarissa Chase by the treaty and such a title her sole heir, Hiram Chase, has inherited and now holds.

This conclusion has not been reached without a careful consideration of the opinions of Judge Shiras in Sloan v. United States (C. C.) 95 Fed. 193, 196, and Sloan v. United States (C. C.) 118 Fed. 283. But in those cases the attention of the court does not appear to have been challenged to the rights of grantees holding their lands in severalty under the treaty of 1865, and so far as there are expressions in these opinions inconsistent with the conclusions that have been reached in this case they fail to persuade.

Let the judgment below be reversed, and let the case be remanded to the District Court, with instructions to render a judgment on the merits of the case in favor of Hiram Chase, the defendant below.

PATTERSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. March 13, 1915.)

No. 2571.

1. MONOPOLIES ⊂=31—CRIMINAL PROSECUTIONS—INDICTMENT—CONSTRUCTION.
An indictment alleged that during the 20 years prior to the finding thereof many concerns had been engaged in the manufacture and sale of cash registers, a list of such concerns, so far as known to the grand jurors, being therein set out; that defendants, the officers and agents of the N. Company, conspired to restrain the interstate trade and commerce carried on by such concerns other than the N. Company by unfair means, which wrongfully and irresistibly excluded others from engaging in such trade and commerce; that, intending to restrain the interstate commerce so carried on by such concerns, and compel them either to go out of business or sell their business and instrumentalities for carrying it on to the N. Company, so that it could, as in most cases it did, discontinue the business and the use of such instrumentalities, and thereby eliminate competition, they conspired to accomplish their objects by the means therein specified. *Held*, that it was not the intention of the indictment to allege that each of the competitors of the N. Company named was in existence during the entire 20 years preceding the indictment, nor to disclose when any of them were in existence, but only to allege that during such period there was no time when one or more of such competitors were not in existence.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂=31.]

2. MONOPOLIES ⊂=31—CRIMINAL PROSECUTIONS—INDICTMENT—CONSTRUCTION.
An indictment alleged that many concerns had been engaged in the manufacture and sale of cash registers, a list of which, so far as known, was therein set out; that certain officers and agents of the N. Company had conspired in restraint of the interstate trade and commerce carried on by the several concerns thereinbefore named other than the N. Company; and that, intending to restrict and restrain the interstate commerce so carried on by "said concerns," and to compel them to go out of business or sell their business and instrumentalities to the N. Company they had conspired to accomplish the object specified by the means therein set out, alleged to have been directed against "said concerns," "such concerns," etc. *Held*, that the indictment did not charge a general conspiracy against all competitors, but only a conspiracy against those therein named.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂=31.]

3. INDICTMENT AND INFORMATION ⊂=125—DUPLICITY—INDICTMENTS FOR CONSPIRACY.
Though such indictment charged only a conspiracy against the competitors therein named, and though it did not allege that all of such competitors were in existence during all of the time to which it referred, it was not duplicitous, as charging a separate conspiracy against each competitor, as its underlying thought was that there was a generic conspiracy against all competitors, which took specific direction against those named as they came into existence, and continued against them as long as they remained in existence, and therefore it charged a single conspiracy.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. ⊂=125.]

4. MONOPOLIES ⊂=31—CRIMINAL PROSECUTIONS—INDICTMENT—CERTAINTY.
Though, under such indictment, a conviction could be had only in so far as the conspiracy charged existed within the period of limitation and

as to the competitors in existence within such period, the allegations as to its prior existence and its existence against competitors who had ceased to exist more than three years before the finding of the indictment being merely descriptive, it was not void for uncertainty for failure to allege which of the competitors were in existence within the three years.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂⊃31.]

5. MONOPOLIES ⊂⊃31—CRIMINAL PROSECUTIONS—INDICTMENT—SUFFICIENCY.
An indictment for conspiring to restrain the interstate commerce of defendants' competitors in cash registers alleged, concerning the competitors therein named, that they had sold the greater portion of the cash registers manufactured by them to users and dealers whose several places of business were situated in states other than those wherein the cash registers were manufactured by such concerns, respectively, and had consigned for sale other cash registers to dealers and to their own agents in such other states, that they had been shipping such cash registers to such users, dealers, and agents in such other states, and that in doing so each of such competitors had been engaged in trade and commerce among the several states. *Held*, that this sufficiently showed that the trade and commerce in which defendants' competitors were engaged was interstate.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂⊃31.]

6. MONOPOLIES ⊂⊃12—STATUTORY PROVISIONS—CONSPIRACIES FORBIDDEN.
Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1913, § 8820), declaring illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations covers only contracts, combinations, and conspiracies which are unreasonably in restraint of interstate trade or commerce, though possibly every conspiracy is unreasonably in restraint thereof, on the theory that there can be no reasonable conspiracy, or conspiracy to do a reasonable thing.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. ⊂⊃12.]

7. MONOPOLIES ⊂⊃12—STATUTORY PROVISIONS—CONSPIRACIES FORBIDDEN.
Act July 2, 1890, § 1, relative to combinations and conspiracies in restraint of interstate commerce, includes conspiracies between competitors, or between the officers and agents of one competitor, on its behalf, against another competitor, and also includes conspiracies between any persons against any other person.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. ⊂⊃12.]

8. MONOPOLIES ⊂⊃12—STATUTORY PROVISIONS—CONSPIRACIES FORBIDDEN.
To bring a conspiracy within Act July 2, 1890, § 1, it is not essential that its execution be of any benefit to the conspirators; it being sufficient that it will be in restraint of another's interstate trade or commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. ⊂⊃12.]

9. MONOPOLIES ⊂⊃16, 17—STATUTORY PROVISIONS—CONSPIRACIES FORBIDDEN.
Under Act July 2, 1890, § 1, relative to conspiracies in restraint of interstate commerce, the extent of the interstate trade or commerce conspired against is immaterial, and a conspiracy between the officers and agents of one competitor on its behalf to restrain a single interstate sale or shipment by another competitor is covered by it.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 12, 13; Dec. Dig. ⊂⊃16, 17.]

10. MONOPOLIES ⟸17—STATUTORY PROVISIONS—CONSTRUCTION—"MONOPOLIZE."

Within Act July 2, 1890, c. 647, § 2, 26 Stat. 209 (Comp. St. 1913, § 8821), making it illegal to monopolize, attempt to monopolize, or combine or conspire to monopolize, any part of the trade or commerce among the several states, there can be no monopolizing in making a single interstate sale, or a great number of such sales, even though wrongful means are used in making them, and a wrong of some other nature is done competitors, since to "monopolize" in a legal and accurate sense is to exclude other persons, though not necessarily all persons, and there can be no monopolizing with respect to a sale which in the nature of things can be made by but one competitor, and in which there can be no common occupation.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⟸17.]

11. MONOPOLIES ⟸13—STATUTORY PROVISIONS—CONSTRUCTION.

A monopolizing of interstate trade and commerce by efficiency in producing and marketing a better and cheaper article than any one else is not within Act July 2, 1890, § 2.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. ⟸13.]

12. MONOPOLIES ⟸12—STATUTORY PROVISIONS—CONSTRUCTION.

A combination of competitors, accompanied by an exclusion of outsiders from interstate trade and commerce, or the exclusion by a competitor, or its officers and agents on its behalf, of other competitors, by the use of wrongful means, constitutes a monopolizing of such commerce within Act July 2, 1890, § 2.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. ⟸12.]

13. MONOPOLIES ⟸17—STATUTORY PROVISIONS—CONSTRUCTION.

While but one competitor can make a sale, and though there can be no monopolizing within Act July 2, 1890, § 2, in making a single interstate sale, or a great number of sales, though wrongful means are used in making them, one competitor monopolizes interstate trade and commerce by excluding all or substantially all other competitors from the free opportunity of approaching each and every prospective purchaser on equal terms, or by driving them from the field of freely offering their goods, so as to have that field to himself.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⟸17.]

14. MONOPOLIES ⟸17—STATUTORY PROVISIONS—CONSTRUCTION—"ANY PART OF INTERSTATE TRADE OR COMMERCE."

Within Act July 2, 1890, § 2, prohibiting the monopolizing of any part of the trade or commerce among the several states, "any part of interstate trade or commerce" embraces the interstate trade or commerce of all prospective purchasers of a particular commodity in the United States, or in some particular portion thereof, but excludes the interstate trade or commerce of a particular prospective purchaser of a particular commodity.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⟸17.]

15. INDICTMENT AND INFORMATION ⟸125—DUPLICITY—MONOPOLIES—"MONOPOLIZED."

An indictment in the first count charged a conspiracy by the officers and agents of the N. Company in restraint of the interstate commerce of its competitors therein named in the cash register business during 20 years, and alleged that during such period the N. Company had done from approximately 80 per cent. early in the period to approximately 90 per cent. at the latter end thereof, of the business of manufacturing cash

registers, and that such officers and agents had conspired to accomplish their objects by the unlawful means therein specified. The second count charged that such officers and agents under the circumstances and by the means set forth in the first count had, by drawing to the N. Company, monopolized a part of the trade which otherwise would have been secured or retained by its competitors, and it made a part thereof the allegations of the first count descriptive of such trade and commerce, the concerns engaged therein, the means employed, and the knowledge, intent, and acts of the defendants. *Held*, that, while "monopolized," in the light of the context, meant "secured," the indictment charged defendants with monopolizing interstate commerce in cash registers, and not merely with monopolizing a part of such interstate commerce, and hence charged but a single offense, and was not duplicitous, as the offense of "monopolizing" consists, not only in obtaining or securing a monopoly by wrongful acts, but in holding and maintaining it by such acts, and it appeared from the indictment that the N. Company had a practical monopoly, and that the wrongful means specified were employed to maintain and hold such monopoly.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. ⟸125.]

16. INDICTMENT AND INFORMATION ⟸59—SUFFICIENCY OF ACCUSATION.

An offense intended to be charged in an indictment need not be charged expressly in general terms; it being sufficient if the facts alleged, if true, show the commission of the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 180, 181; Dec. Dig. ⟸59.]

17. MONOPOLIES ⟸31—CRIMINAL PROSECUTIONS—INDICTMENT—CERTAINTY.

Where the first count of an indictment charging the officers and agents of the N. Company with conspiring to restrain the interstate commerce of the N. Company's competitors alleged that during 20 years many concerns had been engaged in a particular business, a list of such concerns, so far as known, being therein set out, without, however, alleging that all of the concerns named were in business during the entire 20 years, or alleging when any of them were so engaged in business, a count charging the defendants with monopolizing the trade which, but for their wrongful acts, would have been secured or retained by the concerns "mentioned" in the first count as having carried on business during the three-year period of limitation, and another count alleging that such defendants, having drawn to the N. Company by the means "mentioned" in the first count that part of the interstate trade in cash registers which otherwise would have been secured or retained by the concerns mentioned in the first count as having carried on business before the period of three years, continued to hold and carry on its interstate business augmented by such wrongful means, and thereby monopolized interstate trade in cash registers, were void for uncertainty; the first count having "mentioned" no concerns as carrying on business within three years or before three years.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⟸31.]

18. MONOPOLIES ⟸29, 31—CRIMINAL PROSECUTIONS—SUFFICIENCY OF INDICTMENT.

A patentee and its officers and agents were not guilty of monopolizing interstate trade and commerce in cash registers, in holding such trade and commerce after securing it by wrongful means, if such trade and commerce was covered by its patents; and hence, where an indictment charging that the officers and agents of the patentee, having by wrongful means drawn to the patentee interstate trade and commerce which its competitors would otherwise have secured, continued to hold, conduct, and carry on its interstate business augmented by such wrongful means, and thereby monopolized interstate trade and commerce in cash registers, was de-

fective, where, though it showed that some at least of the patentee's patents had not expired, it did not allege that the trade and commerce so secured and held was not covered by those patents.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 19, 20; Dec. Dig. ⊂⊃29, 31.]

19. MONOPOLIES ⊂⊃29, 31—STATUTORY PROVISIONS—CONSTRUCTION.
A party monopolizing interstate commerce by employing wrongful means to drive its competitors from the field does not continue to monopolize such commerce, within Act July 2, 1890, § 2, by holding the business so secured after its competitors have ceased to compete; and hence an indictment charging a monopolizing within the period of limitations by holding the business previously obtained by such wrongful means was insufficient, where it did not allege the doing of anything to maintain and hold the monopoly during such period.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 19, 20; Dec. Dig. ⊂⊃29, 31.]

20. INDICTMENT AND INFORMATION ⊂⊃99—ALLEGATIONS AS TO VENUE—REFERENCE TO OTHER COUNTS.
Where the first count in an indictment charged a conspiracy to restrain the interstate commerce of defendants' competitors, another count, alleging that defendants, having by the means and under the circumstances and conditions described in the first count drawn to their company a part of the interstate commerce in cash registers which otherwise would have been secured or retained by its competitors, continued to carry on the interstate business of their company so augmented, and thereby monopolized interstate commerce in cash registers, did not make the allegations of the first count as to venue a part thereof.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 270, 270½; Dec. Dig. ⊂⊃99.]

21. CRIMINAL LAW ⊂⊃101—VENUE—STATUTORY PROVISIONS.
Judicial Code (Act March 3, 1911, c. 231) § 100, 36 Stat. 1121 (Comp. St. 1913, § 1087), dividing the Southern district of Ohio into two divisions and providing that certain terms of the District Court for the Western division shall be held at Cincinnati and certain terms for the Eastern division at Columbus, and that terms for the Southern district shall be held at Dayton on dates specified, that prosecutions for crimes and offenses committed in any part of the district shall be cognizable at the terms held at Dayton, and that all suits within either division may be instituted, tried, and determined at such terms, does not require that prosecutions shall be instituted at Dayton, nor that prosecutions instituted at Cincinnati or Columbus shall be transferred to Dayton for trial, and on a trial of the officers and agents of the N. Company, having its plant and principal office at Dayton, where a number of the defendants resided, it was not error to refuse to transfer the case from Cincinnati to Dayton for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 199–205; Dec. Dig. ⊂⊃101.]

22. CRIMINAL LAW ⊂⊃149—LIMITATION OF PROSECUTIONS—CONSPIRACIES.
Under an indictment charging the officers and agents of the N. Company with conspiring to restrain the interstate business of the N. Company's competitors, which proceeded on the theory that there was a generic conspiracy extending over 20 years against all competitors, which as the various competitors named in the indictment came into existence was directed against them specifically, a conviction could be had only for conspiring in restraint of the trade or commerce of such of the competitors named in the indictment as were in existence during the three years prior to the finding of the indictment, and there could be no conviction for conspiring against the competitors who ceased to exist more

than three years prior to the finding of the indictment, or for the generic conspiracy so far as it existed prior to the three years.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 273-275; Dec. Dig. ⊂⊃149.]

23. MONOPOLIES ⊂⊃31—CRIMINAL PROSECUTIONS—EVIDENCE.
On a trial of the officers and agents of the N. Company for conspiring to restrain the interstate trade of the A. Company by making to such company and purchasers and prospective purchasers from it threats of infringement suits and by other means, the fact that the N. Company was successful in the lower court in a suit for infringement was at least prima facie evidence of probable cause, though the decree was reversed on appeal.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂⊃31.]

24. MONOPOLIES ⊂⊃31—CRIMINAL PROSECUTIONS—EVIDENCE.
On such trial the mere fact that there was a conspiracy or joint purpose on the part of the defendants to restrain the trade of competitors of the N. Company, who ceased to exist before the A. Company was organized, by the use of certain unlawful means, was no evidence that they had such joint purpose as to the A. Company, when during the five years of its existence preceding the indictment there was no manifestation of such purpose.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂⊃31.]

25. MONOPOLIES ⊂⊃31—CRIMINAL PROSECUTIONS—EVIDENCE.
Though under an indictment charging the officers and agents of the N. Company with conspiring to restrain the interstate business of such company's competitors, which proceeded on the theory that there was a generic conspiracy against all competitors extending over a period of 20 years, which as the various competitors named in the indictment came into existence was directed against them, there was evidence to make a question for the jury as to a conspiracy within the period of limitations only as against the A. Company, and only with respect to certain of the means of accomplishing the objects of the conspiracy set forth in the indictment, evidence that the defendants were parties to a generic conspiracy of the character mentioned, and that they conspired in restraint of competitors named who ceased to exist before the A. Company was organized, by the use of means other than those shown to have been employed against the A. Company within the period of limitations, was admissible as bearing on the question whether there was a conspiracy against the A. Company when it came into existence, which continued into the period of limitations.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂⊃31.]

26. MONOPOLIES ⊂⊃31—CRIMINAL PROSECUTIONS—EVIDENCE.
Where such indictment alleged that to accomplish the objects of the conspiracy defendants induced, hired, and bribed employés of the N. Company's competitors to disclose the secrets of such competitors' business, and hired and bribed employés of carriers, etc., to disclose the secrets of their employers relative to the transportation of cash registers for such competitors, and instructed and required the N. Company's sales agents to ascertain and report all facts pertaining to the business of such competitors, though these acts were not calculated in themselves to restrain the trade or commerce of any competitor, their sole function being to enable defendants to use other means calculated to restrain such trade, evidence to show that the conspiracy included such means was admissible, and to be considered by the jury as bearing on the further question

whether the conspiracy also included effective means of restraining such trade and commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⟸31.]

27. CRIMINAL LAW ⟸150—LIMITATION OF PROSECUTIONS—"CONSPIRACY."

Where a conspiracy was in existence more than three years prior to the finding of the indictment, and continued into such period of limitation, it was not absolutely essential to support a conviction therefor that anything should be done in furtherance of the conspiracy within the three years, since a conspiracy is not merely an agreement to do an unlawful thing, or a lawful thing by unlawful means, but is initiated by the agreement, and, accurately defined, is a partnership in criminal purposes brought about by an agreement, and so long as the partnership continues the conspiracy continues, whether anything is done in furtherance of it or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. ⟸150.

For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

28. MONOPOLIES ⟸29—CRIMINAL CONSPIRACIES—PARTIES.

Those officers and agents of a company manufacturing and selling cash registers having nothing to do with competition, as, for instance, those in the manufacturing department, could not be said to be parties to a conspiracy on the part of its officers and agents to restrain and destroy the interstate trade of its competitors.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. ⟸29.]

29. CONSPIRACIES ⟸40—CRIMINAL OFFENSES—PARTIES.

It was not sufficient to make persons parties to a conspiracy that they knew of it, or acquiesced in it, if they did not by word or deed become a party to it.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 73, 75–78; Dec. Dig. ⟸40.]

30. MONOPOLIES ⟸31—CRIMINAL PROSECUTIONS—EVIDENCE.

On a trial for conspiring in restraint of interstate commerce, evidence *held* to make a question for the jury as to whether there was a conspiracy extending over a great many years on the part of such officers and agents of a corporation as had to do with competition to restrain and destroy the interstate trade of such company's competitors, whether such conspiracy was by the use of certain of the means specified in the indictment directed against the A. Company when it came into existence, and whether the conspiracy continued against it into the period of three years preceding the finding of the indictment.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⟸31.]

31. CRIMINAL LAW ⟸1158—REVIEW—QUESTIONS OF FACT.

It is not the province of an appellate court to weigh the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061–3066, 3070, 3071, 3074; Dec. Dig. ⟸1158.]

32. MONOPOLIES ⟸31—CRIMINAL PROSECUTIONS—EVIDENCE.

Where there was substantial evidence that the officers and agents of the N. Company were in a conspiracy to restrain the interstate trade of a competitor by causing certain wrongful acts to be done, and the question was whether such conspiracy had continued into the period of three years preceding the indictment, evidence as to the doing of such acts within such period in the regular course of the business of the N. Company by sales agents and salesmen of that company who were under the direct supervision of certain of the parties to the conspiracy was not

inadmissible on the ground that the defendants were not shown to have had any connection therewith; it being for the jury to determine whether these acts were accounted for by the continued existence of the conspiracy, and this was not the drawing of one inference from another.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂=31.]

33. MONOPOLIES ⊂=31—CRIMINAL PROSECUTIONS—EVIDENCE.

On a trial of the officers and agents of the N. Company for conspiring in restraint of the interstate trade of the A. Company, competing with the N. Company in the sale of cash registers, there was evidence that a machine sold by the A. Company was out of order, that the agent of that company made repeated attempts to fix it, and that after he quit the employ of that company a piece of the mechanism was found to be bent, and it was the government's position that the agent bent it at the instance of the N. Company. *Held*, that evidence that when he left the employ of the A. Company several months afterwards he entered the employ of the N. Company, and that a few weeks before he did so one of the N. Company's competition men was seen in his store, did not sufficiently connect the N. Company with the defective condition of the machine to render this evidence admissible.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂=31.]

34. MONOPOLIES ⊂=31—CRIMINAL PROSECUTIONS—EVIDENCE.

On the trial of the officers and agents of the N. Company for conspiring in restraint of the interstate trade of their competitors, evidence that a salesman of the N. Company attempted to induce a dealer who bought cash registers from a competitor and resold them to discontinue the business by threats of interference, and evidence of a similar transaction more than three years prior to the indictment, did not make a question for the jury as to a conspiracy with respect to the business of that competitor.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂=31.]

35. MONOPOLIES ⊂=31—CRIMINAL PROSECUTIONS—EVIDENCE.

On a trial of the officers and agents of the N. Company under an indictment charging a conspiracy in restraint of the interstate trade of the N. Company's competitors, directed against the various competitors as they came into existence, on which it was claimed that the conspiracy had existed within the period of limitations as against the A. Company, evidence as to acts directed against other competitors within the three years, but not sufficiently tending to establish a conspiracy against them to make a question for the jury, did not tend to establish a conspiracy against the A. Company, and should not have been admitted.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂=31.]

36. MONOPOLIES ⊂=31—CRIMINAL PROSECUTIONS—EVIDENCE.

On such trial, though there was a question for the jury only as to the conspiracy charged within the period of limitations as against the A. Company, evidence as to acts directed against other competitors tending to show a generic conspiracy against all competitors, and bearing on its fixed and absolute character and on its nature otherwise, was admissible, though relating in some instances to matters occurring in the early part of the 20 years during which the conspiracy was claimed to have existed.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂=31.]

37. MONOPOLIES ⊂=31—CRIMINAL PROSECUTIONS—EVIDENCE.

Under an indictment charging a generic conspiracy on the part of the officers and agents of the N. Company engaged in manufacturing and

selling cash registers, in restraint of the interstate trade of all competitors of the N. Company, sought to be carried out by the means therein specified, though the only question for the jury under the evidence was whether such conspiracy within the period of limitations was directed against the A. Company by the use of certain of the means specified, evidence as to the use of other means not specified in the indictment against other competitors, who ceased to exist before the competitor in question was organized, was admissible to establish that the generic conspiracy was to use every possible wrongful means that might be effective in putting an end to competition.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂⊃31.]

38. MONOPOLIES ⊂⊃31—CRIMINAL PROSECUTIONS—EVIDENCE.

On such trial, evidence as to the purchase by the N. Company of the business of other competitors prior to the organization of the A. Company, and how such purchases came about, and the contracts of purchase, were admissible as tending to establish a conspiracy to compel competitors to sell out to the N. Company by the use of any effective wrongful means, and thereby to establish a specific conspiracy against the A. Company to restrain its trade and commerce by other means, if not to compel it to sell out to the N. Company, though at the time of the purchase of the business of such competitors suits for patent infringement were pending against most of them, the evidence tending to show that the suits were not brought in good faith, and that in some of the cases the use of other wrongful means, and not the bringing of the suit, was the real cause of the competitors selling out, and it also appearing that the contracts of purchase prohibited them from engaging in the same business for 20 or 25 years, except in certain states where the business was not large.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂⊃31.]

39. MONOPOLIES ⊂⊃31—CRIMINAL PROSECUTIONS—EVIDENCE.

On such trial, contracts with dealers in cash registers, who were mainly dealers in second-hand registers, eliminating them from the cash register field, was admissible as evidencing a purpose to acquire complete control of the business in second-hand cash registers of the N. Company's make, and to show a generic conspiracy, and its character, though they were not referred to in the indictment.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂⊃31.]

40. CRIMINAL LAW ⊂⊃695—RESERVATION OF GROUNDS OF REVIEW—OBJECTIONS AND EXCEPTIONS.

On the trial of the officers and agents of the N. Company for conspiracy, though an objection to alleged minutes of the proceedings of conventions of the district managers of such company, on the ground that they were hearsay, raised the objection that before the minutes were read their accuracy should be guaranteed by the persons who made them, or by others who were present at the conventions, the objection should have been more specific, as such guaranty might have been furnished, and no error was committed in admitting the minutes over the objection made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1633-1638; Dec. Dig. ⊂⊃695.]

41. MONOPOLIES ⊂⊃31—STATUTORY PROVISIONS—CONSPIRACIES PROHIBITED.

Under Act July 2, 1890, § 1, prohibiting conspiracies in restraint of trade or commerce among the several states, a patentee, its officers, and agents may not conspire in restraint of the interstate trade or commerce of a competitor in the article covered by its patent, though the competitor's business is an infringement of its patent; and hence, on the trial of the officers and agents of a company for conspiring in restraint of the

interstate trade of a competitor, evidence that such company held patents covering the machines made and sold by the competitor was not admissible.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂⊃31.]

42. PATENTS ⊂⊃191—RIGHTS OF PATENTEE.

A patentee has the common-law right to make, use, or sell the article patented, and the statutory right to exclude or prevent others from making, using, or selling it, and to have others refrain therefrom.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 268; Dec. Dig. ⊂⊃191.]

43. MONOPOLIES ⊂⊃31—CRIMINAL PROSECUTIONS—EVIDENCE.

On a trial of the officers and agents of the N. Company under an indictment charging them with conspiring in restraint of the interstate trade of the N. Company's competitors, by the use of various wrongful means, under which there was a question for the jury as to whether such conspiracy within the period of limitations was directed against the A. Company by the use of certain of such means other than the bringing in bad faith of patent infringement suits, and evidence was admitted as bearing on the existence of a generic conspiracy against all competitors as to the bringing of such suits against competitors other than the A. Company to compel them to sell out or quit the business, which suits were terminated without a decision of the question of infringement by sales of the competitors' business to the N. Company, evidence that the N. Company held valid patents covering the business of such competitors was admissible, since, if there was real cause for bringing the suits, they were not brought in bad faith.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂⊃31.]

44. MONOPOLIES ⊂⊃31—CRIMINAL PROSECUTIONS—EVIDENCE.

On such trial, evidence as to competitive tactics and aggressions on the part of the N. Company's competitors was admissible, as tending to show that the conspiracy against them was due to provocation, and that, there having been no provocation on the part of the A. Company, the conspiracy was never directed against it.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⊂⊃31.]

45. CRIMINAL LAW ⊂⊃363—RES GESTÆ—LETTERS.

On the trial of the officers and agents of the N. Company for conspiring in restraint of the interstate trade of the N. Company's competitors, where a letter written by such company's vice president and manager to district managers about the time a quo warranto proceeding was instituted against the company for violating the anti-trust laws of a state, in which he stated that it was the policy of the company in no case to permit agents to misrepresent cash registers manufactured by other companies, or to induce any purchaser of a cash register made by any other company to break his contract, was in evidence, defendants should have been permitted to introduce as a part of the res gestæ the answers thereto by certain district managers, stating that such policy had been pursued in their districts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. ⊂⊃363.]

46. CRIMINAL LAW ⊂⊃772—INSTRUCTIONS—LIMITATIONS.

On a trial under an indictment charging a conspiracy extending over a great many years against competitors of the N. Company, and directed against the various competitors of such company as they came into existence, though the court charged that defendants could not be found guilty unless they had conspired within three years prior to the indictment, defendants were entitled to specific instructions that they

could not be found guilty for conspiring against competitors who ceased to exist before the period of limitations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1812–1814, 1816, 1817; Dec. Dig. ⊂⊃772.]

47. CRIMINAL LAW ⊂⊃814, 1172—QUESTIONS FOR JURY—FAILURE OF PROOF.

On a trial for conspiring in restraint of the interstate trade of competitors of a company by the use of various means specified in the indictment, it was reversible error to submit to the jury the question whether the conspiracy included means of which there was no evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987, 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. ⊂⊃814, 1172.]

48. MONOPOLIES ⊂⊃17—CONSPIRACIES IN RESTRAINT OF TRADE—UNLAWFUL ACTS.

It was not unlawful for the officers and agents of a company manufacturing and selling cash registers to compare by comparative demonstrations or otherwise competitive cash registers with their cash registers, for the purpose of demonstrating the superiority of their register, and thereby induce prospective purchasers to buy it.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⊂⊃17.]

49. MONOPOLIES ⊂⊃17—CONSPIRACIES IN RESTRAINT OF TRADE—UNLAWFUL ACTS.

It was unlawful for the officers and agents of the N. Company, engaged in manufacturing and selling cash registers, to sell or offer and try to sell the N. Company's cash registers to persons who had bought and owned competing cash registers, if this involved the purchaser breaking his contract with the competitor in any particular, or was done for the purpose of driving the competitor from the field; and on a trial for conspiring in restraint of the interstate trade of competitors, an instruction that it was not unlawful for such officers and agents to sell or offer and try to sell cash registers to persons who owned competing registers in exchange at such price as was satisfactory to the parties needed qualification, and was properly refused.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⊂⊃17.]

50. MONOPOLIES ⊂⊃17—CONSPIRACIES IN RESTRAINT OF TRADE—UNLAWFUL ACTS.

Whether it was unlawful for the officers and agents of the N. Company, engaged in manufacturing and selling cash registers, to require the agents of that company to report the names of persons who had purchased cash registers from competitors, or to secure samples of machines put on the market from competitors, depended on the manner in which the information or samples were obtained or secured; and on a trial for conspiring in restraint of the interstate trade and commerce of competitors of the N. Company, an instruction that it was not unlawful to so require was too broad, and was properly refused.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⊂⊃17.]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

John H. Patterson and others were convicted of offenses, and they bring error. Reversed and remanded.

For opinion on demurrer to indictment, see 201 Fed. 697. See, also, 205 Fed. 292.

This is a criminal prosecution under Act July 2, 1890, 26 Stat. 209, c. 647. The indictment was found February 22, 1912, and contains three counts. The

offense which the first charges is that of engaging in a conspiracy in restraint of interstate trade and commerce under the first section of the act, and that which each of the other two charges is monopolizing a part of such trade and commerce under the second section. The defendants were 30 in number. Each, for many years, had been connected with the National Cash Register Company, a corporation engaged in the business of manufacturing and selling cash registers, with its principal place of business at Dayton, Ohio, within the district of the lower court, in the capacity of an officer or agent. All but four were so connected when the indictment was found; those four ceased their connection, three in 1910 and one in 1911; and four of them had been connected for at least 20 years continuously prior to its finding. The conspiracy with which they were charged was directed against competitors of that company, and the monopolizing was the exclusion of its competitors from such trade and commerce for its benefit. Trial was had, and all the defendants save one were found guilty under each count. Motion for new trial was sustained as to one, and the indictment was nollied as to him. Sentence as to another was deferred because of sickness, and pronounced as to the other 27, who are the plaintiffs in error herein. The sentence of one, John H. Patterson, president, was a fine of $5,000 and confinement in jail for one year; that of 23, such confinement for one year; and that of 3 for nine months. The trial lasted nearly three months and 393 errors have been assigned. They bring up, so far as relied on, rulings adverse to defendants on demurrer to each count, on motion that the trial be had at Dayton, instead of Cincinnati, where the indictment was found, on the admissibility of evidence, some of which was admitted and some excluded, on motion to direct a verdict for defendants, and on requests to charge the jury.

The first count is quite long; each of the other two is short. The first makes certain introductory statements before charging the offense and alleging the facts, the doing of which it claimed constituted its commission. Those statements are:

(1) That "throughout the 20 years last past" inventors and manufacturers have invented and put upon the market cash registers; numerous patents, during said 20 years, having been issued to inventors, some basic and some for improvements, most of the former and many of the latter having expired long before the three years immediately preceding the finding of the indictment, and the number being so great as to prevent detailed description thereof and of the various inventions covered by them being set forth.

(2) That "during the said 20 years many concerns have been engaged, in the manner and under the circumstances hereafter set forth and in competition with each other, except as hereinafter shown, in the manufacture and sale, directly and indirectly, under letters patent and otherwise, of such cash registers, and that a list of the names of such of said concerns as are known to said grand jurors, showing their respective places of manufacture so far as known to said grand jurors, is as follows, to wit." The list contains the names of 33 different concerns, including the National Cash Register Company, and is found in the margin.[1]

[1]The National Cash Register Company, a corporation, Dayton, Ohio; the American Cash Register Company, Columbus, Ohio; the Michigan Cash Register Company, Detroit, Mich.; the Peninsular Cash Register Company, Detroit, Mich.; the Dial Cash Register Company, Milwaukee, Wis.; the St. Louis Cash Register Company, St. Louis, Mo.; American Cash Register Company, Philadelphia, Pa.; the Bensinger Cash Register Company, Chicago, Ill.; the Boston Cash Register Company, Northampton, Mass.; the Bundy Cash Register Company, Binghamtn, N. Y.; the Burdick-Corbin Company, Detroit, Mich.; the Century Cash Register Company, Detroit, Mich.; the Chicago Cash Register Company, Chicago, Ill.; the Cuckoo Cash Register Company, Detroit, Mich.; the Globe Cash Register Company, Detroit, Mich.; the Hallwood Cash Register Company, Columbus, Ohio; the Internatinal Company, Columbus, Ohio; Hopkins & Robinson, Louisville, Ky.; Hubinger-Carroll Company, New Haven, Conn.; the Ideal Cash Register Company, Bound Brook, N. J.; the Jewell Cash Register Company, Detroit, Mich.; the Kruse Cash Register Company, New York, N. Y.; the Lamson Cash Register Company, Lowell, Mass.; the Latimer Cash Register Company, Detroit, Mich.; the Metropolitan Cash Register Company, New York, N. Y.; the Navy Cash Register Company, Chicago, Ill.; the Osborn Cash Register Company, Detroit, Mich.; the Standard Cash Register Company, Orange, N. J.; the Sun Cash Register Company, Columbus, Ohio; the Toledo Cash Register Company, Toledo, Ohio; the Union Cash Register Company, Trenton, N. J.; the Weiler Cash Register Company, Detroit, Mich.

(3) That "of the total amount of manufacturing of such cash registers done by all of said concerns during said 20 years the National Cash Register Company has done from approximately 80 per cent. early in said period to approximately 95 per cent. at the latter end thereof."

(4) That "said concerns during said 20 years have also respectively sold the greater portion of their cash registers so manufactured by them, some to users of and some to dealers in such cash registers, whose several places of use and business have been situated in all the other states of the United States than those wherein such cash registers have been so manufactured by said concerns, respectively, and have sonsigned for sale other such cash registers to such dealers, and to their own agents in such other states; that in pursuance of such sales and upon such consignments said concerns have respectively been continually shipping such cash registers to such users, dealers, and agents in such other states, the number of such users, agents, and dealers being so great as to make it impracticable, if not impossible, to set forth a list of them in this indictment; * * * and that in and by so manufacturing, selling, consigning, and shipping such cash registers into other states than the state of manufacture each of said concerns has been engaged in trade and commerce among the several states of the United States, within the meaning of the act of Congress approved July 2, 1890."

(5) And that the National Cash Register Company "has had certain persons for its principal officers and agents, each of whom has been actively engaged in the management of the business and affairs of said the National Cash Register Company under its authority and to the full extent of his authority as such officer and agent; and that a list of said persons as are known to said grand jurors, showing so far as known to said grand jurors the character of their several offices and agencies and the time of their becoming such officers and agents, respectively, and, in case they have ceased to become such officers and agents, the time when they so ceased to become such officers and agents, is as follows, to wit," which list contains the names of 137 persons, including those of the 30 defendants.

These introductory statements were followed by a charge of the offense in general terms. It is alleged that the defendants, "being, as said grand jurors * * * charge they have been, the persons who have, by virtue of their being such officers and agents of said the National Cash Register Company, controlled and directed the business and affairs of said the National Cash Register Company unlawfully have, continuously and at all times from the days when, as in this count above set forth, they respectively became officers and agents of said the National Cash Register Company to the day of the finding and presentation of this indictment, or to the days when they ceased to be such officers and agents in cases where they did so cease to be such officers and agents at and within said Western division of said Southern district of Ohio, knowingly engaged and consciously participated in a corrupt conspiracy in undue, unreasonable, * * * restraint of said interstate trade and commerce so as aforesaid, during such times, carried on by the several concerns in this count above named other than said the National Cash Register Company—each of said defendants then and there well knowing, as he then and there did know, all the premises in this indictment aforesaid; that is to say, a conspiracy to restrain, and which during and throughout such times has in fact restrained, said last-mentioned trade and commerce by divers unfair * * * means which, consideration being given to the advantage over said other concerns held by said the National Cash Register Company in consequence of its resources being, as they were, so great as compared with those of such other concerns, respectively, have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce, none of which has been justified or warranted by any letters patent."

From this charge in "generic terms" the count descended to "particulars." It characterized the particular allegation which followed as a "description" of the "conspiracy and means" thereby charged. In strictness it was an allegation of facts the doing of which it was claimed constituted the offense charged generally. The allegation was that, "intending to obstruct, restrict, and restrain the free flow of said interstate commerce so carried on by said concerns other than the National Cash Register Company, and compel those

concerns either to go out of business or to sell and transfer their business and facilities and instrumentalities for carrying it on to said the National Cash Register Company, so that said the National Cash Register Company could, as in most cases it in fact did, discontinue the business and the use of the facilities and instrumentalities so acquired by it, and thereby effectually and inevitably to eliminate and prevent all competition of such other concerns with said the National Cash Register Company (all of such other concerns being hereafter referred to as competitors), said defendants in their several capacities as such officers and agents of said the National Cash Register Company have by concerted and continuous endeavor carried on the business and affairs of said the National Cash Register Company upon a plan involving" 11 different things, which the count then proceeded to set forth in considerable detail. This allegation has been treated as the equivalent of an allegation that the defendants, whilst such officers and agents, conspired to accomplish the objects thus set forth by means of those 11 things, and we so accept it. The 11 things by means of which the defendants conspired to accomplish those objects may thus be summarized:

(1) Inducing, hiring, and bribing employés of the competitors of the National Cash, Register Company, named, to disclose to it the secrets of their business, particularly as to prospective buyers, customers who had ordered, customers who had not fully paid, shipments to customers, agents, and dealers, volume of business, places where done, inventions, financial conditions, and connections.

(2) Inducing, hiring, and bribing employés of carters, truckmen, express companies, railroad companies, and telephone and telegraph companies to disclose to it the secrets of their employers pertaining to the carriage and transportation of the cash registers of such competitors.

(3) Instructing and requiring all its sales agents to ascertain and report all facts and details pertaining to the business of such competitors, and particularly of competitors coming into the competitive field.

(4) Using its influence and that of its agents with, and the making of unwarranted and false statements to, banking and other institutions, to injure the credit of such competitors and prevent them from securing accommodation of money, credit, and supplies.

(5) First. Instructing and requiring all its sales agents to interfere with, obstruct, and prevent, in every way possible, sales of such competitive cash registers by such competitors, and their agents and dealers in cash registers, and by any and all means to bring about sales of its cash registers, and the displacement of such competitive cash registers, and the substitution of its genuine cash registers therefor in the hands of users of cash registers, and particularly (a) by making to prospective purchasers of such competitive cash registers false statements derogatory of same, and reflecting injuriously upon the business character and financial credit of such competitors, and their ability and intention to perform their undertakings and make good their warranties and promises, and offering to sell to them cash registers at prices much less than the regular and standard prices and on unusually favorable terms as to payment; (b) by inducing persons who have already ordered such competitive cash registers to cancel their orders and purchase its cash registers through such statements and offers; (c) by inducing purchasers of such competitive cash registers who had only partially paid therefor to repudiate their contracts of purchase through such statements and offers and allowing them the amount they had paid; (d) by inducing purchasers of such registers, whether they had paid in full or not, to surrender them to it, in exchange for its registers for the purpose of exhibiting them in the windows of its stores where its registers were on sale, bearing placards with the word "Junk" or "For Sale at Thirty Cents on the Dollar" printed thereon; (e) by offering, to prospective purchasers of such registers, registers in similitude of any competitive registers they were contemplating buying, at a price much lower than the regular price thereof, and in cases at much less than the manufacturer's costs, which registers so offered were manufactured by it solely as a so-called "knocker," so as to cause such purchasers to believe that it was of such cheap and poor construction that it was a waste of money to purchase it or such registers; (f) and by offering to prospective purchasers of such

registers such knockers with weak and defective mechanism, and claiming that the registers they were contemplating buying had the same weak and defective mechanism. Second. And instructing and requiring its sales agents secretly to weaken and injure the interior mechanism, and remove and destroy parts of such mechanism of the cash registers of such competitors in actual use by purchasers, and thereby to cause them to become dissatisfied and substitute for them its cash registers.

(6) Making by it to such competitors and to purchasers and prospective purchasers of their cash registers of threats to begin suits in the courts against them for infringing and having infringed its patent rights pertaining to its cash registers, when, as each of them well knew, no such patent rights existed, and no such suit was contemplated or would really be begun, and such threats were made merely to harass such competitors, purchasers, and prospective purchasers, and deter such competitors from manufacturing and selling such competitive cash registers in such interstate trade and commerce and such prospective purchasers from buying and using such competitive cash registers.

(7) Beginning, in other cases, by it against such competitors and against purchasers of such competitive cash registers of suits for infringement of its patent rights pertaining to its cash registers, when, in those cases, they each well knew no patents upon which such suits could be maintained were in existence or owned or controlled by it, and when, as they each well knew, none of those suits would be further pressed, but all such suits would be kept pending only as long as they served the purpose of harassing such competitors and purchasers.

(8) Organizing cash register manufacturing concerns and cash register sales concerns and maintaining them, ostensibly as competitors of their company, but in fact as convenient instruments for use in gaining the confidence and obtaining the business secrets of competitors and accomplishing the objects of the conspiracy and making such use of competitive concerns from time to time acquired by it.

(9) Inducing by offers of much greater compensation the agents and servants of such competitors and dealers patronizing them to leave their employment and cease patronizing them and to enter its employment and patronize it.

(10) Applying and causing application to be made for patents upon the cash registers and the improvements thereupon of such competitors, for the purpose of harassing them by interference proceedings and suits and threats to institute such proceedings.

(11) Using of or originating and using of and instructing and requiring of its agents and sales agents to use of or to originate and use such other unfair means excluding other concerns besides it from engaging in said interstate trade as might at any time become or appear to them or those agents or sales agents to be necessary or convenient to accomplish the object of the conspiracy, a description of which means other than already described the grand jury are unable to set forth, because such means were so numerous in kind and shifting in character as to make such description impossible.

The count then concludes with the general charge that so it is that the defendants during the three years next preceding the finding of the indictment unlawfully have knowingly engaged and participated in a conspiracy in undue and unreasonable restraint of interstate trade and commerce in cash registers, which has restrained that trade and commerce by unfair means and means which have unlawfully and irresistibly excluded others from engaging therein.

The second count contains but a single sentence, and charges that the defendants, "at divers times during the three years next preceding the finding and presentation of this indictment, at and within the said Western division of the Southern district of Ohio, under the circumstances and conditions and by use of the means set forth and described in the first count of this indictment, unlawfully have, by drawing to said the National Cash Register Company and causing that company to grasp it, monopolized a part of the trade and commerce which, but for their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the man-

ner in said first count specified would, during this period, have been secured or retained, as a matter of lawful right, by the divers concerns, other than said the National Cash Register Company mentioned in said first count as having carried on business during said three years—said means being, as in said first count shown and charged, unfair, oppressive, tortious, illegal, and unlawful under said circumstances as against said other concerns, and of a nature under said circumstances irresistibly to exclude those concerns from engaging in that trade and commerce; said grand jurors being unable by reason of the great extent thereof and because the same are unknown to them, the said grand jurors, to enumerate or describe the items of such trade and commerce in cash registers so monopolized by said defendants; and the allegations of said first count, descriptive of such cash registers, of said interstate trade and commerce in the same and the concerns engaged therein, and of the means employed by said defendants to restrain said interstate commerce and the allegations of said first count as to knowledge, intent, and overt acts on the part of and by said defendants being incorporated in this count by reference as fully as if they were repeated in this count as part of the charge of monopolizing in this count made."

The third count likewise contains a single long sentence, and charges that the defendants, "having before the period of three years next preceding the * * * indictment, in the manner, by the means, and under the circumstances and conditions mentioned and described in the first count, * * * engaged, as said grand jurors * * * here charge they did engage, in the unlawful conspiracy in said first count described, and having, in and by so engaging in that unlawful conspiracy, drawn, as said grand jurors * * * here charge they did draw, to said the National Cash Register Company, and caused, as said grand jurors * * * charge they did cause, said the National Cash Register Company to grasp, a part of the trade and commerce among the several states in cash registers; that is to say, that part of said trade and commerce which, but for their so engaging in that unlawful conspiracy and their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the manner and under the circumstances in said first count specified, would have been secured or retained, as a matter of lawful right, by the divers concerns other than said the National Cash Register Company, mentioned in said count as having carried on business, before said period of three years (said means being, as in said first count shown and charged, unfair * * * under said circumstances as against said other concerns, and of a nature under said circumstances irresistibly to exclude those concerns from engaging in that trade and commerce), and each of said defendants well knowing all the premises in this indictment aforesaid, unlawfully have, throughout said period of three years next preceding the * * * indictment, continued to hold, conduct, and carry on said interstate business of said the National Cash Register Company, so by said means before said period augmented, and thereby have monopolized said interstate trade and commerce in cash registers—said grand jurors being unable, by reason of the great extent thereof, and because the same are unknown to them, the said grand jurors, to enumerate or describe the items of such trade and commerce so as in this count aforesaid monopolized by said defendants; and the allegations of said the first count descriptive of such cash registers of said interstate trade and commerce in the same, and the concerns engaged therein before said period of three years, and of the means so employed by said defendants, * * * also the allegations of said first count as to knowledge and intent on the part of said defendant, being * * * incorporated in this count by reference as fully as if they were repeated in this count made against said defendants."

Lawrence Maxwell, of Cincinnati, Ohio, and J. F. Wilson, of Columbus, Ohio, for plaintiffs in error.

S. T. McPherson, U. S. Atty., and E. P. Moulinier, Asst. U. S. Atty., both of Cincinnati, Ohio.

Before DAY, Circuit Justice, and COCHRAN and SANFORD, District Judges.

COCHRAN, District Judge (after stating the facts as above). [1] The first questions which come before us are those raised by the assignment complaining of the order overruling the demurrer to each count of the indictment. Only three of them need be noticed. They are that no offense against the United States was charged, and that it was void for uncertainty and bad for duplicity. The grounds of uncertainty and duplicity as to the first count are not seriously urged. Yet it will aid in bringing out its meaning, of which, in view of the other questions in the case, it is important to be sure, if we proceed upon the assumption that they are. Before indicating wherein these grounds are presented, the meaning of the count in two particulars should be determined. One is as to the duration of the existence of the competitors of the National Company named in the second item of the introductory statement. Is the meaning that each one of them was in existence during the entire 20 years preceding the indictment, and, if not, what is the meaning in regard thereto? A first blush view may lead to the conclusion that the meaning of the count is that each one of them was so in existence. But close observation will disclose that such is not its thought. The government so contends, and it is not urged otherwise by defendants. Perhaps it is in the interest of the claim of duplicity to have it that way. As a matter of fact no one of them was so in existence. It is only true to say that during the entire period one or more of them were in existence. Indicative that such is not its thought is the statement in the general charge of the conspiracy that the means by which its object was to be accomplished were such that they had "unlawfully, wrongfully, and irresistibly excluded others," and the further statement in the description thereof that the intent was to compel the competitors named either to go out of business or to sell and transfer their business to the National Company, so that in the latter case it could discontinue such business, "as in most cases it in fact did." This implies that in some, if not in many, instances that company did acquire the business of some of those competitors, and affirms that in most of those cases it discontinued the business. In such cases, therefore, the competitors did not continue to exist until the finding of the indictment. If, then, it is not the thought of the count that all the competitors were in existence at that time, it is not its thought that all were in existence at the beginning of the 20 years. We think, then, that its thought must be taken to be, in accordance with the fact, that during the entire 20 years there was no time that one or more of them were not in existence with no disclosure whatever as to when any of them were in existence other than that it was during that period. Such is the presupposition of the second and third counts as to the allegation of the first on this subject, and, not only this, but also that it mentions which of them were in existence and carrying on business during the three years preceding the indictment and which during the time preceding the three years, to which extent it is incorrect.

[2] The other particular is one as to which the parties differ. It is urged by defendants that the conspiracy charged is a conspiracy against the 32 competitors named, and not a general conspiracy against all competitors. This the government will not concede. But we think that there is no escaping the conclusion that the charge is of a conspira-

cy against the competitors who are named and that it is limited thereto. In charging the offense generally the allegation is that the conspiracy was in restraint of the interstate trade and commerce "carried on by the several concerns in this count above named other than the National Cash Register Company," and thereafter reference is made solely to them by the use of such phrases as "said" or "such other concerns than said the National Cash Register Company" or "said competitors" or "such competitors."

It is, then, in the truth of the positions thus taken as to the meaning of the count in these two particulars that an opening is made for the claim of duplicity. If its allegation were that each of the competitors named was in existence during the entire 20 years there would be no such opening. A single conspiracy against them specifically would include them all. But as they were not all so in existence, how is it possible for a single conspiracy to cover them? It may be thought that there must have been a conspiracy against those in existence at the beginning of the 20 years, and then successive conspiracies against the others as they came into existence. If such were the case, undoubtedly the count would be duplicitous.

In 5 R. C. L. p. 1081, it is said:

"The court will never be keen to hold an indictment bad for duplicity."

[3] But it is not necessary to give way to bias against the defense of duplicity here to rid ourselves of it. Though, as we have seen, the charge of the count is of a conspiracy against competitors who are named and is limited thereto, its underlying thought is that there was a generic conspiracy against all competitors, and that this conspiracy took specific direction against the competitors named as they came into existence, and continued against them as long as they remained in existence. In the second item of the introductory statement, where those competitors are named, it is alleged that they are all the competitors known to the grand jurors, which was as much as to say that if others had been known they would have been named also, and the charge would have been made that the conspiracy included them also. This could only have been on the basis that there was a generic conspiracy against all competitors. The effect of this consideration is merely to relieve the count of any claim of duplicity. It is the tie that binds. It did not render the defendants subject to conviction for the generic conspiracy so presupposed. In spite of it they were only subject to conviction for a conspiracy against the competitors who were named. What we have, then, in the count is a single conspiracy. It began at least 20 years preceding the indictment. At the beginning it was directed against the competitors named then in existence, and continued against them until they ceased to exist. As the others came into existence, it was directed against them, and continued against them until they ceased to exist, or, in case they had not ceased to exist at the time of the finding of the indictment, until then. And all of the defendants were not parties thereto during its entire existence, but only such of them—four in number—as were then connected with the National Company at the beginning of the 20 years. As the others became connected with it, they became parties to the conspiracy, and remained so until the finding

of the indictment, except as to the four who ceased their connection in 1910 and 1911, when they ceased to be parties thereto. Such we take to be the conspiracy charged in the first count.

[4] Of course the defendants were subject to conviction under the first count only in so far as the conspiracy charged existed within the three years preceding the indictment and as to the competitors who were then in existence. Because of the bar of the statute of limitations, no conviction could have been sought in so far as it existed prior to the three years. The reference to its prior existence and to its being against competitors not in existence during the three years was merely in order to a description of the conspiracy. Apart from this the count is to be taken as charging only a conspiracy within the three years against those of the competitors named then in existence. That it did not allege which of them were in existence did not render the count void for uncertainty.

[5] It remains to consider whether the count is defective in not charging an offense against the United States. There is but one particular in which it is claimed that it comes short of so charging, and that is in not alleging facts showing that the trade and commerce conspired against was interstate. In item 4 of the introductory statement the character of the trade and commerce in which the competitors named were engaged is set forth, and the charge is that it was that trade and commerce which was conspired against. Unless, therefore, such trade and commerce was interstate, the point is well taken. It is urged that, in determining whether it was or not, no help can be obtained from the claim made in that item that it was. It must be determined solely from what it is alleged that the competitors named had done. So limiting the consideration, it is claimed that all that is alleged could have been done, and yet the competitors not have been so engaged. As to sales and shipments pursuant thereto the allegation is satisfied by sales calling for delivery to the purchasers in the state of manufacture and shipments to them therein; the transportation from that state to the states of the purchasers being by them. And as to consignments for sale to dealers and agents the allegation is satisfied in the same manner. But in such cases the transportation from the state of manufacture to the state where the sale was to be had by the agents, if not also by the dealers, was by the competitors, through the agents and dealers. So doing, however, is such an unusual way of transacting business that the fair meaning of the allegation should be taken to be that the sales were for delivery in the state of the purchaser, and the shipments pursuant thereto were from the state of manufacture to such states, and so as to the consignments for sale. It is merely contended that the allegation does not "necessarily" mean this. Whilst it may not necessarily so mean, such we take to be its fair meaning, and whilst the claim that the business the competitors did was interstate cannot supply an omission in the allegation as to what they did, it can serve as an aid to its interpretation. It must be held, therefore, that the first count is good.

The second count alleges that the defendants had monopolized a part of the interstate trade and commerce in cash registers. It alleges that

defendants had so done at divers times during the three years preceding the indictment, within the lower court's district, and under the circumstances and conditions set forth and described in the first count. The way in which they had so done was by the use of the means therein set forth and described. They had thereby drawn that part of that trade and commerce to the National Company and caused it to grasp it. That part of that trade and commerce was the interstate trade and commerce in cash registers which, but for the use of those means by defendants, would have been secured or retained by the competitors named in the first count as having carried on business during those three years. It will be noted that the allegation is not that the defendants had monopolized the interstate trade and commerce in cash registers in the United States or in some particular portion thereof. It is that they had monopolized a part of such trade and commerce, and that the part which they had monopolized was that part thereof which the competitors referred to would have secured or retained, but for the use of those means by the defendants. The meaning of the allegation is no more than this—that by the use of those means the defendants had made interstate sales of cash registers for the National Company which, but for the use thereof, those competitors would have made. That such is its meaning is borne out by the allegation that it was "at divers times" that defendants had monopolized a part of that trade and commerce, and the further allegation that because the items thereof were unknown and of great extent they could not be enumerated or set forth in the count.

Assuming that what was done, as set forth in the count, constituted monopolizing within the second section, it is questionable whether the company was not the monopolizer and the defendants were mere aiders and abettors. But as aiders and abettors are liable as principals this is unimportant.

[6-9] Assuming, further, that the count charges no more than that defendants by the use of those means had made interstate sales of cash registers for the National Company which, but for the use thereof, those competitors would have made, the question arises whether this is an offense under section 2; i. e., whether the making by one competitor of an interstate sale or interstate sales of a commodity by the use of wrongful means which, but for the use thereof, another competitor or other competitors would have made, constitutes monopolizing a part of interstate trade and commerce by such competitor within the meaning of the second section. It should be approached through the first section. It is now settled that that section covers those contracts, combinations, and conspiracies only which are unreasonably in restraint of interstate trade or commerce. Possibly every conspiracy in restraint thereof is unreasonably so. This is on the idea that there is no such thing as a reasonable conspiracy, or a conspiracy to do a reasonable thing. It is a contradiction in terms. The section includes conspiracies between competitors, or between the officers and agents of a competitor on its behalf against a competitor. But it is not limited to such conspiracies. It includes also conspiracies between any persons, whoever they may be, against any other person. Loewe v. Lawlor,

208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815. It is not essential that the execution of the conspiracy be of any benefit to the conspirators. It is sufficient that it will be in restraint of another's interstate trade or commerce. And it is immaterial what is the extent of the interstate trade or commerce conspired against. In the case of Steers v. United States, 192 Fed. 1, 112 C. C. A. 423, it was held by this court that a conspiracy in restraint of a single interstate shipment was within the section. There is no act of interstate trade or commerce so insignificant as not to be protected by it. Clearly, then, a conspiracy between the officers and agents of one competitor on its behalf in restraint of a single interstate sale or shipment of another competitor is covered by it.

[10-12] But it does not follow from this that the making by one competitor of a single interstate sale or a great number of such sales by the use of wrongful means, which, but for the use of such means, another competitor would have made, is a monopolizing of a part of the interstate trade or commerce within the meaning of the second section, and covered by it. Whether it is covered by it depends upon what it is to monopolize, and what is "any part" of interstate trade or commerce, within its meaning. The word "monopolize" is used in this section in a legal and accurate sense. Its root idea is to exclude. To monopolize trade or commerce, or a part thereof, is to exclude persons therefrom. It is not, however, to exclude all persons. In the case of a perfect monopoly, which in experience has arisen only from a sovereign grant, the exclusion is of all persons but one, or, perhaps, a group of persons. By reason of such exclusion such person or group of persons secure the entire field covered by the grant to themselves. But it is not such monopolizing that the section has in mind. It is monopolizing by the acts of individuals. Mr. Justice McKenna, in National Cotton Oil Co. v. Texas, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689, said:

"The idea of monopoly is not now confined to a grant of privileges, but is understood to include a condition produced by the acts of individuals."

In the case of such a monopoly it would seem that it is not essential that all but the insiders be wholly excluded, so that they have the whole field to themselves. It is sufficient that outsiders are substantially excluded, so that the insiders have to themselves approximately, or "a largely preponderating part of," the whole field. But the section does not cover every monopolizing by the acts of individuals. A monopolizing by efficiency in producing and marketing a better and cheaper article than any one else is not within it. However, possibly, efficiency is so abundant that in experience there never will be, as there never has been, such a monopolizing. It is possible for there to be a monopolizing by a combination of competitors. Such combinations have been divided into "combinations by agreement," or "loose combinations," in which each member of the combination remains in the field, notwithstanding the combination, as in the case of Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and "combinations by fusion," or "corporate combinations," as in the Standard Oil and Tobacco Cases. Possibly in cases of the former class, where there is no exclusion of outsiders, it is not proper to say that there is a monop-

olizing, as in that contingency there is no exclusion. At most it may not be proper to say more than that there is a combination in restraint of trade. But in the latter case, notwithstanding there is no exclusion of outsiders, there is no reason for not characterizing what has been done as monopolizing, for in such case there is exclusion. The members of the combination are excluded for the benefit of the single corporation into which they are fused. Mr. Justice McKenna seems to have had such monopolizing in mind in the case of National Cotton Oil Co. v. Texas, supra, when he said:

"Its [monopoly's] dominant thought now is, to quote another, 'the notion of exclusiveness or unity'; in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.'"

A combination of competitors, accompanied by exclusion of outsiders, and the exclusion by a competitor, or by its officers and agents on its behalf, of competitors by the use of such means as are charged here, clearly constitute monopolizing within the section. Mr. Chief Justice White in Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, pointed out that monopolizing was a species of restraint of trade or commerce, so that a combination or conspiracy to monopolize a part of interstate trade or commerce is covered by both sections. In this particular they overlap. We have seen that conspiracies in restraint of trade and commerce are not confined to conspiracies by competitors, or on behalf of a competitor against a competitor. It is not even necessary that the execution of the conspiracy be of any benefit to the conspirators. It is sufficient that it will restrain the interstate trade or commerce of the person conspired against. But in the case of monopolizing under the second section, where there is exclusion by a competitor, or a combination of competitors, of competitors substantially from interstate trade or commerce, it is in order that the former may have the whole or approximately the whole of the field to itself or themselves. It is penalized, so that there may be no such exclusion, and the field may be occupied by all on equal terms.

It follows from this general survey that there can be no monopolizing in the legal and accurate sense of the word where there can be no common occupation. Where in the very nature of things there must be exclusion of all others but one, there can be no monopolizing. Hence it would seem that there can be no monopolizing in making a single interstate sale, or in making a great number of such sales, even though wrongful means are used in making them. A wrong has been done the competitors, but the wrong is not that of monopolizing. In the very nature of things but one competitor can make the sale. The idea that such conduct constitutes monopolizing is no according to the legal and accurate meaning of the word. It ca only be such according to a popular conception thereof.

[13] But, though but one competitor can make a sale, all competitors can enjoy the free opportunity of approaching each and every prospective purchaser on equal terms, with the chance of making a

sale if he can persuade him to buy. For one competitor to exclude all or substantially all other competitors from such opportunity—i. e., drive them from the field of freely offering their goods, so as to have that field to himself—is to monopolize according to the legal and accurate sense of the word.

[14] This leads to a consideration of what is "any part" of interstate trade or commerce, within the meaning of the section. What are the possible parts of interstate trade or commerce that may be covered by it? The interstate trade or commerce in a particular commodity of all prospective purchasers thereof in the United States is a part of interstate trade or commerce; also the interstate trade or commerce in such commodity of all prospective purchasers thereof in some particular portion thereof is a part thereof. And also the interstate trade or commerce in such commodity of any prospective purchaser thereof wherever located in the United States is a part thereof. There can be no question that the first two are parts of interstate trade or commerce within the meaning of the statute. The case of Montague v. Lowery, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, involved a monopolizing of the second part of interstate trade or commerce above referred to. The only question is as to the third part. Is the interstate trade or commerce of a prospective purchaser a part thereof within it? The case of Whitwell v. Continental Tobacco Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, involved the question whether it is. There a manufacturer of plug chewing tobacco had refused to sell to a jobber unless he would agree not to purchase such tobacco from its competitors, but to give his entire business to it, and the question was whether such conduct on its part was an attempt to monopolize a part of interstate trade or commerce under the section. This depended on whether the interstate trade or commerce of that jobber was a part of such trade or commerce within its meaning, and whether the means by which it was attempted to monopolize it was wrongful. It was held that the case did not come within the section. The apprehension that, if it was held that it did, then every interstate sale would be within it, seems largely to have brought it about. This is to be gathered from certain expressions in Judge Sanborn's opinion, repeated in United States v. Standard Oil Co. (C. C.) 173 Fed. 177, 191. He there said:

"Undoubtedly every person engaged in interstate commerce necessarily attempts to draw to himself, to the exclusion of others, and thereby to monopolize, a part of that trade. Every sale and * * * transportation of an article which is the subject of interstate commerce evidences a successful attempt to monopolize that trade or commerce which concerns that sale or transportation. If the second section of the act prohibits every attempt to monopolize any part of interstate commerce, it forbids all competition therein, and defeats the only purpose of the law; for there can be no competition, unless each competitor is permitted * * * to draw to himself, and thereby to monopolize, some part of the commerce."

But there was no reason for such apprehension, for, as we have seen, interstate sales do not come within the section, because in such cases there is no monopolizing. It is only the conception of the meaning of that word according to popular speech that could create such

an apprehension. It was such a conception that led Judge Ward in United States v. American Tobacco Co. (C. C.) 164 Fed. 700, 727, to say:

"As this section prohibits a monopoly of, or an attempt to monopolize, any part of such commerce, it cannot be literally construed. So applied, the act would prohibit commerce itself."

In dealing with this subject the Supreme Court, speaking by the Chief Justice, in the Standard Oil Company Case, 221 U. S. 61, 31 Sup. Ct. 516, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, said:

"The commerce referred to by the words 'any part,' construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance; that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce."

This excludes therefrom the interstate trade or commerce of a particular prospective purchaser of a particular commodity, and confines it to the interstate trade or commerce of all prospective purchasers of a particular commodity in the United States or in some particular portion thereof. Reasoning from the analogy to a monopolizing by sovereign grant leads to the conclusion that such is a true construction of the section. In case of such monopolizing it is of a particular commodity, and in olden times in England it was limited in some instances to particular portions of the kingdom.

[15] The second count charges that defendant had monopolized a part of the interstate trade and commerce in cash registers "under the circumstances and conditions set forth and described in the first count," and in the latter part it makes part thereof the allegations of that count descriptive of that trade and commerce, the concerns engaged therein, and the means employed by defendants, and as to knowledge, intent, and overt acts on the part of and by defendants. In the light of the entire context, we think the word "monopolized" should be construed as meaning "secured." So construing it, the question arises whether the offense which the count charges is not that of monopolizing the interstate trade and commerce in cash registers, and not a part thereof.

[16] There is no rule of law requiring the offense intended to be charged in an indictment to be charged expressly in general terms. It is sufficient if the facts alleged, if true, show the commission of the offense. If, then, the effect of what the second count alleges that the defendants had done, if done by them, was the commission by them of the offense of monopolizing the interstate trade and commerce in cash registers, that is the offense charged against them, and to which reference was had by the use of the words "charge of monopolizing in this count made" at the end of the second count.

Now, the offense of monopolizing consists not only in obtaining or securing, in the first instance, a monopoly by the wrongful acts of individuals, but in holding and maintaining it by such acts. According to the allegation of the first count, during the preceding 3 years the National Company had a practical monopoly in cash regis-

ters. It did approximately 95 per cent. of the manufacturing and selling of cash registers. Also, according thereto, the defendants carried on the business of the National Company on a plan involving the use of the means therein set forth, with the intent and purpose to restrain the interstate trade and commerce of all its known competitors and to drive them out of business. Such are the circumstances and conditions under which it is alleged that the defendants had secured for the National Company interstate sales of cash registers by the use of those means which, but for the use thereof, would have been secured by those competitors. Such action on the part of defendants was calculated to hold and maintain the monopoly which the National Company had. It being done with such intent, it was done with the intent to maintain and hold the monopoly. It seems to us, therefore, that the count does charge the commission of the offense of monopolizing interstate trade and commerce in cash registers during the 3 years preceding the indictment. This being so, it is not duplicitous. It charges but a single offense.

[17] But this is not all that is to be said upon this count. The competitors whose interstate trade and commerce are alleged to have been secured by defendants for the National Company by the use of the means complained of are alleged to be those "mentioned in said first count as having carried on business during said 3 years." When, however, we turn to the first count, we do not find any of the competitors named therein mentioned as having carried on business during the 3 years preceding the indictment. It is only on the hypothesis that the count alleges that all of the 32 competitors carried on business during the whole 20 years that it can be said that it mentions those of them who carried on business during the 3 years. But we have seen that the government does not contend that such is the meaning of the allegation and we have held that it does not mean it. It means no more than that during the entire 20 years some of the competitors were carrying on business, without giving any indication whatever as to when any of them were so doing. The competitors, then, whose business it is alleged the defendants secured by the use of those means, are incapable of identification. It is not those who in fact carried on business during the 3 years, but those which the first count mentions as then carrying on business; and it does not mention which of them so did. We see no escaping from the conclusion that the count on this ground is void for uncertainty. We are aware that the point is somewhat technical, and that it is in the air now that the courts should be indulgent to looseness in pleading, even in an indictment. But that indulgence goes no farther than that an indictment is to be "taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech." It should not go to the extent of taking it to mean that which "by a fairly exact use of English speech" it does not mean, or, in other words, when it says competitors "mentioned in said first count as having carried on business during said 3 years," it should be taken to mean competitors who did carry on business during those 3 years. The words of Mr. Justice Brewer in Clyatt v.

United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726, come in here. They are:

"Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

On this ground we think the count is defective, and that the court erred in overruling the demurrer thereto.

[18] This brings us to the third count, and we need not spend much space upon it. It charges that the defendants, having before the 3 years preceding the indictment, engaged in the unlawful conspiracy described in the first count, and having by engaging therein drawn to the National Company and caused it to grasp that part of the interstate trade and commerce which, but for their engaging therein and by the use of the means described in the first count, would have been secured or retained by the competitors mentioned in the first count as having carried on business before those 3 years, had during those 3 years continued to hold, conduct, and carry on the interstate business of The National Company so by those means before those 3 years augmented and thereby had monopolized the interstate trade and commerce in cash registers. The monopolizing here charged, it will be noted, is not of a part of said trade and commerce, but such trade and commerce. It differs from the second count, in that it does not allege that during the 3 years preceding the indictment defendants had secured for the National Company any such trade or commerce by the use of wrongful means, which, but for the use thereof, would have been secured by its competitors. What it charges the defendants did was that during the 3 years they had continued to hold, conduct, and carry on the interstate business of the National Company, augmented by the interstate trade and commerce in cash registers which before the 3 years, by the use of the means complained of, they had drawn to the National Company and caused it to grasp, and which, but for the use of those means, would have been secured or retained by those of its competitors mentioned in the first count as having carried on the business before the 3 years. It will be noticed that the same uncertainty exists here as to the interstate trade and commerce in cash registers secured by the National Company, by the use of those means, before the 3 years, and held on to by it during the 3 years. It is that which, but for the use thereof, would have been secured by those of its competitors which are mentioned in the first count as having carried on business before the 3 years preceding the indictment. The first count no more mentions which of them carried on business before the 3 years than it does those which so did during the 3 years. On this ground the count is bad.

But it is otherwise insufficient. It does not charge an offense against the United States, i. e., the offense of monopolizing a part of interstate trade and commerce, and that for two reasons. According to the allegations of the first count, made a part of this, the cash registers manufactured and put on the market by the National Company during the 20 years were patented. It owned patents which covered them. So far as the third count goes, the interstate trade and commerce

which it so secured may have been covered by its patents, and it was in law entitled to it thereunder. It may not have had a right to get it in the way charged, but should have asked the courts to protect its rights. This is a question that will be considered later. In holding onto it thereafter it could not have been guilty of monopolizing, even if otherwise it might have been. The indictment, having thus charged that the National Company had patents covering the cash registers made and sold by it, should have negatived that the trade and commerce which it so secured and held onto was covered by those patents. In the first count it is alleged that defendants' conduct therein complained of was not "justified or warranted by any letters patent"; but it was not meant thereby to charge that the trade and commerce affected by the conspiracy complained of therein was not covered by the National Company's patents, for it is the position of the government that the defendants were not justified or warranted by those patents in protecting the rights so secured in that way. It is charged in the first count that at the beginning of the 20 years the National Company did 80 per cent. of the manufacturing of cash registers. This of itself was a practical monopoly. It is not alleged that it had been secured by wrongful acts. Presumably it was entitled to it under its patents. It is true that it is alleged that long before the 3 years preceding the finding of the indictment most of the basic patents and many of the improvement patents had expired. But this concedes that some of the basic patents were then still unexpired at the beginning of the 3 years, and it is consistent with the fact that such was the case as to a great number of improvement patents. Everything, therefore, which the count alleges, may be true, and yet the National Company have been entitled to hold onto the business which it had so secured, in which case its conduct in so doing could not have been monopolizing.

[19] But otherwise the count does not charge the offense of monopolizing, in that it does not allege that defendants had done anything during the three years to maintain and to hold its monopoly. In the case of a monopoly brought about by monopolizing through a "combination by fusion" or "corporate combination," the monopolizing exists as long as the combination continues to exist. It can at any time be dissolved, and its constituent elements restored to existence. But in the case of a monopolizing by wrongful means, as here, the monopolizing ceases whenever the pugnacious competitor ceases to fight. It is not possible to resurrect the competitors who have been slain in the contest and restore to them what they have lost. Such competitor does not continue to monopolize, within the meaning of the statute, in holding onto the spoils of victory. It is never to be lost sight of that actually doing business, no matter how large, is not monopolizing. It is excluding from the opportunity of doing business that is. If it is thought that this is an evil condition of things, which should not be allowed to continue, the answer is that things should not have been allowed to get in that condition. The competitors attacked should have called upon the courts to protect them whilst they were being attacked.

In the case of United States v. Irvine, 98 U. S. 450, 25 L. Ed. 193, it was held that the offense of withholding pension money was complete upon its first being withheld, and that it did not continue thereafter, even though the money was never paid to the pensioner. And in the case of United States v. Kissel, 218 U. S. 607, 31 Sup. Ct. 126, 54 L. Ed. 1168, Mr. Justice Holmes said:

"It also is true, of course, that the mere continuance of the result of a crime does not continue the crime."

[20] It is also urged that the third count is bad for failing to allege proper venue. It would seem to be clear that it was essential to allege that the offense charged was committed within the district where the indictment was found. Otherwise, the court had no jurisdiction of the offense. It would seem clear, also, that the third count is not aided by the allegation of venue in the first and second counts, unless such allegation is incorporated in the third count by reference thereto. The government does not differ with the defendants as to these two propositions. Its position is that the allegation of the first count as to venue is so incorporated in the third. It makes this out from the fact that it alleges by way of recital that the defendants had, prior to the three years preceding the indictment, engaged in the unlawful conspiracy charged in the first count "under the circumstances and conditions mentioned and described in the first count." But this has reference to the conspiracy charged in the first count. It has no reference to the offense charged in the third count, to wit, of holding, conducting, and carrying on the business unlawfully acquired

It must be held, therefore, that the third count is bad, and the lower court erred in overruling the demurrer thereto.

[21] 2. We come now to the assignment that the court erred in overruling defendants' motion that the trial be had at Dayton. Section 100 of the Judicial Code divides Ohio into two judicial districts, Northern and Southern, and the Southern into two divisions, Western and Eastern. It provides that certain terms of the District Court for the Western division shall be held at Cincinnati and certain for the Eastern at Columbus. Then follows this provision:

"Provided, that terms of the District Court for the Southern district shall be held at Dayton on the first Mondays in May and November. Prosecutions for crimes and offenses committed in any part of said district shall also be cognizable at the terms held at Dayton. All suits which may be brought within the Southern district, or either division thereof, may be instituted, tried and determined at the terms held at Dayton."

This is a continuation or re-enactment of the act of March 4, 1907 (34 Statutes at Large, 1294), which first provided for the holding of terms of court at Dayton. This prosecution was instituted at Cincinnati. It is not claimed that the lower court abused its discretion, if, indeed, it had any, in overruling this motion, but that defendants were entitled as a matter of right to have the case transferred to Dayton for trial. The sole ground of the motion was that the National Company's plant and principal office is located there, and 11 of the defendants resided there, and that none of them resided at Cincinnati. We fail to find any basis whatever for this position. It will be noted that

Dayton is made a place for holding court for the entire Southern district. As to prosecutions for crimes and offenses committed in any part of the district, they "shall be cognizable" and as to suits which may be brought within the district—i. e., of which it has jurisdiction—they "may be instituted, tried and determined" at Dayton. The provision that such prosecutions shall be cognizable at Dayton does not require that they be instituted there; otherwise no prosecution could be instituted at Cincinnati or Columbus, but all would have to be instituted at Dayton. No more does it require that any prosecution instituted at Cincinnati or Columbus shall be transferred there for trial. The only possible question which can arise is whether any prosecution instituted at Cincinnati or Columbus can be transferred to Dayton. The original act provided for such transference of pending suits, and nothing else. This assignment, therefore, is not well taken.

[22] 3. Chronologically the assignments calling in question the rulings on the admissibility of evidence come next. But we prefer to pass at once to the assignment that error was committed in overruling defendants' motion to direct the jury peremptorily to find a verdict for them. As introductory to its consideration, two things should be clearly understood. One is as to what, under the evidence, was the case which it was open to the government to claim should be submitted to the jury. It was whether within the 3 years preceding the indictment the defendants conspired in restraint of the interstate trade or commerce in cash registers of the American Company of Columbus by the use of the fifth and ninth means specified therein. We make this out in this way: Certainly it was not more than whether the defendants within that time conspired in restraint of such trade or commerce of the competitors named who were in existence during the 3 years by any of the means specified. It did not include whether they at any time conspired against any other of the competitors named therein because, as they had ceased to exist prior to the 3 years, defendants could not have conspired against them within the 3 years, and, so far as they conspired against them prior to the 3 years, i. e., whilst they were in existence, as the prosecution therefor was barred by the statute of limitations, the indictment did not seek conviction for the conspiracy as to them. Nor did it include whether they at any time conspired generally, i. e., against all competitors, because whilst, as we have seen, the underlying thought of the first count is that they so conspired, and that this conspiracy was directed against the competitors named during and as they came into existence, the count did not seek conviction for such generic conspiracy. Properly construed, it sought conviction for a conspiracy against the named competitors only, and those only who were in existence during the 3 years. And so far as such generic conspiracy existed prior to the 3 years the prosecution for it, too, was barred. It follows, therefore, that that case was not more than whether the defendants within the 3 years conspired in restraint of such trade or commerce of the American of Columbus, the Michigan, the Peninsular, the Burdick-Corbin, the Jewell, and the Dial, by any of the means specified, for these were the only competitors who were in existence during the

3 years. The Bensinger and Hopkins-Robinson were not in existence at any time within the 20-year period, the St. Louis is not mentioned in the evidence, the Bundy was not in the cash register business, and all the others ceased to exist prior to the 3 years. The last of them to go out of existence was the Union, and it ceased to exist as a competitor November 1, 1906.

[23, 24] But the case was not even this much. It is not claimed by the government that the generic conspiracy was ever directed against the Peninsular, the Burdick-Corbin, the Jewell, or the Dial. It only claims that it was directed against the American of Columbus and the Michigan. The American came into existence not later than the early part of 1907, and the Michigan in 1908. And so far as the Michigan is concerned there was no substantial evidence that such conspiracy was ever directed against it. There was evidence of but two acts which can be said to have been unfriendly towards it, only one of which was in the 3 years. They were directed, not against it, but against two dealers in the machine, who purchased them outright and resold them. Its president and organizer, who had been connected with the National Company and who ceased his connection therewith in July, 1907, then holding the position of general manager, was one of the principal witnesses for the prosecution, and he made no complaint whatever of the National Company's attitude or action toward his company. Possibly the reason why the generic conspiracy, assuming that there was one, was never directed against these five companies, i. e., the Peninsular, the Burdick-Corbin, the Jewell, the Dial, and the Michigan, was because they did not seriously endanger the National supremacy. And, in view of this, perhaps the generic conspiracy should be stated to be, not that it was against all competitors, but only against such as might endanger such supremacy. Such is the way, then, in which we limit the case which it was open to the government to claim should be submitted to the jury to the American of Columbus. But we also limit it under the evidence as to the means to be used in accomplishing the object of the conspiracy against that competitor; i. e., to the fifth and ninth. It is not claimed that the defendants conspired to use the fourth means against any competitors. The first, second, and third means were not means to accomplish that object. They were not calculated, in and of themselves, to restrain the trade or commerce of any competitor. If no use was made of the information thereby obtained, no competitor would be restrained in his trade or commerce. Their sole function, therefore, was to enable the defendants to use other means which, in and of themselves, were calculated to restrain. It did not include the sixth, seventh, and tenth means, because there was no substantial evidence that the defendants at any time, much less within the 3 years, conspired in restraint of that company by the use of those means.

It may be assumed in this connection that there was substantial evidence that the generic conspiracy and the specific conspiracy against the competitors who ceased to exist prior to 1907 included the use of such means, but it does not follow that the conspiracy against the American of Columbus included the use thereof. There was not a

particle of evidence that any such applications for patents as are called for by the tenth item, or that threats to that company, or to any purchaser or prospective purchaser of its machines, to begin suits for infringement against it or him, called for by the sixth item, were ever made. But a single suit for infringement was ever brought. That was brought against that company itself in the District Court of the Southern District of New York in 1908. The National obtained therein a decree of infringement, which was reversed on appeal. National Cash Register Co. v. American Cash Register Co., 178 Fed. 79, 101 C. C. A. 569. The patent was held invalid because of the sale of a single machine covered by it more than 2 years before its issue. The fact that the National was successful in the lower court is at least prima facie evidence of probable cause. The mere fact that there may have been a conspiracy—i. e., a joint purpose on the part of the defendants to restrain the trade of the competitors who ceased to exist before the year 1907 by the use of such means—is no evidence whatever that they had such joint purpose as to the American of Columbus, when during the 5 years of its existence preceding the indictment there was no manifestation of such purpose. The same is true as to the means covered by the eighth and eleventh items. We assume here, also, that there was substantial evidence that the generic conspiracy and the specific conspiracy against the competitors who ceased to exist prior to 1907 included the use of the means specified in the eighth item, and of other effective means not specified at all, but covered by the eleventh item. But there is not a particle of evidence that the defendants at any time within the 5 years of its existence contemplated the use of such means against the American of Columbus. And so it is that we limit the case which was open for the government to claim should be submitted to the jury to whether the defendants within the 3 years preceding the indictment conspired in restraint of the interstate trade or commerce of the American of Columbus by the use of the means described in the fifth and ninth specifications.

[25] But in so limiting that case we are not to be understood as holding that the jury were not to consider at all whether the defendants conspired in restraint of the competitors named who ceased to exist prior to 1907 during their existence by the use of all the effective means specified except the fourth and of other effective means not specified covered by the eleventh item, and whether they were parties to a generic conspiracy of that character, and that evidence to this effect was not admissible. Our position is simply that those were subordinate issues in the case. The ultimate issue therein was whether the defendants had so conspired against the American of Columbus. The former issue had bearing on the question whether there was a generic conspiracy, and the latter on the question whether there was a conspiracy against the American of Columbus when it came into existence, which continued into the 3 years. Our purpose in putting the matter thus is to bring out sharply just what was the ultimate issue in the case, after the close of the evidence. A clear understand-

ing of this will aid us in disposing of the question in hand, and also the other questions yet to be considered.

It is, however, urged on behalf of defendants that the decision in the case of Commonwealth v. Harley, 7 Metc. (Mass.) 506, is against the consideration of a generic conspiracy in this case at all. It was there held that, under an indictment charging a conspiracy to defraud Stephen W. Marsh, evidence was not admissible of a conspiracy to cheat the public generally, or any person who might fall in the way of the conspirators. This was, however, on the ground—it could only have been on that ground—that the charge in the indictment excluded the thought of a generic conspiracy, and charged a conspiracy which in its origination was a specific conspiracy against Stephen W. Marsh. But that is not the case we have here. It is true that the indictment charges a specific conspiracy only, but it is not a conspiracy which was specific in its origination. In its origination it was a generic conspiracy, which became a specific conspiracy by being directed against the competitors named as they came into existence. Hence it was a pertinent question in the case whether there was a generic conspiracy during the 20 years, and there was no variance.

In the case of People v. Gilman, 121 Mich. 187, 80 N. W. 4, 46 L. R. A. 218, 80 Am. St. Rep. 490, a conviction was upheld under an indictment charging a conspiracy to defraud Edwin H. Sadler upon evidence of a conspiracy to cheat such persons as might be induced to attend certain seance meetings, and that he attended them. The decision is in conflict with the Massachusetts case, unless the indictment permitted the construction that it charged a specific conspiracy against Sadler by reason of a generic conspiracy being directed against him.

[26] So as to the first, second, and third means—the means which in and of themselves were noneffective—evidence tending to show that the conspiracy included them was admissible. And so far as there was substantial evidence to the effect that it did, it was for the jury to consider whether it did, but only as bearing on the further question whether it included, also, any of the effective means.

[27] The other thing which at this point should be clearly understood is whether, in order to there being such a case for submission to the jury, it is absolutely essential that anything was done in furtherance of such conspiracy within the 3 years preceding the indictment. We think that it is not. And this follows from Mr. Justice Holmes' illuminating and most helpful opinion in the case of United States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168. Before the decision in that case the question of the continuance of a conspiracy was in confusion and the authorities in conflict. There is no longer any confusion. The position there combated was that a conspiracy could not have continuance in time. It was urged that it could not, because it consisted in an unlawful agreement, and an agreement does not have continuance. That that was what it consisted in seemed to be justified by the common definition of a conspiracy as an agreement to do an unlawful thing, or to do a lawful thing by unlawful means. But this is no longer an accurate definition of a conspiracy. The agreement simply initiates the conspiracy, but it is not the whole of it. Mr. Justice Holmes said:

"It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it."

And again he said:

"A conspiracy is constituted by an agreement, it is true; but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is the result of it. The contract is instantaneous; the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes."

Here we have an accurate definition of a conspiracy. It is "a partnership in criminal purposes," to which we might add, brought about by an agreement. So long, then as the partnership in a criminal purpose continues, the conspiracy continues. And it may continue without anything being done in furtherance of it. X. and Y. conspire on a day or two before the beginning of the period within which an indictment on a certain date may be found to murder Z., or to commit some other crime, on a day certain one week off; i. e., several days after the beginning of that period. After the beginning thereof, they abandon the conspiracy, either by a formal understanding, or by allowing the day to go by without doing anything, and never renewing it. In such case the partnership in the criminal purpose continues into the period. In so far, then, as it continued into the period, it was not barred by the statute of limitations. The mere fact that the prosecution for the agreement which initiated the partnership is barred is no reason for barring it as to so much of the partnership as has continued into the period. It may be important to show something done in furtherance of the conspiracy within the period to establish its continuance into it. It is not essential to its continuance thereinto.

We come, then, to the question whether the government was entitled to a submission of such case to the jury. This depends on whether there was substantial evidence in support of that case. By substantial evidence we mean evidence fit to induce conviction. And in determining this we limit ourselves entirely to the government's evidence, for it is not the province of the court, on a motion for a peremptory instruction, to weigh the evidence. That is for the jury only, except that it may be weighed by the court on a motion for new trial. Jenkins & Reynolds Co. v. Alpena Portland Cement Co., 147 Fed. 641, 77 C. C. A. 625.

[28, 29] In order for the defendants to have so conspired it is essential that they had such connection with the National Company that in the performance of their duties they had to do with its competitors. Those of its officers and agents who had nothing to do with competition, as, for instance, those in the manufacturing department, cannot be said to have so conspired. It is not sufficient to connect any officer or agent of the National Company with the conspiracy that they knew of it or acquiesced in it. They must by word or deed have become a party to it. People v. Richards, 1 Mich. 216, 51 Am. Dec. 85; 5 R. C. L. p. 1065.

[30] The president and general manager of the company had to do with competition. Both, the latter under the former, had supervision

of its entire business. They were located at Dayton. The United States was divided into sixteen districts. Over each was placed a district manager. Those district managers were located in the principal cities of the country. They had complete charge of the business in their respective districts, which included sales and competition. Sales were made by sales agents and salesmen distributed throughout the country; the latter being under the former, and both under the district managers. In making sales they were brought into contact with competition. There was a competition department, with a competition committee. This committee was located at Dayton. It had entire supervision of competition. It had executives who dealt with competition in the field, known as "company salesmen." They worked in conjunction with sales agents and salesmen, and when in the field were under the district managers. The nexus between the competition department and the president and general manager was the executive secretary. Besides these, there was a sales manager and assistant sales manager located at New York. They had more or less to do with competition. The district managers at times held conventions at Dayton. They were attended by the president and general manager, the members of the competition committee, the executive secretary, and the company salesmen. At these conventions the subject of competition was given prominence. The sales agents and salesmen at times held conventions in different parts of the country, and at these conventions competition was a subject of discussion. Some of these officers and agents—at least the president and general manager, competition committee, and district managers—took part in framing the policy of the company as to competition. And it would seem that most, if not all, of them knew of it and had a hand in carrying it out. The sales agents and salesmen were paid a commission on their sales. All the others received salaries.

All but three of the plaintiffs in error were connected with the National Company when the indictment was found, and most of them were connected in one or the other of the capacities above set forth, and had been so for some time. The plaintiff in error John H. Patterson was president; Edward A. Deeds, vice president and a director, and possibly assistant general manager; William F. Bippus, treasurer and a director; Alfred A. Thomas, general counsel and a director; Robert Patterson, a director; Thomas J. Watson, sales manager; Joseph E. Rogers, assistant sales manager; Alexander C. Harned, executive secretary; Alexander W. Sinclair and John E. Range, company salesmen; and Frederick S. High, Pliny Eves, Arthur A. Wentz, George E. Morgan, Charles T. Walmsley, Charles A. Snyder, Walter Cool, Myer N. Jacobs, Mont L. Lasley, M. G. Keith, J. C. Laird, W. C. Howe, and E. H. Epperson, district managers. It is not certain that the plaintiff in error Jonathan B. Hayward was then connected with the company; if so, it was as patent counsel. The plaintiff in error William H. Muzzy ceased his connection in 1911, and was then connected with the patent department at least as an attorney. Both Hayward and Muzzy had been members of the competition committee. And the plaintiffs in error William Pflum and Earl B. Wilson

ceased their connection in 1910; the one being general manager, and the other sales agent. John H. Patterson had been president since 1884, and all the others had been connected with the company many years, though not in the same capacities in which they were then connected, and yet most of them in capacities which caused them to have to do more or less with competition.

We think it clear that there was substantial evidence to the effect that there was a conspiracy on the part of those officers and agents of the National Company who then had to do with competition against most, if not all, of the competitors named who were in existence before the American of Columbus came into existence, which was not later than the early part of 1907, except the Peninsular, Burdick-Corbin, and Dial, as long as they were in existence within the 20-year period, and that this conspiracy included the use of some, if not all, of the means specified, and other means not specified aimed to be covered by the eleventh item, and that when that company came into existence there was a generic conspiracy against all competitors, at least all who might endanger the National's supremacy, which generic conspiracy had been in existence at least from the beginning of the 20 years. In an issue of a publication of the company seemingly for distribution amongst its officers and agents, of date May 1, 1892, occur these statements:

"If the opposition knew what is in store for them, they would not waste any more time and money staying in the business. They are all beginning to realize that there is no hope for them."

"It is only a question of whether we propose to spend the money to keep down opposition. If we continue, it is absolutely certain no opposition company can stand against this company and its agents. If necessary, we will spend five times as much money as we have already done, in order to down opposition. If they really believe this, they will throw up the sponge and quit."

"We are receiving overtures to buy out opposition. We will not buy them out. We do not buy out; we knock out."

In an issue August 1, 1895, occurs this statement:

"We are determined to absolutely control the cash register business."

And in an issue of date March 25, 1897, after setting forth the policy of the company of frankly informing a competitor of the purpose to drive him out of business, occurs this statement:

"This, it is true, is what is called 'securing a monopoly'; but we think there can be no possible economic or other objection to it. Cash registers are not a necessity of life. Any one who chooses can do business without them, thus contributing nothing to the 'monopoly.'"

It is then stated that "this monopoly" "is managed upon a liberal and broad-minded plan." And at a convention of the district managers held at Dayton July 22, 1907, the defendant John H. Patterson, president, thus expressed himself to them:

"We want Mr. Anderson of the competition department to give you a little idea of how we are going to control competition. We want Mr. Hayward also to give you a little talk. We want Mr. Muzzy to tell you how we are going to absolutely control the competition of the world, because we want you to feel this way. The first thing we aim to do is to keep down competition."

And again:

"I asked the Standard Oil Company what was the secret of their success, and they said this question could be answered in a very few words. Men, nothing but men; men well organized; they will keep down competition and make things succeed."

In the publications of the company and in the communications between the officers and agents having to do with competition, terms of warfare were not infrequently used, such as battle, fight, enemy, ammunition, shot, whipped, victory, and flags flying. During that time all the competitors named then in existence retired from the field. The American of Philadelphia, Boston, Hallwood, International, Hubinger & Carroll, and Latimer quit. The National does not seem to have been the cause of the Latimer quitting. The Century, Chicago, Cuckoo, Globe, Ideal, Kruse, Lamson, Metropolitan, Navy, Osborn, Standard, Simplex, Sun, Toledo, Union, and Weller sold out to the National, and it discontinued their business. The American of Philadelphia and Boston quit because of infringement suits brought against them by the National, in which it was successful. The decisions in its favor against them are National Cash Register Co. v. American Cash Register Co. (C. C.) 47 Fed. 212; National Cash Register Co. v. American Cash Register Co., 53 Fed. 367, 3 C. C. A. 559; National Cash Register Co. v. Boston Cash I. & R. Co., 159 U. S. 261, 15 Sup. Ct. 1041, 40 L. Ed. 142. The result of this litigation may possibly have had something to do with other competitors quitting or selling out. Infringement suits were brought against most, if not all, the others, and these suits had more or less to do with their quitting or selling out. There was evidence tending to show in some of these instances at least that the claim of infringement was unfounded and known to be so, and that the suits for infringement were not brought in good faith, but for the sole purpose of aiding in driving the competitors from the field. The government claims that such was the case in all instances. In most, if not all, of these instances, some, if not all, of the other means were resorted to, and it is not unlikely that in some instances at least they were more effective than the suits. And such means were resorted to in some, if not all, the cases where the suits were successful. The Hallwood, International, Century, Chicago, Cuckoo, Globe, Ideal, Metropolitan, Navy, Osborn, Simplex, Sun, Toledo, Union, and Western retired from the field during the 7 years prior to 1907. Most, if not all, of the others retired before then, and mainly in the early part of the 20-year period.

In justice to the National Company and the defendants it should be noted that it was the pioneer in the cash register business and developed it. It owned the basic patents and must have acquired in a proper manner a very great number of improvement patents. In addition to this, it had the advantage of very great capacity in the management of its affairs. These two considerations together, without reference to any unfair treatment of its competitors, are sufficient in themselves to account in a large measure for the success it has attained. And it is not unlikely that its trade was pirated by other competitors besides the American of Philadelphia and the Boston, against whom it obtained

decrees of infringement, and that these, as well as others, in their competition with it, resorted to some of the tactics complained of here.

We think it clear, also, that there was substantial evidence to the effect that this generic conspiracy was directed against the American of Columbus when it came into existence, and became specific as to it, and that it continued up until just shortly before the beginning of the 3-year period. The only other competitors then in existence were the Peninsular, Burdick-Corbin, and Dial, neither of which, as stated, was of much consequence. That company was the successor of the International, and it in turn of the Hallwood. The Hallwood during its existence, which covered a number of years, was one of the National's most stubborn competitors. It went into the hands of a receiver in 1903 or 1904. There was evidence tending to show that an effort was made, whilst its assets were in such hands, by the National, to acquire them without its being known in the transaction. The International acquired them, and then the American. Its connection with the Hallwood not unlikely aided it in getting established in business soon after entering the field. So identified with the Hallwood was it that its machines were frequently called Hallwood, and it, sometimes, the Hallwood Company. In view of its connection with the Hallwood Company, one would expect the generic conspiracy to be directed against it as soon as it came into existence, and so the government's evidence tended to show. May 4, 1907, the district manager at Detroit, Henry F. James, wrote to the assistant head of the competition department, Joseph E. Warren, that the Hallwood (i. e., American) situation in Detroit looked rather serious, and suggested the employment of the plaintiff in error Alexander W. Sinclair, then off the roll, to hire the Hallwood agent at that point. Warren answered that the competition did not warrant placing Sinclair on the roll again, and suggested that he (James) was in a better position to hire the agent than Sinclair. There was no evidence of anything else of a specific character during this year. But there were general statements as to competition which could not have had reference to any one but the American. Such was the statement of plaintiff in error John H. Patterson, at the convention of district managers July 22, 1907. June 20, 1907, the general manager, Hugh Chalmers, wrote to all the sales agents and salesmen, suggesting that they call on the users of competing machines and point out to them the weaknesses and deficiencies thereof, so that, even if they could not make a trade, they would cease to be a "plugger" for the opposition. And September 6, 1907, the head of the competition department, C. D. Anderson, wrote James at Detroit that the company was never in better shape to take care of competition than at that time, and for that reason they did not intend to let it increase again.

March 1, 1908, the plaintiff in error Sinclair entered the employ of the American and located at Detroit. It is possible that he was then still off the National's roll. He continued in its employ there until September 24, 1908. During this time a vigorous effort was made to drive him from the field, and it finally succeeded, when he re-entered the National's employ as a company salesman, and so continued until

the trial. The plaintiffs in error Pflum, then general manager, Harned, then executive secretary, and Watson, then sales manager, participated in this effort. The method of attack was to prevent him from making sales of American machines and to displace such as he made. The way in which the former was attempted was by offering Hallwoods owned by the National Company at low prices—i. e., 30 cents on the dollar—in competition. The intention was to construct a machine specially for that purpose. In letter from James to Harned of date March 16, 1908, he stated that he needed a proper tool with which to fight Sinclair's competition, and requested that 10 or 12 Hallwoods be sent him, "as our machine parallel to Hallwood will not be ready for some time," and Harned in his answer said that work on drawer-operated machine—which was the character of the American—was being pushed and they would be able to give it to him sooner than he had stated. But whether this machine was used in this connection does not appear. The way in which the displacements were brought about was by offering the regular National machines on unusual terms. Both methods were unfair. Their purpose was to drive Sinclair and the American which he represented off the field, so that the National might have it to itself. May 16, 1908, Harned wrote James, congratulating him on displacing six Hallwoods taken in part pay for six Nationals, and stated that all at the factory, including plaintiff in error Deeds, were pleased and gratified at the outcome, and that he had put a crimp in Sinclair from which he would have difficulty in recovery. June 9, 1908, James wrote Pflum that since Sinclair had taken hold he had blocked 25 of his sales and displaced 9. September 4, 1908, plaintiff in error Watson issued a circular to the selling force empowering them to sell Hallwoods at 30 cents on the dollar. There was evidence of unfair means being used during this same time at Los Angeles to prevent the sale of the American machine, the details of which need not be given. And September 10, 1908, James, in whose territory Grand Rapids, Mich., was located, wrote plaintiff in error Watson, wanting to know the conclusion of himself and plaintiff in error Pflum as to the situation at that place, and whether they had succeeded in hiring Cleaves, the agent of the American, and saying that, if they could not hire him, they should have some special men—i. e., company salesmen—there until they ran him out of business.

After Sinclair returned to the service of the National, he was sent to Toledo, Ohio, where he remained at least until in November, 1908. Whilst there he adopted the same tactics that had been used against him in Detroit to drive out the agents of the American at that point. Finally, in the middle of January, 1909, James, the district manager at Detroit left the service of the National, and in breach of a contract that he had with it at once entered the employ of the American and was placed in charge of several states, with headquarters at Detroit. In the early part of February, 1909, certainly not as late as the 22d of that month, the new district manager appointed to take the place of James at Detroit was installed. At a meeting of the sales agents and salesmen who were to be under him, held on that occasion, the plaintiff in error Watson was present and undertook to outline the policy

of the National in meeting competition, and in the course of his remarks, according to one witness, he said that it would be necessary to use every means possible to put James out of business, and according to another that they did not want him to get a foothold in Detroit, and that they would move their executive offices to Detroit, but that they would put him out of business.

Thus it is that the government's evidence tended to establish a conspiracy on the part of some of the defendants at least against the American, and brought it down almost to the door of the 3-year period. It remains to consider whether there was substantial evidence to the effect that it entered that door. Possibly in view of the fact that the American was still actively in business—that what had transpired preceding the 3 years down almost to it indicated an absolute and fixed purpose to restrain the trade of the American, if not to drive it out of business, without any indication of a change of purpose before the 3 years—and that the American was represented at Detroit by the National's former representative, against whom it had a grievance, it was for the jury, without more, to determine whether the conspiracy continued into the 3 years. But the case does not depend upon presumptions. Things were done within the 3 years by representatives of the National in restraint of the American's trade and commerce. According to the defendants, all that was done was by sales agents and salesmen, and none of the plaintiffs in error were directly connected with it; and what was done by sales agents and salesmen was scanty, in view of the fact that the National had 750 of such representatives distributed throughout the country, and the American was doing business all over it. They urge that what the government's evidence established was done should be taken as being all that was done. The American knew of all unfriendly action towards it, and actively assisted it in the prosecution of the case, and the evidence disclosed that it made a very thorough investigation. Here, according to defendants, was all that was done. In 22 instances sales agents and salesmen of the National attempted to induce purchasers of American machines, who had not paid for them, to repudiate their contracts by seller's talk and offering to allow them what they had paid on the purchase price of Nationals, in two, and possibly three, of which instances the attempt was successful. They occurred in 14 different states and 17 different localities. Ten of them occurred in 1909, 7 in 1910, and 5 in 1911. Defendants would have it that these were all such instances, but the tendency of the testimony of Steubenrauch is to establish 8 others, 6 of which were in 1910 and 2 in 1912, in Connecticut. In addition to these the acts in restraint covered by the government's evidence were the display in March, 1909, by the National's sales agents at Los Angeles, in California, in his show window, smashed-up Hallwood cash registers with a card bearing this inscription:

"Hundreds of merchants have exchanged unsatisfactory Hallwood cash registers for Nationals. We sell them at 30 cents on the dollar. But as they have no commercial value and do not sell, we are compelled to break them up to make room and will sell as Old Junk"

—an unsuccessful attempt by the sales agent of the National at Dallas, Tex., in the winter of 1909–10 to bribe a drayman in the employ

of the American agent to tell him where he delivered every American machine, and an unsuccessful attempt by the sales agent of the National at Los Angeles, Cal., May 1, 1910, to induce the American agent at that point to leave its employ and enter that of the National. The defendants contend that it is more reasonable to account for these acts by a desire on the part of the sales agents and salesmen to make commissions than the existence of the conspiracy charged. Undoubtedly these acts are small in number compared with the number which might have been, and it is possible to account for them on the grounds suggested. And the fact that James, the most important witness for the government, did not definitely testify to any specific acts in restraint of his trade after he became connected with the American is favorable to the defendant's position. But even on the basis that the foregoing list exhausts all acts in restraint of the trade and commerce of the American within the 3 years, and that these are to be accounted for, as defendants would have it, or as mere sequelæ of a conspiracy that terminated before the beginning of the 3 years, still we are constrained to hold that it was for the jury to determine whether the conspiracy continued into the 3 years. We have shown that the government's evidence tends to establish the continuance of the conspiracy almost up to the very beginning of the 3 years. Something happened shortly after the beginning of the 3 years calculated to terminate the conspiracy, which may account for nothing being done by the defendants in error within the 3 years indicating the continued existence of the conspiracy, and which, if it was the cause of its termination, involves its continuance into the 3 years. That was action on the part of James to call the National to account for its attitude towards and action against the American. On July 14, 1909, an information in the nature of a quo warranto on behalf of the people on relation of James was filed in the Supreme Court of Michigan against the National Company to oust it from that state for violating its antitrust laws, which proceeding resulted in a judgment for a fine on July 14, 1914. In the nature of things, some time must have been taken to prepare for the proceeding, and the evidence disclosed that James caused affidavits to be taken of unfair acts towards the American by National agents as far back as in March, 1909. It is not unlikely that the National became aware of this contemplated proceeding, and knowledge of it was calculated to cause it to take steps to end all action against the American which could reasonably be complained of. And we find that on April 1, 1909, the plaintiff in error Pflum sent the following letter to all the district managers, to wit:

"The National Cash Register Company.

"New York, April 1, 1909.

"To All District Managers:

"Mr. M. N. Jacobs: In the various conventions I have attended, I found that some of the newer members in the districts are not thoroughly clear on the best way to handle sales made by other companies. Please see that every agent in your district thoroughly understands our position in the matter.

"You know what this policy is, but in brief will say that in no case will we permit any of our agents to misrepresent cash registers manufactured by other companies, neither will we permit any agent or person in our employ to induce any purchaser of a cash register made by any other company to break

his contract and return the register to the manufacturer. With the line of registers that our agents now have, they are able to show the superiority of Nationals over those of any other make and at lower prices.

"There has been no violation of our policies that I know of, but I give you this information because of the inquiries received from the newer men in the field.

"Please see that these instructions are carried out in every detail and that the new men are so instructed on entering the field.

"Yours very truly, Wm. Pflum,
"W. P.—T. Vice President and Manager."

There is room to claim that such is the only reasonable ground to account for this letter being written and sent out. If so, there is room to claim, further, that the conspiracy continued at least until then.

[31] But we would not be understood as holding that, apart from this construction, the acts in restraint of the American's trade within the 3 years above given were not sufficient, in connection with the evidence tending to trace the existence of the conspiracy up to the beginning of the 3 years, to require that the question as to its continuance within the 3 years be submitted to the jury. The question is not whether those acts were sufficient to establish the entering into a conspiracy in the first instance, but the continuance of a conspiracy theretofore formed. And that list cannot be said to be exhaustive. We have heretofore noted that James in his letter to Harned of March 16, 1908, and Harned in his answer, referred to a drawer-operated machine parallel to the Hallwood (i. e., American), which the National was making for the purpose of fighting the American therewith. The government's evidence tended to show that a machine known as 1,000-line machine, and which not unlikely was this machine, was used only for the purpose of fighting the American and keeping it from making sales within the 3 years. If so, this could hardly be without some of the defendants being connected with it. The government's position here was combated strongly by the defendants, but we cannot weigh its evidence on this point as against that of the government. For these reasons, therefore, we think the case was for the jury, and the court did not err in overruling all the motions. It is not the province of an appellate court to weigh the evidence. What the trial court might do on a motion for new trial as to some of the defendants, in the view which we have taken of the nature of the offense charged, we need not pause to consider.

4. It is now in order to take up the assignments questioning rulings upon the admissibility of evidence. They are very numerous, but the consideration of them can be shortened by classification. In considering them, the case for the jury, as we have determined it to have been, should be kept constantly in mind. That case is whether within the three years the defendants conspired in restraint of the trade of the American of Columbus, by the use of the fifth and ninth means. No evidence that was not relevant thereto was admissible, and all that was was admissible, if not otherwise objectionable. The primary classification of these rulings is into those involving evidence that was admitted and those where the evidence was excluded. We consider first those where the evidence was admitted. In this connection it may be said generally that the admissible evidence was not confined

to that which bore directly upon the existence of such conspiracy within the 3 years. All that was not otherwise objectionable tending to show the existence of a generic conspiracy when that company came into existence and its fixed and absolute character was relevant and admissible. Likewise as to all evidence tending to show that upon its coming into existence the generic conspiracy was directed against it specifically and continued down to the beginning of the 3 years.

The admitted evidence involved in the rulings covered by the assignments relates to transactions within the 3 years and to transactions prior thereto as far back as the beginning of the 20 years. Here we consider first that which relates to transactions within the 3 years. And that may be divided into the evidence of the acts in restraint of the American trade, heretofore referred to, evidence of an act against that company, not heretofore referred to, and evidence of acts against the Michigan and Dial companies.

[32] All of the evidence of acts against the American, heretofore referred to, was objected to, and the rulings admitting it are assigned as error. It is urged that none of those acts come within the means specified in the indictment, and that the eleventh item is insufficient, under the authority of the case of United States v. Greene (D. C.) 115 Fed. 343, 346. We think, however, that they fairly come within the fifth and ninth. Greater stress is made on the consideration that it was not shown that any of the defendants were connected with any of those acts. It is true that there was no direct evidence of such connection, apart from the use of the 1,000-line machines; but this circumstance did not render evidence of those acts inadmissible. The government would base its admissibility on the doctrine of respondeat superior. It cites the cases of United States v. Gooding, 12 Wheat. 460, 6 L. Ed. 693, Cliquot's Champagne, 3 Wall. 114, 18 L. Ed. 116, and Stockwell v. United States, 13 Wall. 531, 20 L. Ed. 491, where it was held that:

> "Whatever is done by an agent in reference to the business in which he is at the time employed and within the scope of this authority is said or done by the principal, and may be proved as well in a criminal as in a civil case in all respects as if the principal were the actor."

But this doctrine can have no application here, as the persons who did the acts—i. e., sales agents and salesmen—were not the agents of the defendants. They were the agents of the National Company. They were under defendants, but this did not make them defendants' agents. It urges further that they were co-conspirators with defendants, and under the case of Clune v. United States, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269, what one conspirator does is evidence against the other, even though he is not a defendant or charged with being a party to the conspiracy in the indictment. Possibly this is sufficient to uphold the action of the court in admitting the evidence. But it is not necessary to rely on it. All the acts were done in the regular course of the business of the National Company. Those sales agents and salesmen were under the direct supervision of some, at least, of the defendants. There was substantial evidence that

prior to the 3 years the defendants were in a conspiracy to restrain the trade and commerce of the American of Columbus by causing such acts to be done, and the sole question was whether that conspiracy had continued into the 3 years. The doing of those acts was relevant to that issue. It was not an unreasonable inference that they were to be accounted for by the continued existence of the conspiracy. Possibly they are to be accounted for by the initiative of the sales agents and salesmen in their anxiety to make commissions or as mere sequelæ. But it was for the jury to determine how they were to be accounted for as between those three possible ways of doing so. The defendants contend that is a case of an inference upon or from an inference, and that this is not allowable under the cases of United States v. Ross, 92 U. S. 281, 23 L. Ed. 707, and Manning v. Insurance Co., 100 U. S. 693, 25 L. Ed. 761. That it is a case of an inference upon or from an inference is attempted to be made out by tracing the course of inference in this way. An inference is first drawn that the sales agents and salesmen acted upon the instructions of the National Company, and then the further inference is drawn that defendants were connected with such instructions. This case does not involve any such question. It is a case of immediate inference. The course of inference is not as claimed, but from the acts done to the conspiracy as the cause thereof. The court, therefore, did not err in admitting the evidence.

[33] The evidence of an act against the company not heretofore referred to was as to something that happened in connection with one of the attempts on the part of the National's sales agents and salesmen to induce purchasers of American machines to repudiate their contracts of purchase, to wit, the attempt as to Conrad Green & Sons of Portland, Oregon, in the latter part of 1910. The agent of the American, who made that sale, left its employ the latter part of March, 1911, and entered that of the National. Evidence was admitted that after the delivery of the machine it was noticed to be out of order. The American agent made repeated attempts to fix it, but it remained out of order until he quit its employ. After he left, his successor, a repairman, who with the agent had examined the machine before its delivery and found it to be in perfect condition, examined it again and found that it was out of order because a piece of its mechanism was bent. The government's position was that the American agent had bent it, at the National's instance. There was no other evidence that the National had any other connection with the matter than that the American agent entered its employ four or five months afterwards and one of its competition men was seen in his store about three weeks before he did so. We do not think the evidence was sufficient to connect any National agent with the defective condition of the machine. There was no evidence of any other such act having ever been committed or attempted against the American. We, therefore, hold that there was error here.

[34, 35] The acts against the Michigan and Dial, evidence of which was admitted, were these. A salesman of the National attempted to induce a dealer in Michigan cash registers, who bought them out-

right from the Michigan Company and resold them, to discontinue the business by threats of interference. A similar transaction to this took place prior to the three years, i. e., in 1908. As to the Dial in one instance an agent of the National happening in the office of that company when an acquaintance was there negotiating for some of its stock advised him not to buy it; and in another the plaintiff in error Muzzy attempted to purchase the business or patents of the company which was unsuccessful. We think the court erred in admitting this evidence. The government does not contend that the evidence as to the Dial was sufficient to make a case for the jury of conspiracy against it and we have held that that as to the Michigan was not sufficient for that purpose. If this evidence did not tend to establish a conspiracy against those companies, it did not tend to establish one against the American.

[36] We come now to the evidence as to transactions prior to the three years as far back as the beginning of the twenty years which was admitted over defendants' objection and the rulings as to which are assigned as error. The bulk of the evidence relates to such transactions and most of it was objected to. If the admission of any of the evidence as to acts against the American prior to the three years which, we have theretofore stated, is assigned as error, the assignment has escaped us. The admission of the evidence as to the other act against the Michigan is assigned as error. This assignment is well taken for the reason given as to the act within the three years. The rest of the assignments here have to do with evidence tending to show a conspiracy against the competitors who ceased to exist prior to 1907 and a generic conspiracy which was directed against them. The same objections are made to some of this evidence which were made to the evidence of the acts against the American within the three years heretofore set forth. It is urged that the transactions to which it relates do not come within the means specified and the eleventh item is not sufficient to warrant evidence of them under the Greene Case. And the defendants were not shown to be connected with or responsible for them. It is also urged as to the evidence relating to transactions and matters occurring in the early part of the twenty years that they were too remote. We think, however, that none of it was too remote. It as well as the evidence of later transactions and matters tended to show a generic conspiracy and bore on its fixed and absolute character and on its nature otherwise. As to defendants' connection therewith they all occurred in the regular course of the business of the national and whether any of the defendants and which of them were connected therewith was open to inference to be drawn by the jury.

[37] Nor do we think the objection to certain of this evidence that it did not relate to transactions coming within the means specified well taken. The ruling of the court in refusing to require a bill of particulars of the means intended to be covered cannot be questioned here and the indictment was quite liberal in the matter of specification. Besides the case for which the defendants were subject to conviction was limited to means specified, to wit, fifth and ninth. The

question here is whether in establishing the generic conspiracy—a fact relevant to the existence of the specific conspiracy covered by that case—the government was limited to the means specified as to competitors who ceased their existence prior to 1907. The tendency of the use of other means than those specified was to establish that the generic conspiracy was to use every possible wrongful means that might be effective in putting an end to competition.

[38] Special emphasis is made upon the assignments which call in question rulings admitting evidence concerning the purchase of the businesses of 16 competitors by the National prior to 1907, and how the purchases came about. But all this evidence was admissible. Its tendency was to establish a generic conspiracy to compel competitors to sell out to the National by the use of any effective wrongful means in existence when the American came in the field, and the tendency of such generic conspiracy is to establish a specific conspiracy against the American when it came into existence, which continued into the 3 years, at least to restrain its trade and commerce, if not to compel it to sell out to the National, by the use of the fifth and ninth items. It is true that, at the time of these purchases, suits for infringement were pending against most, if not all, of these competitors. If such suits were brought in good faith and were the cause of the competitors selling out, then the tendency of that evidence was not to establish such a generic conspiracy. The case of Virtue v. Creamery Packing Company, 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. 393, was an action for treble damages under the seventh section of the Anti-Trust Act for a conspiracy in restraint of the plaintiff's interstate trade by prosecuting suits against them for infringement of patents and circulating reports that his articles were an infringement thereof. Two suits for infringement had been brought, in one of which infringement was denied and in the other decreed. In connecton with those suits such reports were circulated. It was held that no recovery could be had. Mr. Justice McKenna said:

"Patents would be of little value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal. Patent rights, it is true, may be asserted in malicious prosecutions as other rights * * * may be. But this is not an action for malicious prosecution. It is an action under the Sherman Anti-Trust Act for the violations * * * of that act, seeking treble damages."

He did not mean by that that no recovery could be had under that act for damages caused by a conspiracy in restraint of interstate trade by the malicious prosecution of suits for infringement. He meant no more than that it did not appear that there was any such conspiracy in that case. So far as appeared, both suits were brought in good faith.

But here there was evidence tending to show that suits were not brought in good faith, and, on the contrary, were an "illicit use of the courts as instrumentalities of oppression," condemned in the case of Commercial Acetylene Co. v. Avery Portable Light Co. (C. C.) 152 Fed. 642. Besides, there was evidence tending to show in certain of the cases, at least, that the bringing of the suit was not

the real cause of the competitors selling out, but the use of other wrongful means. In addition to this, in each case of purchase it was made a provision in the contract that the competitor should not engage in the cash register business for 20 or 25 years, except one or two states in the West, where the cash register business was not large, which evidenced the purpose to keep competitors out of the business. This circumstance made what is known as the Leland contract, settling litigation growing out of the suit against the Boston Company, in which the National was successful, admissible in evidence. After the end of that suit the National brought suits against certain officers of the Boston to recover damages. In the case of National Cash Register Co. v. Leland, 94 Fed. 502, 37 C. C. A. 372, it was held that it was entitled to recover, and this is the litigation in settlement of which the contract referred to was executed. By it the National acquired patents, models, and certain apparatus of the Boston Company. It contained a provision by which the officers were not to engage in the cash register business for 25 years, except in Montana and Idaho. There was no error in admitting any of these contracts in evidence.

[39] The admission of contracts with others than the competitors named in the indictment, eliminating them from the cash register field, is also assigned as error. There were five or six instances of this kind. The parties with whom the contracts were made were mainly dealers in second-hand registers. They evidence a purpose to acquire complete control of the business in second-hand registers of its make, and were admissible as tending to show a generic conspiracy and its character, notwithstanding they were not referred to in the indictment.

[40] The ground of objection to the evidence thus far considered is at bottom want of relevancy. Except to the extent stated we have found it to be relevant. In addition to these portions of the evidence, the admission of certain other evidence is assigned as error on the ground of its being hearsay. It is evidence as to what took place at two conventions of district managers held at Dayton, one in December, 1902, and the other in July, 1907. We have made use of what was said by the defendant John H. Patterson at the last of the two. What took place at these conventions was evidenced by what purported to be minutes thereof. Those of the first convention were identified by a witness who had been assistant to the head of the competition department and was present at it. He further testified that the minutes were taken by stenographers, amongst whom was the plaintiff in error Harned, who took most of them, and that he thought a copy was sent to each district manager, and several were kept in the competition department. Those of the last one were identified by the former district manager at Detroit. He testified that they were sent to him by the National Company with his name on it. It is not clear whether he is to be understood as testifying that he was present at the convention. Two objections are made to that evidence. One is that both were copies, and the originals should have been produced or accounted for. The other is that the evidence of what took place at those conventions was hearsay. The first ob-

jection was not made in the lower court. That raised by the other was that before the minutes were read in evidence their accuracy should have been guaranteed, either by the persons who made them or by others who were present at the conventions. Strictly speaking, the objection that the evidence was hearsay raised this question. But the objection should have been more specific. It should have been expressly urged that such guaranty should be made before admitting the minutes in evidence. It might have been furnished. Because of this, if any error was committed in admitting these minutes in evidence, it cannot be considered.

[41, 42] This brings us to the assignments questioning rulings excluding evidence offered by the defendants. That mainly complained of is the rejection of evidence offered to prove that the National owned unexpired patents covering the machines made and sold or offered to be sold, by the 16 competitors whom it bought out, by the Hallwood, International, and Hubinger & Carroll, which quit business, and by the American of Columbus, during the times they were in existence, which machines, therefore, infringed those patents. According to this offer, all the competitors who ceased business prior to 1907, and the American of Columbus, against whose trade and commerce defendants are charged with conspiring, were infringers of the National's patents, and in so conspiring they were but seeking to prevent them from doing that which the National had a right to have them refrain from doing. We are not much impressed with the good faith of the offer as to the American. The conduct of the National and its managing officers during the five years of its existence preceding the indictment seems to belie it. During that time no suit for infringement was brought against that company, except the one heretofore referred to, and there is no indication that they then thought that it was liable to such suit. It is not likely that they would have remained quiescent in this regard, if they so thought. Because of the absence of any evidence to this effect, we have held that the conspiracy as to that company, if there was one, did not include the sixth and seventh means. But, assuming that the offer was made in good faith, we think the court was right in excluding the evidence. It could not have been admissible to meet a charge that it had in bad faith threatened to bring suits for infringement. There was no such charge to meet. The only possible ground for its admissibility was to make good that defendants had the right to conspire in restraint of the interstate trade and commerce in cash registers of the American by the use of the fifth and ninth means, and hence were not guilty of an offense under first section of the Anti-Trust Act in so doing.

This brings before us the question whether a patentee and another, or the officers and agents of a patentee, can conspire in restraint of the interstate trade or commerce in the article covered by the patent of persons who have no right to engage in such trade and commerce, and who by engaging therein infringe the right of the patentee; i. e., whether such a conspiracy comes within that section. Its disposition involves the rights of a patentee. These rights are two, one statutory,

and the other at common law. The statutory right is usually stated in its adjective form; i. e., to exclude or to prevent others from making, using, or selling the article covered by the patent, or, in other words, to sue or to bring actions against others who are or have been making, using, or selling them. But this right has also a substantive form. It is that others shall refrain from making, or using, or selling the article. The patentee's right at common law is to make, use, or sell the article. This right is to no extent dependent on the statute. The patentee, therefore, has the right to have others refrain from selling the article covered by his patent, and if they will not do so he has the right to prevent them from selling by suit. Has a patentee, then, the right to prevent any infringer from selling the article covered by his patent in any other way? He certainly has no right to do it by killing him, or destroying his factory, or such infringing articles as he may own. In selling the infringing article, no assaults are made upon his person, so that there is no room for claiming that his action was in self-defense. And the infringer owns his factory and articles. The patentee may be entitled to a destruction of the infringing articles through the process of the court, but not otherwise. But has he the right to prevent him from so doing by action outside of the courts, not involving an invasion of the rights of person or property of the infringer; i. e., by the use of means which would be wrongful if used by him to prevent another from selling articles not covered by his patent—i. e., such means as are charged here.

We are not concerned here with the question as to what a patentee may himself do in a general way to protect the substantive right which he has from invasion. The question in hand is whether he and another, or his officers and agents in his interest, may conspire to prevent an invasion of his rights in the interstate field by the use of any such means. This depends solely on whether such a conspiracy is within the first section of the Anti-Trust Act. And it would seem that to ask this question is to answer it. The terms of the section are of a most sweeping character. It includes every conspiracy in restraint of interstate trade or commerce. It is not a question whether it is rightful or wrongful interstate trade or commerce that is covered by the conspiracy. It is sufficient that it is interstate trade or commerce. If two or more persons in no way interested in a patent were to conspire in restraint of the interstate trade or commerce of an infringer, no one would contend that the conspiracy was not covered by the statute. No more is it open to contend that a conspiracy by a patentee and another, or by the officers and agents of a patentee in his interest, to restrain the interstate trade or commerce of an infringer, is not within the statute. The intent of the statute was to sweep away all conspiracies in restraint of such trade or commerce, whatever their character may be. The statute respects the monopoly of the patentee. It to no extent invades the rights conferred upon him by his patent. Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; United States v. Winslow, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481. But the right to conspire with

another or others in his interest in restraint of the interstate trade or commerce covered by his patent is not one of the rights conferred thereby, and such a conspiracy is within the statute. Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107. Mr. Justice McKenna there said:

"Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights a universal license against positive prohibitions. The Sherman Law is a limitation of rights—rights which may be pushed to evil consequences, and therefore restrained."

We are therefore clearly of the opinion that the defendants were not entitled to offer evidence that the trade and commerce of the American of Columbus in cash registers was covered by an unexpired patent owned by the National.

[43] How, then, as to the competitors who ceased to exist prior to 1907, and who either sold out to the National or just quit doing business? Was evidence that their trade and commerce was covered by unexpired patents so owned admissible? We think it was. As to them the question before the jury was not whether the defendants had the right to conspire in restraint of their interstate trade or commerce. The defendants were not on trial for any such conspiracy. The right to prosecute them for such conspiracy had been long before barred by the statute of limitations. But the question was before the jury whether they had conspired against those competitors to restrain their interstate trade or commerce by threatening to bring and bringing in bad faith suits against them for infringement of patents to compel them to sell out to the National or quit the business. It was the position of the government that they had so conspired, and there was evidence tending to establish that they had, at least as to some of them. This was not an ultimate question in the case. It was only a subordinate one, and yet it was a real one. It was not primarily subordinate to the question whether the defendants had conspired in restraint of the interstate trade or commerce of the American of Columbus by the use of such means. As we have seen, there was no such question in the case. It was primarily subordinate to the question whether, prior to 1907, when the American came into existence, the defendants were parties to a generic conspiracy in restraint of the interstate trade or commerce of all competitors who might endanger the supremacy of the National by the use of any effective means, of which a conspiracy against the American of Columbus by the use of the fifth and ninth means, which continued into the 3 years, was the outgrowth.

Now, as bearing on that question, we think that the defendants were entitled to prove, if they could, that the machines of those competitors were infringements. The means covered by the seventh item were in effect malicious prosecutions against those competitors—the bringing of suits for infringement, not in the belief that the National had a good cause of action against them, but without regard to whether it had or not—in order to drive them from the cash register field; i. e., in bad faith or without probable cause. A suit for malicious prosecution cannot be brought until the termination of the prosecu-

tion. In such a suit, therefore, it is never a question whether there was real cause for the prosecution. Its dismissal settles the question whether there was real cause. But it is a question therein whether there was probable cause. The suit cannot be maintained if there was. But here there was no termination of the suits for infringement, by a decision of the question of infringement involved therein. In most instances the suits were terminated by settlement. The question, therefore, whether there was real cause for bringing them, is still an open question. And if there was real cause for their bringing, they were not malicious prosecutions—they were not brought in bad faith. If in an ordinary suit for malicious prosecution it is a good defense that there was probable cause for the prosecution, so here the claim that these infringement suits were brought in bad faith is met by showing that there was real cause for them, in that the competitors were infringers of valid unexpired patents held by the National. The defendants were not limited to showing that the National acted on the advice of counsel in bringing the suits. They had the right to show, if they could, that such suits were based upon valid patents against real infringers. It is true that the effect of this is to bring into this prosecution a considerable number of patent suits as it were. But the government has brought them here by charging in the indictment that defendants conspired to drive these competitors from the cash register field by maliciously bringing suits for infringements of patents against them, and introducing evidence to that effect. We think, therefore, that the evidence was admissible, and that there was error in excluding it.

[44] It is also urged that the court erred in excluding evidence of competitive tactics and aggressions on the part of the National's competitors, offered by defendants. As we make it, this evidence related only to the Hallwood, the American's predecessor, and to Steubenrauch, the American's Connecticut sales agent; the conduct of the latter happening within the 3 years. We think this evidence was admissible. The relevancy of the government's evidence as to a conspiracy against the Hallwood was in its bearing on the existence of a generic conspiracy and its character. The tendency of the evidence as to its competitive tactics and aggressions against the National was to make out that, in so far as there was a conspiracy against the Hallwood, it was due to provocation. Provocation, therefore, was a possible element in the generic conspiracy, and, if so, the fact of there having been no provocation on the part of the American, the remote successor of the Hallwood, would make it open to contend that the general conspiracy was never directed against it. It is in this way that it seems to us that the evidence as to the conduct of the Hallwood bore on the question whether there was a conspiracy against the American. Then, as to Steubenrauch's conduct: The tendency thereof was to show that the conduct of the National's sales agent complained of was due to that conduct, and not to a conspiracy on the part of defendants against the American.

[45] Finally, the exclusion of the letters of plaintiffs in error High and Snyder to the plaintiff in error Pflum, of date, respectively, April

5, 1909, and April 6, 1909, in answer to his circular letter of April 1, 1909, to the district managers, heretofore quoted in full, are assigned as error. In those letters these two plaintiffs in error stated that the policy therein outlined had been pursued in their districts. We think the letters were admissible in evidence. They were written nearly 3 years before the finding of the indictment, and were a part of the res gestæ. Hibbard v. United States, 172 Fed. 66, 70, 96 C. C. A. 554, 18 Ann. Cas. 1040; Harrison v. United States, 200 Fed. 674, 119 C. C. A. 78; Gould v. United States, 209 Fed. 730, 126 C. C. A. 454. If there was anything in the circumstances then or theretofore existing affecting their good faith, they were for the jury to consider, just as it was for them to determine the good faith of the Pflum circular.

5. It remains to consider the errors assigned in connection with the charge to the jury. But few exceptions were taken to the charge which was given, and no assignment of error in this connection has been argued. We therefore pass these exceptions by. The court submitted all three counts to the jury. The defendants requested that the jury be instructed to find them not guilty on the second and third. In accordance with our holding as to the sufficiency of these two counts, the defendants were entitled to have the jury so instructed. The first count alone should have been submitted to them.

[46] The court clearly told the jury that the defendants could not be found guilty under that count unless they had conspired within the 3 years. This, of course, limited the case upon which they could be so found to competitors in existence during the 3 years. But defendants were entitled to have the jury instructed specifically that they could not be found guilty as to the competitors who ceased to exist before 1907. They asked specific instructions to this effect. These instructions were given as to 6 of them. They should have been given as to the other 20. That such instructions were given as to 6 made it more prejudicial that they were not given as to the other 20.

[47] The defendants also requested that the jury be specifically instructed that they could not be found guilty as to each of the 6 competitors who were in existence during the 3 years. They were not entitled to the instruction as to the American of Columbus. They were entitled to the instruction as to the other 5. There was no substantial evidence that within the 5 years defendants had conspired as to either of those 5 competitors. The instructions as to the Burdick-Corbin and Jewell were given. Those also as to the Peninsular, Dial, and Michigan should have been given. The defendants further requested that the jury be specifically instructed that they could not be found guilty of having conspired within the 3 years in restraint by the use of each of the 11 means specified. They were so instructed as to the fourth. They were entitled to have it instructed also as to the sixth, seventh, eighth, ninth, and eleventh. Whilst, as we have held, the first, second, and third means were noneffective, without more, and the evidence as to the conspiracy within the 3 years including either of those means was slight yet such as it was the jury was entitled to consider in connection with that bearing on the fifth and

ninth means, and no instructions should have been given which could be construed as excluding that evidence. That it is reversible error to submit to the jury the question whether the conspiracy in question includes means of which there is no evidence follows from the decision in Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232. The grounds upon which we hold the court erred in not giving the specific instructions indicated appear in what we have had to say on defendants' right to a peremptory instruction. The giving of them would have presented sharply to the jury the only ultimate question before it, to wit, whether within the 3 years the defendants conspired in restraint of the interstate trade or commerce in cash registers of the American of Columbus by the use of the fifth and ninth means specified.

[48-50] The defendants also requested the giving of three instructions embodying certain general propositions as to what it was not unlawful for the defendants to do in their several capacities as officers and agents of the National, to wit:

(1) "To require the agents of their company to report the names of persons who had purchased cash registers from competitors, or to secure samples of machines from time to time put on the market by competitors."

(2) "To sell or offer and try to sell National cash registers to persons who had bought and owned competing cash registers in exchange at such price as was satisfactory to the parties."

(3) "To compare by comparative demonstrations or otherwise competitive cash registers with National cash registers, for the purpose of demonstrating the superiority of the National cash registers, and thereby induce the prospective purchaser to purchase the National cash register."

No objection can be made to the last proposition, but the other two were too broad. They need qualification. It was unlawful for defendants to do as stated in the second proposition, if the doing thereof involved the purchaser and owner of the competing cash register breaking his contract with the competitor in any particular, or was done for the purpose of driving the competitor out of the cash register field. One competitor has the right to try to sell by fair means all of his goods that he can, and if the effect of his selling is to drive another competitor out of the field he is not to blame. But it is wrong for one competitor to want to drive another competitor from the field by unfair or illegal means, and to take steps to that end, so that he may have the field free from such competition and thereby be enabled to sell his goods.

Then, as to reporting purchasers of competing registers and securing samples, it all depends on the manner in which the information in the one instance and the samples in the other were obtained or secured. If in a proper manner, nothing unlawful was done.

We do not deem it necessary to consider the other requests asked and refused.

We are constrained, therefore, to reverse the judgment of the lower court, and remand the case for a new trial and further proceedings consistent herewith.

UNION PAC. R. CO. v. BOARD OF COM'RS OF WELD COUNTY, COLO., et al.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1915.)

No. 4136.

COURTS ⊜335—EQUITY JURISDICTION OF FEDERAL COURTS—EFFECT OF STATE LEGISLATION.

While state legislation on the subject of procedure cannot impair the remedial powers of federal courts of equity, the Legislature of a state may, within constitutional limitations, change the substantive law, even though such change of necessity produces changes in remedial relief; and where a statute gives a new right that may be enforced by an action at law, equally available in a federal or state court, in cases where the federal court has jurisdiction, such remedy may supersede and displace an equitable remedy theretofore existing in the federal courts, since the statute may remove the very evil which was the ground of equitable jurisdiction, or by providing an adequate remedy at law exclude such jurisdiction, under Judicial Code (Act March 3, 1911, c. 231) § 267, 36 Stat. 1163 (Comp. St. 1913, § 1244).

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 902-907½; Dec. Dig. ⊜335.]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

On motion for rehearing. Denied.

For former opinion, see 217 Fed. 540.

C. C. Dorsey, of Denver, Colo. (N. H. Loomis, of Omaha, Neb., and Gerald Hughes and E. I. Thayer, both of Denver, Colo., on the brief), for appellant.

Charles F. Tew, of Greeley, Colo. (Walter E. Bliss, of Greeley, Colo., on the brief), for appellees.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. In a carefully prepared petition for rehearing the following passage from the opinion filed herein is quoted:

"Is the remedy given by section 5750 adequate? It is difficult to follow the reasoning which would hold that it is not adequate. The evil caused by suits in equity to restrain the collection of taxes is grave, and has often been set forth by courts. Dows v. Chicago, 11 Wall. 108, 112, 20 L. Ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651; Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796. To correct this evil, statutes of similar import to section 5750 have been passed in many of the states of the Union. The highest court of Colorado has frequently declared the correction of this evil to have been the object of its statute. Board of Commissioners of Bent County v. Atchison, T. & S. F. Ry. Co., 52 Colo. 609, 125 Pac. 528. The statute is not attacked upon the ground that it is unconstitutional, nor could such an attack, if made, be sustained. The law is therefore valid legislation. It was not intended to be cumulative. Its object was to give an action at law for the recovery of sums paid on account of invalid taxes, in place of a suit in equity to restrain their collection. Under such circumstances, does it lie with the courts to say that the remedy which the Legislature has provided is inadequate, and that the remedy which it has

condemned shall therefore be continued? This would be to make the law of no effect through the traditions of equity. It would not only be judicial legislation, but would nullify a statute which is conceded to be constitutional. It is a mistake to view this statute as relating to procedure only. It creates a right in favor of the aggrieved taxpayer, and, from considerations of the highest public policy, abolishes the right to stay the collection of public revenues by injunction. The courts may not rightfully nullify it, upon the ground that the remedy which it gives is less adequte than the one which it takes away. The statute being constitutional, the judgment of the Legislature on that subject must control. Such statutes have been frequently before the Supreme Court, and have been uniformly held to afford a plain, speedy, and adequate remedy such as excludes the right to resort to equity."

In regard to this passage the petition proceeds as follows:

"We respectfully assert that this is revolutionary doctrine. From the foundation of the federal judicial system until this court spoke in the present case, it had been held by an unruffled current of authority, including repeated decisions of the Supreme Court of the United States, that equity jurisdiction of the federal courts was to be determined in accordance with the general principles of equity as the same existed in 1789, at the time of the adoption of the first Judiciary Act," etc.

This is a grave charge, especially grave when made by the eminent counsel who sign the petition. It has therefore received careful consideration.

The rule which the passage of our opinion is supposed to violate is stated as follows in Payne v. Hook, 7 Wall. 425, 430, 19 L. Ed. 260:

"We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different states could not be impaired by the laws of states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of states, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union."

The case in which this language was used was as follows: An administrator in the state of Missouri had wasted the estate and converted the same to his own use, and been guilty of other gross frauds. An heir of the estate residing in Virginia filed a bill against the administrator, asking that he be compelled to account, that certain fraudulent instruments be set aside, and plaintiff's distributive share be ascertained, and a decree entered for its payment. The statute of Missouri conferred exclusive jurisdiction in the administration of estates of deceased persons upon the probate courts of the state. The administrator objected to the suit in the federal court upon the ground that this remedy in the probate court was plain and adequate, and exclusive of all redress by plenary suit in equity. Under the laws of Missouri a citizen of that state, seeking redress similar to that sought by the plaintiff, would have been compelled to go into the probate court, and it was contended that a citizen of Virginia could have no other remedy. The Supreme Court rules that this remedy in the courts of the state could not be pursued in the federal courts, and could not be given effect so as to destroy the jurisdiction of those courts as created by the Constitution and laws of the national government.

Another case cited in the petition for rehearing is Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. That was a suit brought by railroad companies having lines in the state of Nebraska to restrain the enforcement of a schedule of rates fixed by the Railway Commission of that state. The local statute authorized any railroad company to show, in a proper action brought in the Supreme Court of the state, that the rates prescribed by the Commission were unreasonable and unjust, and, if that court found such to be the fact, to obtain an order upon the Railway Commission permitting the rates to be raised, etc. It was objected to the jurisdiction of the federal court that this remedy was plain and exclusive. The Supreme Court ruled that the remedy could not be pursued in the federal courts, and that, as the case made by the bill showed a controversy clearly within the jurisdiction of those courts, the granting of this statutory remedy, which was available in the state court alone, could not have the effect to destroy jurisdiction of the federal courts.

A great many cases of similar character are cited and quoted from in the petition for rehearing. Among them are the following: McConihay v. Wright, 121 U. S. 201, 205, 7 Sup. Ct. 940, 30 L. Ed. 932; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052; Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. 342, 30 L. Ed. 532; Kirby v. Lake Shore & Michigan Southern R. R., 120 U. S. 130, 137, 7 Sup. Ct. 430, 30 L. Ed. 569; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 84 C. C. A. 167; Spencer v. Watkins, 169 Fed. 379, 94 C. C. A. 659; McClellan v. Carland, 187 Fed. 915, 110 C. C. A. 49; National Surety Co. v. State Bank, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394. In all of these cases the remedy given by the state statute was confined to state courts or could not be asserted by a citizen of another state in the federal courts.

What bearing have these authorities on the present case? In the absence of a statute, the payment of a tax, with few exceptions, is held to be voluntary, and, though the tax may be invalid, the money paid cannot be recovered. This is especially true of taxes upon real property. The process by which such taxes are collected is so gradual, and affords so many opportunities of resistance, that the courts have almost uniformly held that there can be no such duress as to such taxes as to render their payment involuntary. The statute of Colorado here under consideration changes that law. It provides that, in all cases in which a person shall pay a tax which is for any reason erroneous or illegal, the board of county commissioners shall refund the same without abatement or discount. This is substantive law. It gives a new right. The statute has nothing to do directly with the law of procedure. The remedy for the enforcement of the right which it gives is not prescribed by the statute. That remedy is a suit at law. It is given by the common law. That is the remedy now, was the remedy in 1789, and for some centuries before that date. This remedy, as Mr. Justice Van Devanter points out in Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288, is available in the federal courts the same as in the state courts.

In the passage quoted from our opinion we thought we made it plain that this statute does not provide a remedy in the sense that that term

is used in the law of procedure. It deals only with the substantive rights of property owners. It is remedial only in the sense of a substantive law which corrects a known evil. It is too elementary for discussion that such laws of the several states are as binding upon federal courts, sitting in those states, as upon the local courts. We are therefore brought back to the conclusion reached in that part of our opinion which is criticized, namely, that the statute lies in a field of legislative, rather than judicial, discretion.

The inapplicability of the decisions cited in the petition for rehearing is made quite plain by the opinion of this court in National Surety Company v. State Bank, 120 Fed. 593, 602, 56 C. C. A. 657, 61 L. R. A. 394. It is there said as follows:

"It is an absence of an adequate remedy at law *in the national courts, and that alone*, which conditions jurisdiction in equity in those courts."

States cannot, by conferring jurisdiction upon their own courts alone, oust the jurisdiction of federal courts. Nor can they, by creating a remedy which, in the system of practice that obtains in the federal courts, cannot be pursued there, destroy the jurisdiction of those courts. But, as we have pointed out, there are in the present case no such difficulties. The statute of Colorado simply grants to a property owner the right to have any sum exacted from him by an illegal tax refunded. The remedy for the enforcement of such a right is now, and has always been, an action at law. When facts which confer federal jurisdiction exist, the right can be enforced in the federal courts by precisely the same remedy as in the state courts.

It is well established, as counsel for appellant contend, that state legislation on the subject of procedure cannot impair the remedial powers of federal courts of equity. Over against this, however, stands the equally well established principle that the Legislature of the state may, within constitutional limits, change the substantive law. Such changes will, of necessity, frequently produce changes in remedial relief. A system of practice which took no account of changes in the substantial rights of litigants would be anomalous indeed. Whole departments of equitable jurisdiction have been swept away by changes in the substantive law. The rights of married women and of assignees of choses in action are familiar illustrations. In 1789, and for some decades thereafter, equity had exclusive jurisdiction of such rights. Changes in substantive law have so completely obliterated that jurisdiction that a reference to it is beginning to seem antiquarian. A statute which gives a new right, that may be enforced by an action at law, may remove the very evil which was the ground of equitable jurisdiction. When such a statute is passed, it must be taken in connection with section 723, Rev. St. U. S., and the combined result must produce a change in the right to equitable relief in the federal courts.

This is not the first time that the argument set forth in the petition for rehearing has been presented in federal courts. In 1789 a mortgagee was entitled in the High Court of Chancery of England to a decree of strict foreclosure forever barring the rights of the mortgagor without any period of redemption. When the state of Illinois passed a law requiring a sale of the mortgaged premises and giving to the

mortgagor a year within which to redeem his property, the federal court of that state, responding to the argument that is here made that state statutes cannot in any way affect the equitable jurisdiction of federal courts, passed a decree of strict foreclosure denying to the mortgagor the benefit of the state statute. The case was taken to the Supreme Court. It is the case of Brine v. Insurance Co., 96 U. S. 627, 24 L. Ed. 858. The argument is presented there with such fullness that we shall quote from the opinion at length:

"It is denied that these statutes are of any force in cases where the decree of foreclosure is rendered in a court of the United States, on the ground that the equity practice of these courts is governed solely by the precedents of the English Chancery Court as they existed prior to the Declaration of Independence, and by such rules of practice as have been established by the Supreme Court of the United States, or adopted by the Circuit Courts for their own guidance. And treating all the proceedings subsequent to a decree which are necessary for its enforcement as a matter of practice, and as belonging solely to the course of procedure in courts of equity, it is said that not only do the manner of conducting the sale under a decree of foreclosure, and all the incidents of such a sale, come within the rules of practice of the court, but that the effects of such a sale, on the rights acquired by the purchaser and those of the mortgagor, and his subsequent grantees, are also mere matters of practice to be regulated by the rules of the court, as found in the sources we have mentioned.

"On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred, whether by deed, by will, or by judicial proceeding, are subject to, and may be governed by, the legislative will of the state in which it lies, except where the law of the state on that subject impairs the obligation of a contract. And that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.

"We are of opinion that the propositions last mentioned are sound; *and if they are in conflict with the general doctrine of the exemption from state control of the chancery practice of the federal courts, as regards mere modes of procedure, they are of paramount force, and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition that when substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way, and adapt themselves to the forms necessary to give effect to such rights.* * * *

"*If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form.* * * *

"It is not denied that in suits for foreclosure in the courts of that state the right to redeem within 12 months after the sale under a decree of foreclosure is a valid right, and one which must govern those courts.

"Nor it is pretended that this court, or any other federal court, can in such case review a decree of the state court which gives the right to redeem. This is a clear recognition that nothing in that statute is in conflict with any law of the United States. If this be so, how can a court, whose functions rest solely in powers conferred by the United States, administer a different law which is in conflict with the right in question? To do so is at once to introduce into the jurisprudence of the state of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right. * * *

"*We are not insensible to the fact that the industry of counsel has been rewarded by finding cases even in this court in which the proposition that the rules of practice of the federal courts in suits in equity cannot be controlled*

by the laws of the states, is expressed in terms so emphatic and so general as to seem to justify the inference here urged upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those courts substantial rights conferred by the statute of a state."

Missouri, Kansas & Texas Trust Co. v. Krumseig, decided in this court, 77 Fed. 32, 23 C. C. A. 1, and affirmed in the Supreme Court, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474, involved a usury statute of the state of Minnesota, which declared that all mortgages tainted with usury should be void, and should be canceled by the court. This statute, as interpreted by the highest court of Minnesota, is directly in conflict with a principle of equity law and practice uniformly enforced in the High Court of Chancery in England, and in the federal courts, which requires that any person seeking relief against a usurious mortgage shall do equity by paying the amount of the debt, with legal interest. The plaintiff brought the suit to have the mortgage canceled for usury, without making the tender required by this ancient rule of equity jurisprudence. It was urged that the statute of the state could not alter or impair the system of jurisprudence as administered in federal courts of equity. The argument as applied to the particular case was persuasive. It divided this court and produced a strong dissenting opinion. The majority of the court, however, upon a careful review of the decisions of the Supreme Court, held that the statute was binding upon federal courts. The reasons for the rule have never been better stated than in the prevailing opinion rendered at that time. The case was taken to the Supreme Court and affirmed. We shall not prolong this opinion by quoting from either of the opinions. They are not only binding upon us as authority, but meet with our entire approval as a sound exposition of the law.

We are convinced that the right of a state to provide for the prompt payment of its revenues stands upon ground quite as clear and high as its right to regulate the transfer of property by private individuals, or to prescribe the relief to be given against a usurious contract. We are aware that the right which the statutes gives may not be as advantageous to property owners as the former right to keep their money and litigate the tax. What we insist is that the whole matter lies in the field of substantive law, where the Legislature, acting within constitutional limits, has the right to prescribe the rule. This is not only true as a matter of power, but the history of taxation as written in the opinions of the Supreme Court shows that the legislation is amply justified on grounds of public policy.

It is urged in the petition that the statute has not been held by the courts of Colorado to exclude a resort to equity. We have examined all the authorities cited, and have reached the conclusion that there is no decision in the Supreme Court of Colorado which qualifies the exposition given in Board of Commissioners of Bent Co. v. Atchison, Topeka & Santa Fé R. R. Co., 52 Colo. 609, 125 Pac. 528; nor is there any decision of that court in which the question has been raised and considered in which the right to restrain the collection of taxes by injunction has been sustained. We further observe that the Supreme

Court had before it this question in the Singer Sewing Machine Company Case, and there ruled that the statute of Colorado affords a plain, speedy, and adequate remedy, such as excludes a resort to equity, unless circumstances are shown which render the remedy inadequate. The Supreme Court in that opinion also reviewed the decisions of Colorado, and ruled that this was the interpretation of the statute given by those decisions. We consider these views binding upon us.

We will add a word in regard to "equitable circumstances." In the original brief and in the brief in support of the petition counsel for appellant contend that whenever any equitable circumstance, such as fraud, cloud upon title, or multiplicity of suits, exists, a case is made out which will support jurisdiction in equity, and an injunction to restrain the collecton of the tax. This, however, is the rule, in the absence of a statute like that of Colorado. From the decision in Dows v. Chicago, 11 Wall. 108, 20 L. Ed. 65, to the present time, the Supreme Court has declared with increasing emphasis that no relief can be given in a federal court of equity against the collection of a tax, whatever the cause of its invalidity may be, unless one or more of these equitable circumstances are shown to exist. The result of counsel's argument is that the same rule is applied with the statute as without it. The contention, if sustained, would completely nullify the statute as a means of securing the prompt payment of public revenues. What effect should legislation like the statute of Colorado have upon these equitable circumstances? Take, for example, cloud upon title. Equitable jurisdiction under that head arose out of the fact that the payment of the tax was treated at common law as voluntary. If the property owner removed the cloud by paying the tax, he had no remedy by which he could recover his money. The only way in which he could relieve his property from the lien of the illegal tax, without forfeiting his money, was to go into equity. It is entirely plain that a statute like that of Colorado removes this ground of equitable jurisdiction. Under its provisions the property owner may pay the tax, and if he can show that any part of it is illegal he has the right to recover the same without abatement. Every tax upon real property is a cloud upon its title. Has every owner of such property in Colorado, who believes a tax upon it to be invalid, the right to go into equity, enjoin the collection of the tax, and have it canceled as a cloud upon his title? Would not the courts say to such a plaintiff:

"Pay your tax. That will remove the cloud. Then, if you can show that any part of the tax is invalid, you will be entitled to a proportionate refund of your money."

There are circumstances under which the enforcement of the right given by the statute would lead to results against which equity will grant relief. Taylor v. Louisville & Nashville R. R. Co., 88 Fed. 351, 31 C. C. A. 537; and Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761, are good examples of this class. There state boards of equalization were about to certify to a large number of counties taxes which were shown to be illegal. When thus certified it became the duty of the local officers to enforce their payment. Complainants, to avail themselves of the statute, would have been compelled to maintain a

large number of independent suits at law, and the right to go into equity is based upon the ground of preventing this multiplicity of suits. The whole matter is made clear in Pullman Co. v. Tamble (C. C.) 173 Fed. 200. There suit was brought against the collection officer of a county to restrain the enforcement of a tax after it had been certified to the several counties of the state. Taylor v. Louisville & Nashville R. R. Co., 88 Fed. 350, 31 C. C. A. 537; and Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761, are distinguished in a careful opinion, and the right to resort to equity was denied. The Pullman Company accepted this interpretation of the statute of Tennessee, similar to the statute of Colorado, paid its tax, and brought suit to recover back the payment. Tamble v. Pullman Co., 207 Fed. 30, 124 C. C. A. 590.

When a statute like that in Colorado exists, complainant, seeking to restrain the collection of a tax, must do more than show some of the equitable circumstances which would support a resort to equity if there were no statute. He must make out a case of quite exceptional character, such as Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903, which shows a right to enjoin the tax notwithstanding the statute—a case in which compliance with the statute would, in the language of the Supreme Court, cause "irreparable injury." Such a case will be held to fall outside the intent of the law. The answer which the Supreme Court gave in the Cummings Case to the contention that plaintiff had an adequate remedy under a state statute similar to that in Colorado shows what is necessary to give such jurisdiction in equity:

"It is next suggested that, since there is a plain, adequate, and complete remedy by paying the money under protest and suing at law to recover it back, there can be no equitable jurisdiction of the case.

"The reply to that is that the bank is not in a condition where the remedy is adequate. In paying the money it is acting in a fiduciary capacity as the agent of the stockholders—an agency created by the statute of the state. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank as a corporation is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends, and subject itself to litigation by doing so, or refuse to obey the laws, and subject itself to suit by the state. It holds a trust relation, which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it. To prevent multiplicity of suits, equity may interfere."

It is further urged as an equitable circumstance that the case involves complicated issues and difficult mathematical calculations, unfit for trial by jury. The case does not seem to us more difficult than many commercial causes that are tried by jury. If, however, the ascertainment of the amount of refund to which plaintiff would be entitled should involve issues so complex as to support a resort to equity, it may go into equity for that purpose. That, nevertheless, would furnish no ground for an injunction to stay the collection of the tax, the denial of which is the basis of this appeal. To suspend payment of public revenue during litigation is to defeat the object of the statute. Surely a court of equity will not do that without cause any more than

a court of law. Ascertaining the amount of plaintiff's refund, if any, by a chancellor, is no more cause for enjoining the tax than the same assessment by a jury would be. As the plaintiff has not paid its tax, it has no standing in any court, either of law or equity, to have the amount of its refund, if any, ascertained.

We have carefully examined the petition for rehearing, and find in it no cause to modify our opinion. It is therefore denied.

HOOK, Circuit Judge (concurring). No one will seriously contend that a state may define or regulate the equity jurisdiction of the courts of the United States. On the other hand, it cannot be doubted that the materials upon which that jurisdiction operates may be proper subjects of state legislation, and that changes in the substantive structure of rights may have an important effect upon the method of judicial enforcement or administration. Again, in cases not inherently of exclusive equitable cognizance, but where the right to resort thereto rests upon an inadequacy of the remedy at law, it would seem clear that a legislative act of the state making the remedy adequate would, with section 723, Rev. St., result in a loss of jurisdiction in equity. So the doctrine stated at the outset should not be taken too broadly. I also think that, whenever the question whether a remedy at law given by a state statute is plain, adequate, and complete arises in a court of the United States having the fundamental grounds of federal jurisdiction, it is for that court to determine. In other words, the statute cannot foreclose the consideration of such a question.

In the case at bar I would feel constrained to follow the decision in Atchison, T. & S. F. R. Co. v. Sullivan, 173 Fed. 456, 97 C. C. A. 1, were it not for the later case of Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288. And it is with some hesitation that I conclude that the latter rules the sufficiency of the remedy at law in Colorado in a case like that set up in the bill of complaint.

BYNUM v. JOHNSTON et al.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1915.)

No. 4171.

1. HUSBAND AND WIFE ⟸43—MARRIED WOMAN'S ACT—EFFECT.

   In a state in which the Married Woman's Act (Kirby's Dig. Ark. §§ 5207–5230) is in force, the same degree of strictness in regard to the loaning and repayment of the wife's money is not required as would be required between strangers.

   [Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 226; Dec. Dig. ⟸43.]

2. HUSBAND AND WIFE ⟸149—PROPERTY OF WIFE—LIABILITY FOR HUSBAND'S DEBTS.

   Under Act Tenn. March 23, 1875, providing that the wife's general personal property becomes, after being reduced to possession by the husband, his property, and subject to his debts, and Act Tenn. March 27, 1877, providing that her separate property shall not be subject to his debts,

otherwise than as authorized by the instrument under which she acquired it, furniture ordered by the wife and paid for by the husband, though given by him to her, is liable for his debts, even if paid for by money received from her mother's estate, which she had given to him to use, since such money became his individual property on being reduced to possession by him.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 573, 574; Dec. Dig. ⊂⊃149.]

3. EXEMPTIONS ⊂⊃2—WHAT LAW GOVERNS.

A husband and wife, who were residents of Tennessee at the time the suit was instituted, cannot claim exemptions in Arkansas in furniture attached in such suit.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 2; Dec. Dig. ⊂⊃2.]

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Attachment by T. A. Johnston and others against W. W. Bynum, in which Mrs. Lena Bynum interpleaded, claiming the property. Judgment awarding the interpleader a part only of the property, and she brings error. Affirmed.

G. B. Rose, W. E. Hemingway, D. H. Cantrell, and J. F. Loughborough, all of Little Rock, Ark., for plaintiff in error.

Joseph M. Hill, of Ft. Smith, Ark., and Henry L. Fitzhugh, of Ft. Smith, for defendants in error.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

REED, District Judge. The defendants in error, T. A. Johnston et al., who will be called the plaintiffs, commenced suit in the circuit court of Yell county, Ark., in February, 1913, against one W. W. Bynum, claiming of him damages in the sum of $20,000 for an alleged tort which caused the burning of a cotton seed oil mill of the plaintiffs and the machinery connected therewith, to their damage in said matter. Upon the filing of the complaint a writ of attachment issued against the property of said defendant, and thereunder certain household goods, furniture, a piano, and some other property were levied upon as his property to satisfy said liability.

The plaintiff in error, Mrs. Lena Bynum, wife of W. W. Bynum, in due time filed in said suit an interplea claiming that the household goods and furniture seized under the writ of attachment belonged to her and were a part of her separate estate, and not subject to seizure under the attachment, and asked that she recover judgment for the immediate possession of said property. The suit was later removed by W. W. Bynum to the United States District Court for the Western District of Arkansas, upon the ground that when it was commenced he was a citizen of Tennessee and the plaintiffs citizens of Arkansas. He then moved in the United States court to quash the attachment upon the ground that the writ was wrongly issued, and the property attached thereunder was not his property, but belonged to his wife,

the plaintiff in error. This motion does not appear to have been ruled upon, and is not before us.

The interplea of the plaintiff in error, who will be called Mrs. Bynum, was then tried to the court, a jury having been duly waived, and judgment was rendered in her favor for a part of said property, and against her for the remainder thereof, and she prosecutes this writ of error to reverse so much of the judgment or order as denies her claim to a part of said attached property.

Mrs. Bynum and defendant W. W. Bynum were married in Memphis, Tenn., some 20 years before this trial, and removed to Dardanelle, Yell county, Ark., early in 1913, where he intended to engage in business. The property attached consists of four sets of bedroom furniture, some sitting room, dining room, and kitchen furniture, a piano, couch, and tables, and other articles of household goods, appraised at some $1,500. The testimony shows without any dispute that shortly after her marriage Mrs. Bynum received from her mother's estate some $5,000 in money, which she then placed in the hands of her husband while they were living in Tennessee, to be kept and handled by him for "their mutual benefit," as she says, which amount has never been returned to her in full; that three of the bedroom sets and other furniture attached were purchased by her in Tennessee some years before they removed to Dardanelle, she selecting the same, having them charged to her husband, and sent to their home, and for which he paid. The fourth of the sets was purchased and paid for by her with money that she had personally earned after their marriage, whether as sole trader or not does not appear. All the property so purchased was always called her property by herself and husband, and she claimed it as her separate property from the time it was purchased, and he says that he "gave it to her" and never made any claim to any part of it thereafter. Among the property attached was a walnut dresser, which she says was given to her by her grandmother; that the kitchen furniture was selected and purchased by her and paid for by him in the way above stated, the piano was given to her by her grandmother, and the couch was left to her by her mother, and some of the tables also came from her mother's estate. Mrs Bynum testifies that her husband did not give her any note for the money that she let him have, that she just turned it over to him as a common fund, that he managed the business affairs, that she let him have this money to invest in his own business as he saw fit, and supposed that he did, that he never kept any separate account of it, that she turned the same over to him for the best interests of both, and if she needed anything he would pay for it. Mr. Bynum testified as follows:

"Q. I see a description of household goods, dining room, bedroom set, stoves, etc. You bought all of this, I presume, from time to time as the needs of your family required? A. Yes, sir; that is, I did not buy them. My wife usually bought those things, had them charged to me, and at the end of the month was paid for by me. Q. The same is true of the bedding, I presume? A. A good big part of that bedding was my wife's before we were married. A part of that was bought afterwards, in the same way. Q. You say it would last for 22 years? A. I know it did. Q. (By counsel for Mrs. Bynum.) I will ask you if when you purchased and paid for various articles of furniture, if you considered them as your wife's and gave them to her? A. Yes, sir. Q. You never claimed any ownership in them yourself? A. No, sir."

It is not testified by either that Bynum paid for the furniture from the money left with him by his wife, or that the purchase price should apply towards the repayment of such money. There was no other testimony.

Upon these facts the trial court awarded to Mrs. Bynum the following items of the attached property: Oak set, consisting of three pieces, wash stand, dresser, and bed; walnut dresser, given to her by her grandmother; piano, couch, and table, left to Mrs. Bynum by her mother and grandmother—and awarded the remainder thereof to the plaintiffs in the attachment proceedings as the property of W. W. Bynum to which order awarding the remainder of the property to the plaintiffs Mrs. Bynum duly excepted. The bedroom set awarded Mrs. Bynum was no doubt intended as the set purchased and paid for by her from her personal earnings since her marriage, as the other property awarded to her was that given to her by her mother and grandmother.

[1] It is contended in behalf of the plaintiffs that the furniture attached at once became the property of W. W. Bynum upon its selection and purchase, because it was paid for by him, although he may have intended, when paying for the same, that it was a gift to his wife, and both afterwards treated it as such; also that the $5,000 in money which was left with her husband was a gift to him and at once became his property. Upon this last proposition, see Stickney v. Stickney, 131 U. S. 227, 9 Sup. Ct. 677, 33 L. Ed. 136; Garner v. Bank, 151 U. S. 420, 14 Sup. Ct. 390, 38 L. Ed. 218.

That Mrs. Bynum let her husband have some $5,000 of her own money shortly after their marriage, which came from her mother's estate, is not controverted, and could not well be under the testimony; and she and her husband both say that the furniture was always called hers, and that he never made any claim thereto after its purchase, but "gave it to her." There is no testimony that this furniture was paid for with any of the specific money that was left with him, and the most that could be claimed is that the amount paid for it was a repayment to that extent upon his debt to her for the money she left with him; but the testimony is silent as to any understanding, agreement, or conduct between them to this effect. True, he says that he gave the furniture for which he paid to her; but, if it was given to her, it must have been his to give, or he could not have made the gift, and, if a gift, it would not have been a repayment to that extent upon his indebtedness to her. If the testimony clearly showed that this furniture was paid for with the separate funds of Mrs. Bynum, and the purchase of it was in Arkansas, where the "Married Woman's Act" (Kirby's Dig. Ark. §§ 5207–5230) is in force, they should not be held to that degree of strictness in dealing between themselves in regard to the loaning and repayment of the wife's money that would be held between strangers. See the cases cited in Re Remmerde (D. C.) 206 Fed. 826, 835. But the testimony does not so show, and plainly shows a course of dealing between Mr. and Mrs. Bynum that is usual between husband and wife living together in harmony, where the wife not infrequently selects the household furniture, which is paid for by the husband, the title to which vests in him as the head of the family.

[2] The testimony, however, shows without dispute that Mrs. Bynum let her husband have this money in Memphis, Tenn., where they were married and afterwards lived most of the time until they went to Dardanelle early in 1913, and that this furniture was selected, purchased, and paid for in that state as stated by her. The question naturally arises: What is the law of Tennessee as applicable to these transactions between Mr. and Mrs. Bynum?

Under the act of Tennessee of March 23, 1875 (chapter 89), personal property belonging to the wife, whether acquired before or after marriage, is exempt from the debts, contracts, and other liabilities of the husband before marriage. Otherwise, her general personal property, whether acquired before or after marriage, becomes, after being reduced to possession by the husband, his property, and subject to his debts, contracts, and disposition as his own. By the act of March 27, 1877 (chapter 79), the husband is not liable for his wife's antenuptial debts, contracts, or obligations, and has not such interest in property owned by her at the time of, or acquired by her as heir or distributee after, marriage as to prevent her creditors from subjecting her property to the satisfaction of their debts. Her separate property is not subject to his debts, contracts, or disposition, otherwise than as authorized by the instrument under which she acquired it. When engaged as sole trader, she is liable for debts so acquired as if a feme sole. Acts 1897, c. 82.

By the act of February 20, 1913 (Acts Tenn. 1913, c. 26), effective January 1, 1914, married women are fully emancipated from all disability on account of coverture; and the common law as to the disabilities of married women and its effect on the rights of property of the wife is totally abrogated. But as this was not in force at the time of the transactions in question it has no bearing upon them. Under the law of Tennessee this money left by Mrs. Bynum with her husband, when reduced to possession by him, as it clearly was, became his individual property and subject to his liabilities; and whether the furniture in controversy was paid for by him from such money, or as a repayment thereof to the extent of the amount paid for the furniture, would be wholly immaterial.

[3] As Mr. and Mrs. Bynum were residents of Tennessee at the time this suit was commenced, they were not entitled to any exemptions in Arkansas, and this furniture was subject to seizure for the payment of his liabilities.

The judgment must therefore be affirmed.

And it is so ordered.

LEHIGH VALLEY COAL CO. v. CALAUSKY.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 179.

1. MASTER AND SERVANT ⟸278—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE OF MASTER.

A miner in a coal mine kept his tools and powder in a box owned by him, which stood where it became wet from the drippings of the mine. One of his blasts failed to explode, and he put in another and shot down the coal, and the next day, while he was breaking it with a pick, an explosion occurred by which he was injured. In a suit to recover for the injury, he claimed that the reason his first charge failed to explode was because the powder was damp from the improper place where he was required to keep his box, and that such powder, when struck by the pick, caused the second explosion. The powder was in a steel can, the opening of which was closed by a screw cap, and he testified that the cap was tightly screwed on, and that he did not think there was any danger of dampness reaching the powder, and had never known of such a thing happening. *Held* that, assuming his theory of the explosion to be correct, which was not proven, under such evidence the mineowner was not chargeable with negligence in not anticipating and providing against such an occurrence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977; Dec. Dig. ⟸278.]

2. MASTER AND SERVANT ⟸95½—MASTER'S LIABILITY FOR INJURY TO SERVANT—REPRESENTATIVE OF MASTER—STATUTORY FIRE BOSS IN MINE.

A fire boss in a coal mine in Pennsylvania, who is a state official, unless it is shown that he performs other duties than those imposed on him by statute, does not in any respect represent the mineowner, and any complaints made to him by, or any statements made by him to, a miner are not binding upon, and do not affect, such owner.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 358; Dec. Dig. ⟸95½.]

3. APPEAL AND ERROR ⟸272—EXCEPTIONS TO INSTRUCTIONS—TIME FOR TAKING.

Exceptions taken to the charge of the court after the jury has retired cannot be considered by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611–1619; Dec. Dig. ⟸272.]

In Error to the District Court of the United States for the Southern District of New York.

Allan McCulloh, of New York City (C. P. Williamson, of New York City, of counsel), for plaintiff in error.

Richard W. Darling, of New York City (George C. Holt, of New York City, Francis X. McCaffry, of Brooklyn, N. Y., and L. B. Treadwell, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. [1] Writ of error to review a judgment entered on the verdict of a jury awarding to the plaintiff $10,000 damages for personal injuries under the Employers' Liability Act of Pennsylvania of June 10, 1907 (P. L. 523). The plaintiff was a certified miner employed by the defendant in an anthracite coal mine. He bought from the defendant the explosives, powder, and dynamite which

he used, and kept them with his tools in a box also bought of the defendant. The box was constructed as follows: One half of the cover was permanent and fixed, and the other half loose, with two cleats fast to the under side, which projected under the fixed half, leaving a crack the full length of the cover. On the loose half there was a hasp, which fitted into a staple on the front of the box, so that it could be kept securely locked by a padlock. The box was placed where it was wet by the dripping of the mine. The plaintiff testified that he complained to the fire boss—i. e., assistant mine foreman, employed by the defendant, but an official of the state, appointed under the Pennsylvania act of June 2, 1891 (P. L. 176)—that the powder in the can in his box might get wet, who replied that the place was all right and the box good enough. The negligence charged in the complaint against the defendant is that it failed to give the plaintiff a safe place in which to work, because of the place in which the box was put.

Counsel for the plaintiff in their brief state the facts attending the explosion as follows:

"On the day previous to the accident, Calausky drilled a hole in the seam of coal and inserted a charge for the purpose of blasting out a portion of the coal. The charge consisted, first, of a stick of dynamite, with a detonating cap fastened in the dynamite; then a charge of black powder was inserted over the dynamite, with a hollow iron pipe, called a blasting barrel, through which to fire the charge; then the whole load was covered with dirt, tamped in, in order to make the explosion more effective. Then a squib, consisting of a paper cone containing powder, was inserted in the blasting barrel. The practice was that, when this squib was lighted, the miners and all the men withdrew to a safe place. When the powder in the squib became ignited, it flashed down to the black powder, which exploded. That would explode the detonating cap, and that exploded the dynamite, with the result that a large lot of coal was thrown out and was ready to be taken away. Calausky testified that he prepared such a charge and lit the squib, but that it did not explode; that he then tried another squib, and the charge still did not explode. Thereupon he examined the powder in his keg, and found that, although it retained its shape as powder when poured out of the keg, in fact it was damp and moist, and would crush when handled into a paste like mud. He thereupon obtained some dry powder and borrowed a blasting barrel from a fellow miner, made a new hold about a foot away from the old one, charged it as before, lit the squib, and retired. This time an explosion took place which blew out about 15 tons of coal, enough to make up about five car loads. Calausky and his helper thereupon proceeded to load coal onto the cars the rest of that day. The next morning they came back and resumed work. As usually occurs in mining, some of the pieces blown out were so large that it was necessary for them to be broken into smaller pieces. About 11 o'clock that morning, Calausky started to break up a large lump of coal with a pick, and when he struck it with the pick a severe explosion occurred in the interior of the lump of coal, which caused the injuries complained of."

No one knows how the explosion occurred. The plaintiff's theory was that the powder in the first blast was wet the day it was fired and therefore did not explode; that it was blown out by the second blast, and had dried out sufficiently the next day to explode. An expert for the plaintiff testified that, if the detonating cap was intact, contact of the pick with it might explode the powder, provided it were dry enough, and also the contact of the pick with some flinty material in the coal might do the same thing. What did cause the explosion evidently remains a matter of pure conjecture.

However, adopting the plaintiff's theory that the powder in the plaintiff's can was wet by the dripping from the mine through the cover of his box and was the direct cause of the explosion, we discover no negligence on the defendant's part. The powder was kept in a sheet steel can with a hole in the top three-quarters of an inch in diameter covered by a screw top. The plaintiff had the sole access to and handling of it. He testified that the top of the can was tight and the top screwed down, and that he did not think there was any danger of the powder getting wet, and that he had never known of such a thing happening. Under such circumstances it cannot be said that the defendant had any greater reason to anticipate that water dripping on the cover of the box would wet the powder in the steel can, and therefore should not be held liable for a consequence not fairly to be expected. The motion to direct a verdict for the defendant should have been granted.

[2] Other errors may be briefly noticed. The highest court of Pennsylvania has held that the fire boss is not a fellow servant of the mineowner's servants (Dempsey v. Coal Co., 227 Pa. 571, 76 Atl. 745; Golden v. Mt. Jessup Coal Co., 225 Pa. 164, 73 Atl. 1103), and that the Employers' Liability Act does not apply to such a foreman (D'Jorko v. Berwind, 231 Pa. 164, 80 Atl. 77). It was not shown that the fire boss represented the defendant in any respect, or performed any duties except those imposed upon him by statute. Consequently the conversation between him and the plaintiff did not affect the defendant, and should have been excluded. We have held that if the state official, besides his statutory duties, also acts in other respects for the mineowner, he represents him in these respects; but there must be some evidence of this. Lehigh Valley Coal Co. v. Shandalla, 205 Fed. 715, 124 C. C. A. 83. If the fire boss had undertaken to do so, he had no right to say that plaintiff's box should stay where it was; but all he did say was that the place was all right and the box good enough. The plaintiff could not leave the box where it was, relying upon the judgment of the fire boss, because his own judgment was quite as good.

It was error to permit the cross-examination of Miller, the defendant's mine foreman, as to whether he took steps to secure the plaintiff's box after the accident. This was well calculated to prejudice the jury against the defendant. The box was the plaintiff's property, was removed to his cellar after the accident, and was sold by his wife to some one who long afterwards brought it back to the mine. It was no more the duty of the defendant to secure it than it was of the plaintiff.

[3] Some exceptions were taken to the charge after the jury retired, which for that reason cannot be considered. Mann v. Dempster, 179 Fed. 837, 103 C. C. A. 325.

The judgment is reversed.

BALTIMORE & O. R. CO. v. SMITH.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1915.)

No. 1310.

1. RAILROADS ⊜400—ACTION FOR INJURY TO CHILD ON TRACK—QUESTIONS FOR JURY.

Evidence in an action for injury to a child by being struck by a train on defendant's railroad *held* to justify the submission of the case to the jury, on the ground that it tended to show that the engineer saw the child in time to have stopped the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365–1381; Dec. Dig. ⊜400.]

2. APPEAL AND ERROR ⊜1004—REVIEW—EXCESSIVE VERDICT.

A federal appellate court is without power to reverse a judgment in an action for a personal injury on the ground that the verdict is excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. ⊜1004.]

In Error to the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Action at law by Frances E. Smith, an infant, by her next friend, Isaac V. Smith, against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Rankin Wiley, of Point Pleasant, W. Va., for plaintiff in error.

L. C. Somerville, of Point Pleasant, W. Va. (Somerville & Somerville, of Point Pleasant, W. Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WOODS, Circuit Judge. [1] The plaintiff, Frances E. Smith, a child about five years old, having strayed on defendant's track, was run over by its passenger train and received injuries for which she claims compensation in this action. On the first trial the District Court directed a verdict for the defendant. On appeal this court ordered a new trial, holding that there was evidence from which the inference might be drawn that the engineer saw the little girl on the track in time to stop the train before striking her; that, instead of using instantly all available means to stop the train, he sounded the alarm first, in the hope that she would get off the track before the train reached her; and that only afterwards, when it was too late, he applied the air brakes and stopped the train. On this point the court held as to the law of the case:

"Surely the sight of a little girl of five years, not standing still nor moving off, but running down the track in front of the moving engine, might reasonably be regarded as instant notice to the engineer of the child's being aware of the approach of the train and in such a state of consternation as to be unable to take care of herself. If the jury should find that the engineer did see the plaintiff in this situation in time to stop, they might well say that as a man of ordinary discretion he should have known that he had not a moment to spare and should have used every effort to stop the train."

At the second trial the jury found a verdict in favor of the plaintiff. Defendant assigns error in the refusal of the District Judge to direct

a verdict for the defendant, insisting that the evidence on the part of the plaintiff was so much weaker and that on the part of the defendant so much stronger that the plaintiff's case appeared at the conclusion to have no reasonable foundation. We are unable to assent to this view. It is true that the reputation for truthfulness of Aleshire, an important witness for the plaintiff, was much shaken; but if his evidence, and that of Mrs. Smith, the mother of the plaintiff, be laid aside, this other testimony was sufficient to carry the case to the jury. Shively, a mail agent, testified that he heard the sharp blast of the danger signal about 250 to 300 feet from where the train stopped and that the air was put on later about 50 feet from the stop. The engineer testified that the train was actually stopped in 68 to 70 feet. On the second trial he testified that the child was attempting to cross the track when he saw her, and it might be inferred that it was for this reason that he did not, as he says, see the child until he was within 30 feet of her. On the former trial he testified that she was on the track, and that he did not see her because of the curvature of the track, when by survey the track is shown to be perfectly straight for 130 feet from the place of the accident, and to have a curvature of only 2⅕ feet in 100 feet more. Without further analysis of the evidence, this is enough to show that on this trial, as the court held to be the case in the first, reasonable men might draw these different inferences on vital issues, namely: First, that the engineer's statement that he used every means at hand to stop the train as soon as he saw the child, was correct, or that in the emergency which was upon him he at first relied on the alarm whistle and failed to apply the brakes until it was too late; second, that the engineer, in the emergency which was upon him, did all that could be expected of a reasonably prudent man, or that, even allowing for the emergency, a reasonably prudent man could and would have stopped the train in time.

The differences in the testimony, the allowance to be made for the confusion of the moment, the reliability of the estimates of time and distance of the several witnesses on which the case depended, were all matters of fact peculiarly within the province of the jury. The charge was clear and explicit, stating the law applicable to the case as indicated in the former opinion of this court. The exceptions to it involve merely verbal criticisms too minute for discussion.

[2] It is earnestly urged that the verdict of $15,000 is so large as to indicate prejudice, caprice, or corruption, and that this court should reverse the judgment of the District Court refusing to set it aside. We are denied the power to grant a new trial for an excessive verdict in an action of this character. Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732; N. Y. C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531; Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725.

Affirmed.

KNAPP, Circuit Judge. The facts presented in this record are somewhat less favorable to the plaintiff than those disclosed on the first trial, but not sufficiently so in my judgment to warrant a different decision. Although I adhere to the views expressed in my dissent

on the former appeal, I concur in affirming this judgment, because the opinion of the majority then rendered is the law of the case so far as this court is concerned.

WADDILL, District Judge. I concur in the result reached in the foregoing opinion; the law of the case having been settled by the previous decision of this court.

DUVALL et al. v. SYNOD OF KANSAS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA et al.†

SHEPHERD et al. v. BARKLEY et al.

(Circuit Court of Appeals, Eighth Circuit. April 18, 1915.)

Nos. 4288, 4289.

RELIGIOUS SOCIETIES ⟸34—UNION OF CHURCHES—VALIDITY.

The agreement of union between the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church, entered into May 24, 1906, was legal and valid, and vested the united church with all property rights of the two constituent organizations.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 209–211; Dec. Dig. ⟸34.]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suits in equity by the Synod of Kansas of the Presbyterian Church in the United States of America and others against J. W. Duvall and others, and by James M. Barkley, moderator, etc., and others, against J. F. Shepherd and others. Decrees for complainants, and defendants appeal. Affirmed.

For opinion below, see 208 Fed. 319.

Sanford B. Ladd, of Kansas City, Mo., Robert M. Reynolds, of Marshall, Mo., and Waller C. Caldwell, of Trenton, Tenn., for appellants.

Frank Hagerman, of Kansas City, Mo., for appellees.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. These are appeals from decrees entered for the complainants in the above-entitled actions, which were brought to quiet the title to certain church property situated in the state of Missouri. Generally speaking the controversy is between the Presbyterian Church in the United States of America and certain persons claiming to represent what was formerly known as the Cumberland Presbyterian Church.

On May 24, 1906, the representatives of the Presbyterian Church and the Cumberland branch thereof, entered into an agreement by the terms of which it was substantially agreed that the two churches should be amalgamated, merged, and united into one church by the

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied July 9, 1915.

name of the Presbyterian Church in the United States of America, which should take, hold, succeed to, and possess all the legal, corporate, and property rights and powers of the separate churches, the same as if it were a continuance of each, and the ministers, officers, and membership of the two separate churches should be that of the consolidated church, with the same force and to the same extent as if the members of each church were admitted to and became members of the other. The consummation of this agreement started a conflagration of litigation only possible over family property. The agreement has been held valid in the following cases:

Federal courts: Sherard v. Walton (D. C.) 206 Fed. 562; Helm v. Zarecor (D. C.) 213 Fed. 648; Sharp v. Bonham (D. C.) 213 Fed. 660.

State courts: Alabama, Harris v. Cosby, 173 Ala. 81, 55 South. 231; Arkansas, Sanders v. Baggerly, 96 Ark. 117, 131 S. W. 49; California, Permanent Committee of Missions v. Pacific Synod, 157 Cal. 105, 106 Pac. 395; Georgia, Mack v. Kime, 129 Ga. 1, 58 S. E. 184, 4 L. R. A. (N. S.) 675; Illinois, First Presbyterian Church of Lincoln v. First Cumberland Presbyterian Church of Lincoln, 245 Ill. 74, 91 N. E. 761, 19 Ann. Cas. 275; Fussell v. Hail, 233 Ill. 73, 84 N. E. 42; Id., below 134 Ill. App. 620, 630; Fancy Prairie Church v. King, 245 Ill. 120, 91 N. E. 776; Pleasant Grove Congregation v. Riley, 248 Ill. 604, 94 N. E. 30; Indiana, Ramsey v. Hicks, 174 Ind. 428, 91 N. E. 344, 92 N. E. 164, 30 L. R. A. (N. S.) 665; Bentle v. Ulay, 175 Ind. 494, 94 N. E. 759; Kentucky, Wallace v. Hughes, 131 Ky. 445, 115 S. W. 684; Mississippi, Carothers v. Moseley, 99 Miss. 671, 55 South. 881; Missouri, Hayes v. Manning, 172 S. W. 897; Missouri Valley College v. Guthrie, 172 S. W. 909, decided December 1, 1914; Oklahoma, First Presbyterian Church v. Cumberland Presbyterian Church, 34 Okl. 503, 126 Pac. 197; Texas, Brown v. Clark, 102 Tex. 323, 116 S. W. 360, 24 L. R. A. (N. S.) 670.

That the several complainants are proper class representatives of the Presbyterian Church, and that no indispensable defendants were omitted has been determined by the cases of Smith v. Swormstedt, 16 How. 308, 14 L. Ed. 942; Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666; Helm v. Zarecor, 222 U. S. 32, 32 Sup. Ct. 10, 56 L. Ed. 77; Wheelock v. First Presbyterian Church, 119 Cal. 481, 51 Pac. 841; 1 Blackstone, 483; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629; Westminster Church v. Trustees of New York Presbytery, 142 App. Div. 855, 127 N. Y. Supp. 836; Free Church of Scotland Appeals [1904] L. R. App. Cas. 515, 517; Sharpe v. Bonham, 224 U. S. 241, 32 Sup. Ct. 420, 56 L. Ed. 747; Bacon v. Robertson, 18 How. 480, 15 L. Ed. 499; U. S. v. Old Settlers, 148 U. S. 427, 13 Sup. Ct. 650, 37 L. Ed. 509; Wallace v. Adams, 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547; American Steel & Wire Co. v. Wire Drawers, etc., Unions (C. C.) 90 Fed. 598; Revised Statutes of Mo. 1909, § 2535.

In regard to the plea of res adjudicata arising from the judgment in Turk v. Mitchell, it seems that the decree entered below was without prejudice to the rights of the parties to the property of the Mt. Carmel Cumberland Presbyterian Church. Of this action of the trial

court we do not think counsel can complain. Counsel for appellants frankly state that they relied largely in taking these appeals on the case of Boyles v. Roberts, 222 Mo. 613, 121 S. W. 805. Since the appeals were taken this case has been overruled by the same court in Hayes v. Manning (December 1, 1914) 172 S. W. 897. As the property in litigation is located in the state of Missouri, we should regard the determination of the Supreme Court of Missouri as to the rights of the parties in this litigation as very persuasive.

Learned and able opinions have been written in all the cases cited, wherein all that can be said for and against the validity of the contract of union has been stated. In view of these decisions, which constitute an overwhelming weight of authority, we feel that no duty rests upon us to add anything to what has been said in the different opinions, including the trial court in Barkley v. Hayes (D. C.) 208 Fed. 319, in which we fully concur.

The decrees appealed from are affirmed.

STANDARD SANITARY MFG. CO. v. IRON CITY SANITARY MFG. CO.

(Circuit Court of Appeals, Third Circuit. January 29, 1915.)

No. 1875.

1. PATENTS ⊂=328—ANTICIPATION—DREDGER FOR PULVERULENT MATERIAL.
The Arrott patent, No. 633,941, for a dredger for pulverulent material, used in the enameling of cast iron sanitary ware, *held* void for anticipation by a device invented by one Hayssen, which accomplished the same result in substantially the same way, and was shown beyond reasonable doubt to have been put into actual, practical, and successful use by the inventor some two years before the application for the Arrott patent, and to have been kept in continuous use for more than three years thereafter.

2. PATENTS ⊂=51—ANTICIPATION—ANTICIPATING INVENTION.
To constitute an invention which may be an anticipation, it is not necessary that it should have gone into general use, but is sufficient that it was successfully put into actual and practical use; and it is none the less an invention because its use was afterwards temporarily abandoned.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 66–69, 72, 74; Dec. Dig. ⊂=51.]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Standard Sanitary Manufacturing Company against the Iron City Sanitary Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 213 Fed. 638.

Marshall A. Christy and Christy & Christy, all of Pittsburgh, Pa., for appellant.

James N. Cooke, James I. Kay, and Charles A. Fagan, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

WOOLLEY, Circuit Judge. This is an appeal from the final decree of the United States District Court for the Western District of Pennsylvania, dismissing the bill of complaint charging the defendant with infringement of United States letters patent No. 633,941, for dredger for pulverulent material, granted to James W. Arrott, Jr., on September 26, 1899. The defendant admitted infringement of the patent, if valid, but denied validity of the patent, upon the ground that the invention claimed by it was anticipated by an invention of one Herman Hayssen, made in 1895, and previously known and publicly used in 1896, and continuously for several years thereafter, in the plant of Kohler, Hayssen & Stehn Manufacturing Company, a predecessor of J. M. Kohler Sons Company, at Sheboygan, Wis.

In 1899, the year in which the patent was granted to Arrott, the complainant corporation was organized, and in 1905 acquired the patent by assignment from Arrott, after litigation unimportant for present consideration, and installed and used the patented device in its various plants. In the year 1910 one Edwin L. Wayman proposed and carried into execution a scheme, in which neither the defendant nor its predecessor was a party, whereby he obtained from the complainant title to the patent, and granted licenses thereunder to manufacturers of sanitary enameled iron ware, conditional upon certain trade restrictions, consisting mainly in the limitation of output and the maintenance of prices for sale and resale of the manufactured product. This transaction was attacked by the United States as an illegal combination in restraint of trade, violative of the provisions of the Sherman Anti-Trust Act, and was avoided by the decision of the Supreme Court in Sanitary Manufacturing Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107. Pending the litigation instituted by the government, Wayman brought this suit, and after the termination of that litigation and the reassignment of the patent the complainant was substituted for Wayman as a party to this action.

[1] The art to which the patent is claimed to be a contribution is the manufacture of porcelain enamel cast-iron sanitary ware, such as bath-tubs, bowls, sinks, and other articles made of cast iron and covered with a vitreous, smooth, and glassy coating of enamel. Prior to the invention of the two devices in controversy, cast iron receptacles were enameled entirely by hand. The article to be enameled, as, for instance, a bath-tub, was subjected to a high temperature and brought to a red heat, and then the enamel, consisting of material closely akin to powdered glass, was dusted and evenly distributed over its heated surface, to which it immediately adhered and formed the desired coating. This work was performed by an operator sifting the pulverulent material upon the heated tub by means of a tool known as a hand dredger. A hand dredger was nothing more than a circular tin pan with a wire mesh bottom, attached to and extending from the end of a hickory handle. The operator held the dredger by one hand and arm, and with a stick or bar held by the other struck or rapped the handle of the dredger by blows of such strength and uniformity as to cause the powdered glass to sift through the mesh bottom of the receptacle and fall in even waves upon the surface of the

tub, which was moved and adjusted to meet at right angles the fall and flow of the powder. This operation required skill and endurance. It was difficult to perform, because of the tendency of the operator to change and reduce the strength and regularity of the blows with the increasing fatigue of holding and handling the dredger, causing a corresponding irregularity and unevenness in the enamel coating.

Hand-operated dredgers were old. Arrott conceived the idea that the uniform distribution of the pulverulent material could be increased, and the fatigue of the operator decreased, and the output of the product multiplied, by using an automatic hammer upon the old hand dredger, and secured letters patent for a device in which he made three claims of invention, as follows:

1. A dredger or sifter, consisting of a screen or sieve and a supporting handle, in combination with a pneumatic agitator attached to the dredger and adapted to vibrate the sieve, substantially as described.

2. A dredger or sifter, consisting of a sieve and a handle in combination with an automatic agitator, secured to and carried by the dredger and adapted to agitate or vibrate the same, substantially as described.

3. A dredger or sifter, comprising a sieve and handle and an automatic agitator secured thereto, with means for controlling the operation of said agitator, substantially as described.

No claim of invention was made for either the dredger or the pneumatic device employed to agitate the dredger. From the description in the specifications of the patentee's device, it appears that through a hollow handle of a dredger was injected a long piston, which was given a rapid reciprocal action by means of a pneumatic or automatic device attached to the handle, causing the moving piston to strike with regular blows the side of the sieve, thereby producing an agitation of the pulverulent material contained in it, and creating an even and regular flow or sifting of the material through the meshes.

The device of Hayssen was a small hammer operated by an ordinary pneumatic tool clamped upon the handle of the dredger near the sieve, so that when in operation it rapped the handle, and by the transmitted vibrations jarred or agitated the contents of the sieve, causing the material to sift through with regularity and uniformity. Both the patented construction and the Hayssen device were operated by air pressure, controlled by a suitable valve on the handle. The entire change wrought by both of these tools was the substitution of a rapping by power for rapping by hand.

The process of enameling sanitary articles, the conditions which existed in the prior art, the problems presented, and the extent to which they were solved by Arrott, are set forth in the opinions of the District Court and of this court in the case of Standard Sanitary Manufacturing Co. v. J. L. Mott Iron Works (C. C.) 152 Fed. 635, and J. L. Mott Iron Works v. Standard Sanitary Manufacturing Co., 159 Fed. 135, 86 C. C. A. 325.

In order to determine whether Arrott's device was anticipated by the Hayssen device, certain dates are important. It was found by Judge Acheson in the case of Arrott v. Standard Manufacturing Co.

(C. C.) 131 Fed. 457, 458, and not disputed in this case, that Arrott's original conception dates back to February 14, 1898. It appears that Arrott made application for a patent on March 21, 1899, and that letters patent were granted him on September 26, 1899.

The time at which Hayssen conceived the idea of his device was in the latter part of 1895, and the period in which the tool was made and put into use was the early part of 1896. These dates are established by evidence fixing the dates of certain events prior to which the tool was devised and made, and in connection with which the tool was used. The Kohler, Hayssen & Stehn Manufacturing Company was a small concern manufacturing enamel ware in limited quantities. The molds for castings were quite heavy, and in that year the company started to install apparatus operated by compressed air for lifting them, and in the early part of the year 1896 built an air compressor. Hayssen, who was vice president of the company and being interested in the pneumatic feature of the apparatus which it was then installing, conceived the idea that the rapping and agitation of a dredger might be accomplished by pneumatic means, and designed and had made a small pneumatic hammer, and attached the same to the handle of one of the dredgers then in use in the plant. This hammer is now in evidence. As this was done before the installation of the compressed air hoisting plant had been completed, Hayssen took the device to a saloon near by and conducted his tests by a beer pump. The lack of capacity of the compressed air plant to supply air for the tests, due to its incompletion, was of a date established from the books of the company, and established with sufficient certainty to indicate that the tool was made and tested in the early part of 1896. Connections were then made between the compressed air chamber and the enameling room of the plant, for the purpose of conveying compressed air to the pneumatic device of Hayssen. When the compressed air plant started, the enameling operators began to use Hayssen's invention. The precise date is not established, but that it was in the early part of 1896 is without question.

The defendant maintained that the Hayssen device was within the test of invention prescribed by the Supreme Court in Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821, and followed in Barbed Wire Case, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154, and in many other cases:

"That the invention or discovery * * * must have been complete and capable of producing the result sought to be accomplished."

In proof of its contention, the defendant produced much testimony.

The inventor testified to the conception of his invention, and both the inventor and his business partner testified to its installation in their works early in 1896, and to its successful use for a period of several years.

The machinist who made the device testified to the installation of air connections for the use of the device and that it was employed for the purpose for which it was made.

One enameler testified to using it in the forenoon every day from 1896 to 1899, explaining that in the afternoon the demand for power upon the air compressor by the hoisting apparatus caused an insufficient

and irregular supply of air to the pneumatic dredger. Four witnesses testified to using the pneumatic dredger from 1896 to 1899, with a regularity controlled by the regularity of air pressure, and three witnesses testified to the same effect, covering a period from 1899 to 1900 or 1901. They all testified to the success of the appliance in turning out commercial products.

Approximately 20 witnesses who were not enamelers testified that at different dates from 1896 to 1901 they saw the pneumatic dredger used.

There is no evidence showing the precise number of tubs enameled by the Hayssen device. One witness testified, however, that a good many hundred were enameled from 1895 to 1899. Throughout this period the pneumatic dredger was hanging in a place assigned to it in the enameling room, connected with, or ready for connection with, the air supply.

The defendant introduced a letter written by E. L. Dawes, vice president of the complainant company, dated November 22, 1899, addressed to the Kohler Company, in which he said:

> "When at your place about two years since, Mr. Hayssen told us about the air valve that he had gotten possession of, using the same on a dredger for the purpose of dusting the powder on your work, etc. Now, what we are after is that the S. M. Company claim a patent on a pneumatic dredger," etc.

This letter conforms to the testimony of a witness who said that in the summer of 1897 Dawes visited the Kohler plant to inspect its compressed air hoisting machinery at a period when the automatic dredger was and theretofore had been in use, and was introduced to prove by the admission of Dawes that the Standard Company, the predecessor of the complainant, knew as early as the summer of 1897 that the Hayssen device was in existence and in use prior to the invention of Arrott in February, 1898.

The witnesses for the defendant were not impeached, and their testimony was but little disturbed by the testimony of rebutting witnesses. Opposed to the testimony offered by the defendant in proof of prior knowledge and use of the Hayssen device, the complainant produced three witnesses, one of whom was Arthur H. Hayssen, the son of the inventor of the alleged infringing device, who gave the strongest testimony for the complainant. He testified that he entered the employ of Kohler, Hayssen & Stehn Manufacturing Company in the latter part of the year 1897, and left their employ in 1910; that his work, which was of a general character, brought him into the enameling shop for six or eight months before he left, and that he was familiar with the tools used and methods employed in that department. He further testified that a pneumatic dredger was used in making commercial enamel ware, but was not used regularly, and that it produced but a small percentage of the output, and that the dredger was used only for trials in which at times the enamel came through evenly and at other times it came through in bunches, and that as a result of his own experiments he considered it an unsuccessful factory tool for regular use. From an observation of its use, E. L. Dawes testified that he was of the same opinion.

The testimony convincingly shows that the Hayssen dredger was known and used in the spring of 1896, that it did as much work as the hand dredger with less labor, that when given a uniform supply of air it sifted glass evenly and uniformly, and that it attained the same result as that attained by the Arrott patent in substantially the same way. The testimony further shows that the plant in which the Hayssen device was employed was especially arranged for its use by connecting the enameling room with the air compressor, and that it was in constant, almost daily, use, from the spring of 1896 until 1899, during which time it was successfully used in finishing commercial products.

While the Hayssen device was in continuous use from 1896 to 1899, it appears that during the period between the years 1900 and 1910 it was not in continuous use, and that in 1905 Kohler removed the pneumatic hammer and the valve from the dredger and put them away in his office, where they remained until 1910. At about that time Wayman, the assignee of the Arrott patent, formed the combination to control the licensing of the Arrott dredger under terms and restrictions afterward held by the Supreme Court to be violative of the Sherman Anti-Trust Law, and came in conflict in business relations with the defendant company, whereupon Kohler brought out the Hayssen device, and equipped a number of dredgers with automatic hammers like the original Hayssen hammer, and used them in its plant. Because of the use of pneumatic dredgers by the defendant, the precise type of which is not disclosed by the evidence, though admitted to infringe the Arrott patent, if valid, this suit was instituted by Wayman.

The reply of the complainant to the defense of anticipation is twofold:

First. That the evidence offered does not establish, with the high degree of certainty required by law, the construction and operation of a completed and useful machine prior to the date of Arrott's invention.

Second. That the Hayssen device was merely an experiment, and that the nonuse of it by its owner for the considerable period of years between 1900 and 1910 constituted an abandonment of that experiment, and that this case is similar to and controlled by several other cases, in which the validity of the Arrott patent was upheld, in each of which the defense was founded upon an anticipation.

As to the first contention, we are satisfied that the defendant has proved by evidence that is convincing beyond a reasonable doubt (Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017) that Hayssen constructed and completed and successfully put into operation, in the early part of 1896, his pneumatic apparatus for the manufacture of commercial enamel ware, and continued using it, producing the results sought by it to be accomplished, down to at least 1899.

The second contention, namely, that the defense in this suit is the same as the defense made in other suits in which Arrott's patent was in litigation and its validity upheld, is important for consideration, because, so far as the statement goes, it is correct.

In the case of Arrott v. Standard Sanitary Manufacturing Co. (C. C.) 131 Fed. 457, which was a suit for infringement growing out of a dispute between the patentee himself and the complainant as the assignee of the patent, an alleged prior knowledge and use of the patented dredger by one Oscar Marshchuetz was the anticipation relied upon as one of the grounds of defense. Judge Acheson found the allegation of prior invention and use unsupported by testimony and in fact contradicted upon the question of priority of date, and that the Marshchuetz device was only an unsuccessful and abandoned experiment. In his opinion Judge Acheson says:

"Marshchuetz, testifying for the company, states that, after it [his device] was used *off and on for about three months*, it was put aside and never again used. * * * Not an anticipating date named by any one of them is fixed by any exhibit, book entry, letter, or written memorandum whatever. These witnesses, who were mostly workmen at the Ahrens & Ott establishment, did not agree among themselves. Their testimony was vague and unsatisfactory. * * * The witnesses who testified to the alleged prior device and use by Marshchuetz are met by a number of opposing witnesses, whose testimony conversely shows that the Marshchuetz device was not made or used until October 11, 1898" (that is, later than the date of Arrott's invention).

In the appeal of that case to this court, being Standard Sanitary Manufacturing Co. v. Arrott, 135 Fed. 750, 68 C. C. A. 388, the defense of prior use was not urged, and the decree of the court below was affirmed, overruling the claim of the defendant to an equable ownership of the patent.

In the case of Standard Sanitary Manufacturing Co. v. J. L. Mott Iron Works Co. (C. C.) 152 Fed. 635, prior invention was relied upon as a defense to a suit for infringement of the Arrott patent, and upon this subject, Judge Cross said:

"The defendant, however, alleges that the patent is invalid because of the prior use of an unpatented pneumatic device of a like character to accomplish the same purpose. In support of this contention considerable evidence has been produced, from which it appears that *a few bath-tubs* were enameled with some degree of success by the defendant in the fall of 1896 by a device *in some respects similar* to that defined in the complainant's patent. But I think that the evidence, considered as a whole, discloses nothing more than an *abandoned experiment*. The device—there was but one—was in operation, so the workmen who use it say, *off and on for about a week or ten days*, although one or two other witnesses intimate that it was used for a somewhat longer period. It was then unquestionably *dismantled and was not used again*. * * * The hammer was being changed hourly or daily from one position to another, which tends strongly to show that the device was purely experimental."

The case was appealed to this court and is reported as J. L. Mott Iron Co. v. Standard Sanitary Manufacturing Co., 159 Fed. 135, 86 C. C. A. 325, and the decree of the court below was affirmed.

These are the two cases relied upon by the complainant as analogous to and ruling the case at bar. In each of these cases the defense of prior invention was set up, but in each the court found that the device relied upon as an anticipation was not an invention, but was an experiment that had been abandoned. The one point of similarity between the defenses in these two cases and the defense in the case under consideration is that the devices relied upon as anticipations were in

each instance abandoned; but the point of distinction between the defenses in the two cases cited and the defense in the case in issue is that in the former the devices offered as anticipations were proven to have been merely experiments, while in the latter the device was proven to have been an invention. The devices in the former cases had never passed beyond experimental stages, while the device in the latter case was known and successfully used for the requisite period before invention by the patentee. The former were not shown to have been devices mechanically successful in producing commercial products, while the latter was proven capable at the time of its completion and first employment, as well as during its continued use, to produce the result sought to be accomplished. In the hands of the one who invented and used it, the latter device fulfilled all the requirements of the law to make it an invention.

[2] The Hayssen device, however, was never in general use. It was used only by the company of its inventor and by its successor. To be an invention, and to be one that will anticipate a subsequently invented device, it is not necessary that it should have come into general use; but it is sufficient, if it was in actual and practical use by a number of persons (Daniel v. Restin Co. [C. C.] 131 Fed. 469), and if completed and capable of producing the result sought to be accomplished. Being thus an invention, it is none the less an invention if, after the period in which it was first known and used, it was temporarily abandoned.

Edwin L. Wayman v. Louis Lipp Co., 222 Fed. 679, was a case growing out of the illegal combination previously referred to, and instituted by the original complainant in this action, to enjoin the Louis Lipp Company, using a device claimed to infringe the Arrott patent, heard in the District Court of the United States for the Southern District of Ohio, by stipulation, upon the same testimony presented in this case, and decided February 28, 1912. In that case the court denied a motion for preliminary injunction upon the same ground upon which a similar motion was later denied in this case, and upon which ultimately this case was decided. Each court followed the rule laid down in Buser v. Novelty Co., 151 Fed. 478, 81 C. C. A. 16, in which Cochran, Judge, in reviewing the authorities and speaking for the court, said:

"If, however, the machine or other thing is complete, and capable of producing the result sought to be accomplished, it has passed the experimental stage, and becomes an invention; and, in order that it may constitute an anticipation, it is immaterial how well it becomes known, or how much it is used. * * * Indeed, it has been held that if the alleged invention is complete, and capable of producing the result sought to be accomplished, though it may never have been used, it is an invention and an anticipation. * * * Where the idea of the machine has been conceived, and the conception carried into effect by the construction of the machine, which is used, or is capable of being used, for the purpose for which it was designed, it is no longer an experiment, but an invention; and the subsequent abandonment of the use of the machine does not render it an abandoned experiment, nor lessen its effect as an anticipation, which will invalidate a subsequent patent to another for substantially the same machine. * * * If, then, an alleged invention is in fact an invention, no subsequent abandonment of it can be said to be an abandoned experiment. At most, it is an abandoned invention; but an in-

vention that has been abandoned is as much an anticipation, and to as great extent negatives novelty, as an invention that has not been abandoned."

We are of opinion that Hayssen's pneumatic hammer, when installed in the works of the inventor, was complete, and was capable of producing and did produce the result for which it was intended; that it was invented, known, and used nearly three years before the application of Arrott for letters patent on his invention; that its conception and construction are within the claims of Arrott's patent, in the essentials that the two devices accomplish the same purpose, by substantially the same means, operating in substantially the same way; that the abandonment of the use of the Hayssen device for a period of ten years, following its use for a period of three or four years, is unimportant, in that the abandonment was an abandonment of an invention, and not of an experiment, and does not affect our conclusion that the District Court, in holding the Hayssen device an anticipation of the Arrott invention and in dismissing the complainant's bill, was without error.

The decree below is affirmed.

WAYMAN v. LOUIS LIPP CO.

(District Court, S. D. Ohio, W. D. February 28, 1912.)

No. 6747.

1. PATENTS ⊜286—SUIT FOR INFRINGEMENT—PARTIES.
   A licensee cannot alone maintain a suit for infringement of a patent, but must join the owner as a complainant.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 453–456; Dec. Dig. ⊜286.]

2. PATENTS ⊜286—SUIT FOR INFRINGEMENT—TITLE TO SUSTAIN SUIT.
   An assignee of a patent, by an assignment complete on its face, may sue alone for an infringement, notwithstanding a contemporaneous agreement to reconvey at the end of a stated time, on demand by his assignor.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 453–456; Dec. Dig. ⊜286.]

3. MONOPOLIES ⊜21—SUIT FOR INFRINGEMENT OF PATENT—RIGHT TO MAINTAIN.
   That the holder of the legal title to a patent by assignment, as well as his assignor, is a defendant in a pending suit by the United States, in which it is charged that he holds such title in pursuance of a combination and conspiracy in restraint of trade, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, does not deprive him of the right to maintain a suit for infringement of the patent.
   [Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15; Dec. Dig. ⊜21.]

4. PATENTS ⊜297—SUITS FOR INFRINGEMENT—PRELIMINARY INJUNCTION—PRIOR ADJUDICATION.
   It is the rule that when the validity of a patent has been established by prior adjudication, and especially after long and expensive litigation, a court, on motion for a preliminary injunction in a subsequent suit against another defendant, will consider only the question of infringement; but where new evidence is introduced, of such clear and persuasive charac-

ter as to leave no fair doubt that the court in the prior case would have reached a different conclusion, had that evidence been before it, the injunction may properly be denied.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481–488; Dec. Dig. ⊂⊃297.]

5. PATENTS ⊂⊃62—SUIT FOR INFRINGEMENT—DEFENSE OF PRIOR USE—BURDEN AND MEASURE OF PROOF.

On final hearing in an infringement suit on the issue of prior use, the defendant must establish such use by clear and satisfactory evidence and beyond a reasonable doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 78; Dec. Dig. ⊂⊃62.]

6. PATENTS ⊂⊃51—ANTICIPATION—PRIOR USE OF UNPATENTED DEVICE.

When anticipation by prior use of an unpatented device is relied on to defeat a patent, such device must have been complete, and capable of producing the result sought and accomplished by the patented device.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 66–69, 72, 74; Dec. Dig. ⊂⊃51.]

7. PATENTS ⊂⊃328—ANTICIPATION—DREDGER FOR PULVERULENT MATERIAL.

The Arrott patent, No. 633,941, for a dredger for pulverulent material, *held* void for anticipation by prior use of an unpatented device.

In Equity. Suit by Edwin L. Wayman against the Louis Lipp Company for infringement of letters patent No. 633,941, for a dredger for pulverulent material, granted to James W. Arrott, Jr., September 26, 1899. On motion for preliminary injunction. Denied.

Christy & Christy, of Pittsburgh, Pa., for complainant.
Alfred M. Allen, of Cincinnati, Ohio, for defendant.

HOLLISTER, District Judge. The action is for infringement of a patent, and came on to be heard on complainant's motion for a preliminary injunction. The patent is for a mechanical dredger or sieve used in distributing finely powdered ingredients upon red-hot metal for the purpose of forming an enamel thereon, and, though simple, is ingenious and highly useful. Its validity has been sustained in two jurisdictions —Arrott v. Standard Sanitary Mfg. Co. (C. C.) 131 Fed. 457; Standard Sanitary Co. v. Arrott, 135 Fed. 750, 68 C. C. A. 388; Standard Sanitary Co. v. Mott Iron Works (C. C.) 152 Fed. 635; Mott Iron Works v. Standard Sanitary Mfg. Co., 159 Fed. 135, 86 C. C. A. 325—in the Third and Second circuits respectively. In each of these cases the validity of the patent was challenged on the ground of want of novelty, and the defendant sought in each case to establish prior use, but failed. If the patent is valid, the defendant cannot under the evidence, and does not, I believe, deny infringement.

In opposition to the motion for a preliminary injunction the defendant relies upon two propositions: One, that the title of the complainant is not of such character as to permit him to maintain the suit; the other, the use of substantially the same apparatus prior to the date the patent was granted to complainant's original predecessor in title, the patentee. It appears that the complainant has an assignment, complete on its face, of the patent from his immediate predecessor, whose ownership is evidenced by a complete assignment from the patentee.

[1] The assignment from the patentee to complainant's assignor is not attacked, but defendant claims that the complainant is nothing more than a licensee, and hence cannot maintain the suit, unless the owner is joined with him as complainant. It is settled that a licensee cannot maintain a suit for infringement suing alone, but must join the owner of the patent in his suit. Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768; Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504; Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 577.

[2] There is evidence tending to show that the assignment to complainant by his immediate predecessor in title evidences but a part of the then agreement, which included a promise on the part of complainant to convey back the title after two years upon request of his assignor. The defendant relies upon the definitions given by the Supreme Court of what an assignment is and of what a license is, as found in Waterman v. Mackenzie, 138 U. S. 252, 255, 11 Sup. Ct. 334, 335 (34 L. Ed. 923), where Mr. Justice Gray says:

"The patentee or his assigns may, by instrument in writing, assign, grant and convey, either, first, the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, second, an undivided part or share of that exclusive right; or, third, the exclusive right under the patent within and throughout a specified part of the United States. Rev. St. § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement."

The complainant may have the ownership of this patent for the term of its life, or he may not, depending upon the action of his assignor. If his assignor does not, after the two years, require the reconveyance, then it would seem that the complainant has all the title his assignor had. It seems to me that the complainant's title is as good as that of a mortgagee, whose title is subject to be divested upon compliance by the mortgagor of the conditions upon which the mortgage is to become void as set out in its clause of defeasance. In the case last cited the Supreme Court have held that, for the purpose of maintaining a bill in equity against an infringer, the mortgagee, whose mortgage is recorded within three months of its date in the Patent Office, is the proper party complainant.

[3] It is highly probable, as is sought to be shown by affidavits, that the assignment to the complainant and the agreement for reconveyance were part of a scheme to defeat the operation of the Sherman Anti-Trust Act had the complainant's assignor sought to maintain the action. There is evidence tending to show that complainant and his assignor are both defendants in an action by the United States pending in the Circuit Court of the United States for the District of Maryland, wherein certain alleged illegal conduct of the Bath Tub Trust, so called, is set forth. And the allegation is made that certain patents, including the one in question in this case, are claimed to be held and owned by Edwin L. Wayman, the complainant herein, and were acquired by him

by virtue of the combination and conspiracy in restraint of trade complained of, and solely to effect the unlawful objects and purposes of the same. And among other things the bill prayed:

"That the said Wayman be enjoined from exercising or attempting to exercise any control, direction, supervision, or influence whatever over the interstate or foreign commerce business of the other defendants by virtue of his holding said patents or otherwise."

Whatever proof of the facts alleged in that case the government may have, and howsoever far, if at all, the defendants to it may have transgressed the law, there is no evidence here on this motion, except the fact that such a suit is pending and that the complainant here agreed that he would reconvey the title to his predecessor upon demand after two years. For the purposes of this motion, I hold that the complainant is entitled to maintain the suit.

Such conclusion is, however, of no avail to the complainant, for I am satisfied upon the evidence that the defendant has established the construction and use of a similar apparatus prior to the complainant's patent beyond any reasonable doubt, and am of opinion that, if the same evidence had been produced in the cases heretofore referred to, in which the validity of this patent was sustained, that a different conclusion would have been reached in them.

[4] It is the rule that when the validity of a patent has been established by prior adjudication, and especially after long and expensive litigation, a court, on motion for a preliminary injunction in a subsequent suit against another defendant, would only consider the question of infringement. But where new evidence is introduced, of such clear and persuasive character as to leave no fair doubt but that the court in the prior case would have reached a different conclusion had that evidence been before it, then a preliminary injunction is denied. This rule and its exception are well established. Duff Mfg. Co. v. Kalamazoo Co. (C. C.) 94 Fed. 154; Duplex Co. v. Campbell, etc., Co., 69 Fed. 250, 16 C. C. A. 220 (C. C. A. 6th); Loew Co. v. German Co. (C. C.) 107 Fed. 949, 47 C. C. A. 94 (C. C. A. 6th); Edison Co. v. Beacon Co. (C. C.) 54 Fed. 678; Bresnahan v. Tripp Giant Co., 72 Fed. 920, 19 C. C. A. 237 (C. C. A. 1st); New York Filter Co. v. Niagara Falls Waterworks Co., 80 Fed. 924, 26 C. C. A. 252 (C. C. A. 2d); Philadelphia Co. v. Edison Co., 65 Fed. 551, 13 C. C. A. 40 (C. C. A. 3d); Electric Co. v. Edison Electric Co., 61 Fed. 834, 10 C. C. A. 106 (C. C. A. 7th); Carnegie Steel Co. v. Colorado, etc., Co., 165 Fed. 195, 91 C. C. A. 229 (C. C. A. 8th).

[5] And it is also settled that upon a final hearing the defendant, upon the issue of prior use, must show such use by clear and satisfactory evidence and beyond a reasonable doubt. Coffin v. Ogden, 18 Wall. 120, 124, 21 L. Ed. 821; The Barbed Wire Patent, 143 U. S. 275, 284, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; Young v. Wolfe (C. C.) 120 Fed. 956, 958.

In view of these rules, and the definite establishment of the validity of this patent by eminent authority, the seriousness of holding a prior use to be established by evidence appearing in affidavits is appreciated. But I am unable to escape conviction, amounting to moral cer-

tainty, that the complainant's very apparatus in cruder form, but probably quite as effective in operation, was made by Mr. Hayssen, and was in use in the factory of Kohler, Hayssen & Stehn, at Sheboygan, Wis., prior to the time the patent in suit was granted. There is a wealth of evidence from workmen in that factory—both those who used the apparatus and those who saw it in use.

If, in fixing the date of such prior use, the witnesses merely named a certain year as that in which they remember the apparatus was used, many years having since elapsed, the testimony would be of little value; but there are circumstances of certainty connected with much of the evidence which carries conviction of the time of the use. The letter of Mr. Dawes of 1899 is, with the other evidence in the case, absolutely conclusive of the fact that Mr. Kohler, at his factory in Sheboygan, had, with Mr. Dawes' knowledge, used some sort of a mechanical hammer operated by compressed air upon a sieve for the purpose of enameling bath tubs, prior to the date of the patent. The very hammer originally made by Mr. Hayssen was identified by him and by many of the witnesses, and the apparatus produced in court is shown to be the same kind of apparatus that was in use in the first instance, and has been occasionally used from the time it was made until the present time.

The complainant claims that Mr. Hayssen and the Kohler, Hayssen & Stehn Manufacturing Company never got beyond the experimental stage, and that whatever they had made and used prior to the date of the granting of the patent in suit was abandoned, so far as practical use was concerned, and was what is known in the patent law as an "abandoned experiment." If this claim were sustained by the facts, then the defendant's apparatus would not be permitted to defeat the complainant's patent.

[6] When prior use is relied upon as a defense, the invention or discovery must have been complete and capable of producing the result sought to be accomplished. The defendant must show this, "and every reasonable doubt should be resolved against him." The whole law of the matter is found in the opinion of Mr. Justice Swayne in Coffin v. Ogden, 18 Wall. 120, 124, 21 L. Ed. 821, in which he says:

> "If the thing were embryotic or inchoate; if it rested in speculation; * * * if the process pursued for its development had failed to reach the point of consummation—it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only progress, however near that progress may have approximated to the end in view. The law requires not conjecture, but certainty. If the question relate to a machine, the conception must have been clothed in substantial forms which demonstrate at once its practical efficacy and utility."

The subject is discussed at great length in Buser v. Novelty Co., 151 Fed. 478, 492, 493, 81 C. C. A. 16, in which Judge Cochran, delivering the opinion of the Circuit Court of Appeals for this circuit, reviewed the authorities at length. Among other things he says:

> "If, however, the machine or other thing is complete, and capable of producing the result sought to be accomplished, it has passed the experimental stage and becomes an invention; and, in order that it may constitute an

anticipation, it is immaterial how well it becomes known or how much it is used."

Again:

"Indeed, it has been held that if the alleged invention is complete, and capable of producing the results sought to be accomplished, though it may never have been used, it is an invention and an anticipation."

And again:

"If, then, an alleged invention is in fact an invention, no subsequent abandonment of it can be said to be an abandoned experiment. At most, it is an abandoned invention. But an invention that has been abandoned is as much an anticipation, and to as great an extent negatives novelty, as an invention that has not been abandoned."

[7] Complainant makes much of the fact that the Kohler, Hayssen & Stehn Manufacturing Company and its successor did not early equip its works with these automatic dredgers, and claims that it did not because the apparatus was but an experiment and a failure. But the apparatus used from time to time is the same apparatus as originally used by the Kohler, Hayssen & Stehn Manufacturing Company, and the evidence is overwhelming that it was complete in the beginning, and capable of producing, and did produce, the result sought to be accomplished.

While the apparatus is crude compared with the complainant's perfected machine, both of which are produced in court, yet the principle upon which each operates is the same, and an inspection of them would not indicate that one would not operate as practically and effectively as the other.

If the Kohler Company abandoned the apparatus at all, the abandonment lay in not continually using the apparatus. The complainant fails to make the proper distinction between an abandoned use of an apparatus, which was complete and efficacious for the purposes desired, and an abandonment of an experiment not consummated, and, so far as its efficacy was concerned, a failure.

In Rich v. Lippincott, Fed. Cas. No. 11,758, Mr. Justice Grier said (page 675):

"If the original inventor of a machine abandons the use of it, and does not take out a patent first, no other person can entitle himself to a patent for it."

Many cases to the same effect will be found, among which may be noted Shoup v. Henrici, 22 Fed. Cas. page 26; Brush v. Condit, 132 U. S. 39, 48, wherein Judge Shipman's opinion in the court below is quoted; Electric Co. v. Julien (C. C.) 38 Fed. 117, 131.

The number of persons who knew of Hayssen's apparatus is not material. "The prior knowledge and use by a single person is sufficient." Coffin v. Ogden, 18 Wall. 120, 124, 21 L. Ed. 821.

Being of opinion that inasmuch as defendant has shown beyond a reasonable doubt that an apparatus embodying the same principle as complainant's patent was completed, and was capable of accomplishing that for which it was designed, and did in fact accomplish it prior to the time complainant's patent was granted, the motion for a preliminary injunction will be denied.

An order may be taken accordingly.

UNITED STATES v. LEHIGH VALLEY R. CO.

(District Court, S. D. New York. March 26, 1915. On Settlement of Decree, April 6, 1915.)

No. 375.

CARRIERS ⟸32—REGULATIONS—"REBATE"—"SHIPPER"—FORWARDER.

A forwarder of freight, who sends in his own name all the freight he can over a carrier, which, in consideration of the business thus obtained, pays him a commission or salary calculated on the freight moneys received by the carrier from him, is a "shipper," and the payment in form of commission or salary or otherwise is a "rebate" or concession in violation of the Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 (Comp. St. 1913, § 8569), and Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847, § 1, as amended by Act June 29, 1906, c. 3591, 34 Stat. 587, § 2 (Comp. St. 1913, § 8597).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83–85; Dec. Dig. ⟸32.

For other definitions, see Words and Phrases, First and Second Series, Rebate.]

In Equity. Suit by the United States of America against the Lehigh Valley Railroad Company. Heard on bill and answered. Decree for complainant.

John C. Knox, Asst. U. S. Atty., of New York City, and Charles W. Needham, of Washington, D. C., for the United States.

Allan McCulloh, of New York City, for defendant.

HOUGH, District Judge. Sheldon & Co. are forwarders, a business the nature of which is sufficiently stated in Interstate Commerce Commission v. D., L. & W. R. R. Co., 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. 448. These particular forwarders send all the goods they can over the Lehigh Valley, and have done so for a long time. In consideration of the business thus obtained the defendant pays to Sheldon & Co. a commission calculated upon the freight moneys (at published tariff rates) received by the railroad from Sheldon & Co.

The object of this bill is to prevent the continuance of this practice, for the reason that Sheldon & Co. are shippers, and when they get a commission upon freights which they themselves have paid they necessarily obtain a rebate or concession in violation of the Interstate Commerce Act as amended to August 24, 1912, in section 6 thereof, viz.:

"Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

It is also said that such payment of commissions is in violation of the Elkins Act as amended June 29, 1906, viz.:

"It shall be unlawful for any person * * * to * * * receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce * * * whereby any such property shall by

any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier."

It is assumed that all the freight sent by Sheldon & Co. over the Lehigh Valley, and in respect of which commissions are paid, is freight not owned by said Sheldon & Co., but as to which they act as forwarders only. This does not make Sheldon & Co. any the less a shipper.

The relation of shipper and carrier is formal, and must respond to certain well-known tests. It has no relation to ownership. A shipper is one who ships even when he has no right so to do, but a forwarder is one whose business it is to ship; and I am unable to see how it can be doubted (and I do not think it has been denied) that when Sheldon & Co. send goods over the Lehigh Valley road in their own name they are in a position to insure, to demand and receive delivery, and to recover for breaches of the contract of carriage entered into between themselves and the carrier. These are the indicia of the formal and legal relation entered into by the issuance of a shipping receipt or bill of lading. I have no doubt that Sheldon & Co. are to be regarded as shippers for every purpose, and consider this conclusion to be supported by Great Northern R. R. Co. v. O'Connor, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. Ed. 703.

The railroad seeks to justify its custom by asserting the right to pay commissions to those who bring it business, and in support of this proposition cites United States v. D., L. & W. R. Co. (C. C.) 152 Fed. 269, where the court said:

"The carrier has a right to employ persons to solicit business, just as it had a right to employ clerks and employés of all kinds to do the business, and any payments for such a purpose cannot constitute a rebate, concession, or discrimination within the meaning of the act."

This is all true; but I do not think that the situation is brought within this decision when a shipper is employed, and the amount of his wage or the value of his services is regulated or gauged by the freight value of his shipments. The result may be perfectly normal (though the method is capable of great abuse); but said result in my judgment is illegal because of the bald fact that, when the dealings between Sheldon & Co. and the railroad are ended, Sheldon has finally paid less for the transportation of goods in which he had a special property, and as to which he was a shipper, than did other persons not engaged in the forwarding business.

It is obvious, also, that if the real owner of the goods preferred to send over some railroad other than the Lehigh Valley, Sheldon & Co. as forwarders would be obliged to acquiesce in their customer's desire, and would get no commission upon goods so forwarded. I am quite willing to admit that in this particular instance (as is elaborately set forth in the answer) there is nothing wrong, dishonest, or immoral in the transactions complained of; but they seem to me to be against the letter of the law, and I am further of opinion that such letter must be strictly enforced in order to preserve equality among shippers, for the abuse of granting commissions to any large shipper is so patent and so ancient as not to require further comment.

This conclusion has not been reached without due consideration of the charge to the jury of the late Judge Martin in the case of United States v. Sheldon. From the charge alone (which is all I have before me) I should hesitate to think that the matter before Judge Martin was put in exactly the same way as is this cause; but even if these very facts were contained in an indictment, instead of a bill in equity, Judge Martin's decision (if applicable) would be to me but another illustration of the radical difficulty of attempting to "govern by indictment" and of securing convictions for statutory violations involving no moral turpitude. Even judges instinctively "shy" at branding as a convict any man for failing promptly to square an honest business with new-fangled statutes, and permitting or encouraging juries to find that criminal intent which is still a prerequisite for conviction under such circumstances.

The complainant will take a decree forbidding the continuance of commission payments to Sheldon & Co. under the circumstances revealed by bill and answer.

On Settlement of Decree.

The decree proposed by the United States attorney specifically enjoins the defendant from continuing to pay George W. Sheldon & Co. "any and all sums of money, whether the same be in the form of commissions, *salary,* or otherwise, and which may have accrued, and which would accrue, but for this decree, under and pursuant to the contracts and understandings hereinbefore adjudged and decreed to be unlawful." It is now suggested (and probably with truth) that my opinion was not clear as to whether moneys could or could not be paid to George W. Sheldon & Co. under the name of salary and as compensation for that corporation's activities in procuring freight for the Lehigh Valley.

It is in my judgment just as much an infraction of the law to pay a shipper a salary for shipping his own freight as it is to pay him a commission for doing the same thing. This whole case revolves around the question whether under all the circumstances shown Sheldon & Co. are to be regarded as shippers for every purpose. I think they are shippers, and any form of compensation to them for shipping is against the law.

I have accordingly signed the decree as proposed.

In re WHITE.

(District Court, D. Oregon. May 3, 1915.)

No. 3056.

1. BANKRUPTCY ⟸413—OPPOSITION TO DISCHARGE—SPECIFICATIONS—FALSE OATH.

A specification, in opposition to the discharge of a bankrupt, that he knowingly made a false oath, for the purpose of deceiving the trustee and concealing his assets, sufficiently states the materiality of the oath.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712–718, 725, 727; Dec. Dig. ⟸413.]

2. BANKRUPTCY ⟸413—OPPOSITION TO DISCHARGE—SPECIFICATIONS—REQUISITES.

Specifications, in opposition to a discharge in bankruptcy, especially where attempting to charge some criminal act, should be pleaded with greater particularity than ordinary civil actions, though the strict rules as to indictments do not apply.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712–718, 725, 727; Dec. Dig. ⟸413.]

3. BANKRUPTCY ⟸408 — DISCHARGE — GROUNDS OF OPPOSITION — CONCEALMENT OF PROPERTY.

Where a bankrupt had executed a deed which was in fact a mortgage more than four months before the petition in bankruptcy was filed, his concealment during the four months preceding the filing of the petition of the fact that the deed was a mortgage is a concealment of property, which may be specified in opposition to his discharge, under Bankr. Act July 1, 1898, c. 541, § 14b (4), 30 Stat. 550 (Comp. St. 1913, § 9598).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732–736, 759, 762, 763; Dec. Dig. ⟸408.]

4. BANKRUPTCY ⟸413—OPPOSITION TO DISCHARGE—REQUISITES OF SPECIFICATIONS—INFORMATION AND BELIEF.

A specification, in opposition to a discharge of bankruptcy, which states the facts only on information and belief, is insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712–718, 725, 727; Dec. Dig. ⟸413.]

5. BANKRUPTCY ⟸413—OPPOSITION TO DISCHARGE—REQUISITES OF SPECIFICATIONS—CONCEALMENT OF PROPERTY—DESCRIPTION.

A specification, in opposition to a bankrupt's discharge, which alleges that the bankrupt fraudulently concealed a large amount of groceries and merchandise, does not sufficiently describe the property concealed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712–718, 725, 727; Dec. Dig. ⟸413.]

In Bankruptcy. Proceedings against William Gideon White. On exceptions by the bankrupt to the sufficiency of the specifications filed by the trustee and a creditor in opposition to the application for discharge. Exceptions overruled in part, and sustained in part.

Swafford & McGinnis, of Eugene, Or., for bankrupt.

L. M. Travis, of Eugene, Or., and Angell & Fisher, of Portland, Or., for trustee and objecting creditor.

WOLVERTON, District Judge. The bankrupt having applied for his discharge, the Glafke-Dixon Company, creditor, and the trustee have interposed certain specifications in opposition thereto. To these

the bankrupt has filed exceptions. The inquiry relates to the sufficiency of the specifications.

[1] The first specification is that the bankrupt, knowingly and fraudulently, made a false oath in relation to a proceeding in bankruptcy, and it is objected that the materiality of said alleged false oath to the inquiry is not shown. It is shown, however, that the oath was made for the purpose of deceiving the trustee, and concealing the assets of the bankrupt, and preventing a discovery thereof. This I deem sufficient, in the absence of a more particular statement.

[2] Specifications for defeating a discharge, especially where attempting to set forth some act that the bankruptcy statute has made criminal, should be pleaded with greater particularity than where it is sought to allege matter pertaining to civil actions, although the strict rules pertaining to statements in indictments may not apply. The averments should at least be so specific and of such a character that their sufficiency may be met and tested by demurrer or by exceptions, in analogy to such as are employed in equity practice. Collier on Bankruptcy (9th Ed.) 324; In re Steed (D. C.) 107 Fed. 682, 685; In re Troeder, 150 Fed. 710, 80 C. C. A. 376. On its face, this specification would seem to be sufficient, though testimony is needed to determine whether or not it can be sustained.

[3] The second specification is predicated on the fourth ground of opposition to discharge. Section 14b (4), Bankruptcy Act. It is alleged that the bankrupt, with the intent to hinder, delay, and defraud his creditors, on January 4, 1913, executed a deed to an undivided interest in certain real property, which was recorded July 10, 1913, and is in fact a mortgage, and that the bankrupt, within four months preceding the filing of the petition in bankruptcy, knowingly and fraudulently concealed the same from the trustee. It is objected that the deed is shown to have been executed and recorded more than four months before the filing of the petition in bankruptcy, and hence does not fall within this ground of opposition. It is shown, however, that the deed was intended as a mortgage, and the concealing of that particular fact constitutes the fraudulent act complained against.

While the transaction was had more than four months prior to filing the petition in bankruptcy, the bankrupt continued, subsequent to the first day of the four months immediately preceding the filing of the petition, to conceal the alleged fact that the deed was a mortgage. This was a concealment of property within the intent of the subdivision. In re James, 181 Fed. 476, 104 C. C. A. 224; In re Wakefield (D. C.) 207 Fed. 180.

[4] By a second paragraph of the second specification it is sought to be shown that the bankrupt transferred certain accounts and notes to his wife for the purpose of concealing the ownership; but this is alleged on information and belief; and so of other notes and accounts, no list or memorandum of which is given. Facts stated upon mere information and belief are insufficient upon which to ground specifications in opposition to a discharge. In re Thomas (D. C.) 92 Fed. 912.

It was not intended, by fixing the statutory grounds for opposing a discharge, to afford the objectors opportunity to go upon a voyage of discovery for ascertaining whether, perchance, they might find some-

thing that would defeat the bankrupt's purpose. But, if the bankrupt be guilty of things that render him not entitled to a discharge, they ought to be directly and unequivocally alleged, so that he will be readily apprised of the direct issue as to them, and enabled to concert his defense, and the proof must be clear and convincing, although not beyond a reasonable doubt.

The third paragraph of specification No. 2 is of like character to the second, although relating to real property, and is subject to the same criticism.

[5] The third specification is subject to the criticism that it does not describe any property which it is alleged the bankrupt has concealed with intent to defraud his creditors. The property is described as a large amount of groceries and merchandise, and unless the description is made more specific the bankrupt is not apprised of what property the controversy is about.

The fifth specification is subject to the same criticism as the third, and the sixth is subject to the same criticism as paragraphs 2 and 3 of the second specification.

The fourth specification is perhaps sufficient.

The exceptions will be overruled as to the first and fourth specifications and the first clause or count of the second, and sustained as to the third, fifth, and sixth specifications and the second and third clauses or counts of the second; and such will be the order of the court.

In re STEMPER et al.

(District Court, D. Arizona. April 12, 1915.)

No. B-41.

1. BANKRUPTCY ⟸229—TRUSTEES—RETENTION OF ASSETS—CONTEMPT.

Where the referee disapproved the report of a trustee in bankruptcy as to the assets in his hands, because of the failure to include therein an amount retained by his attorney as compensation for services, and ordered the trustee to make demand on his attorney for the payment of the sum so retained, and the trustee obeyed such order and made such demand, but the demand was refused by the attorney, the trustee was not guilty of contempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 385; Dec. Dig. ⟸229.]

2. BANKRUPTCY ⟸250—TRUSTEES—EMPLOYMENT OF ATTORNEYS—COMPENSATION—SUPERVISION BY COURT.

The attorney for a trustee in bankruptcy in a successful action on an insurance policy was bound to pay the amount recovered into the bankruptcy court, and submit his claim for compensation to that court, and could not retain compensation from the amount recovered, as any contract with him by the trustee was subject to the control of the bankruptcy court, and he could thereunder acquire no rights in or to the assets of the estate, which was not likewise subject to the court's control, and both the trustee and the attorney, as officers of the court engaged in the administration of a trust estate, were subject to control and supervision by the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 235, 350; Dec. Dig. ⟸250.]

In Bankruptcy. In the matter of John Stemper and another, bankrupts. On review of an order of the referee. Ordered in accordance with the opinion.

F. C. Struckmeyer, of Phœnix, Ariz., for plaintiff.
Baker & Baker, of Phœnix, Ariz., for defendant.

SAWTELLE, District Judge. This matter comes before the court on a certificate of the referee. The material facts are as follows:

The bankrupts, at the time of their adjudication as bankrupts, had a policy of insurance on certain goods which had been destroyed by fire. The payment of this policy was resisted by the insurance company, and a suit to enforce the policy was brought by the trustee in bankruptcy in the state superior court. Judgment was rendered in favor of the trustee for $1,500, and this amount came into the possession of F. C. Struckmeyer, Esq., the attorney for the trustee.

Instead of turning over to the trustee the entire recovery, the attorney for the trustee retained the sum of $598.15, which amount was arrived at by claiming and retaining a fee of $500 in the suit on the policy, $50 for services rendered in the bankruptcy, in preparing schedules, notices, and other papers and attending various hearings before the referee, and the amount of $48.15 advancement and costs paid by the attorney. No order of the court or the referee was made fixing or authorizing these fees or expenses, nor was there any account or claim therefor duly submitted. The trustee in bankruptcy reported that he had assets of the estate in the sum of $901.05, and asked for a decree of a declaration of a dividend on that basis. The referee disapproved of this report and ordered the trustee to make demand on his attorney for the payment to him of the entire recovery in the suit on the policy, and the trustee, in obedience to the directions of the referee, made such demand on the attorney. This demand was refused by the attorney, and thereupon an order was made by the referee that the attorney pay over to the trustee the entire amount recovered and submit the matter of his compensation to the referee by proper petition. Failing to pay over this money, the attorney is cited to appear before the judge of this court and show cause why he should not be punished as for a contempt of court for his failure to obey the order of the referee. The trustee is likewise ordered to show cause why he should not be punished as for a contempt of court for his failure to compel the payment to him of the entire sum by his attorney.

The attorney appears and denies the right of the referee to make the order compelling him to pay over the entire recovery, and insists that his fee for services shall be fixed by the trustee and himself, and that the referee has no power to fix or reduce his fees.

[1] In regard to the trustee, it is sufficient to say that the record discloses no order of the referee which he has willfully disobeyed, but, on the contrary, shows that he did obey the order and demand the entire sum recovered by the attorney. It cannot be held, under these circumstances, that he has been guilty of contempt, and there need be no further citation to him.

[2] The right of the attorney to retain any part of a recovery as his fee, without any order of the court or the referee fixing and allowing the same and directing its payment, presents a question of more importance. The suit in question in the state court was by the trustee as such, and the recovery was undoubtedly assets of the bankrupt estate. The trustee had no personal title to these assets, and no power to create a lien on them for any purpose without the order of the referee or the court. They were assets which he was required to reduce to possession and distribute under the directions of the court or referee. Any contract which he might make in regard to these assets was subject to the control of the court, and no person could acquire by such contract with him any rights in or to such assets which were not likewise subject to the control of the court.

It is elemental law that an attorney, performing services for a trustee which he claims shall be paid out of the trust estate, must submit his claim, so far as it affects the assets of the trust estate, to the court, and that any payment to him by the trustee must be in accordance with an order of the court. A trustee may not agree with an attorney that the fee shall be so much without submitting the matter to the court, and the attorney is likewise without power to fix his compensation and retain it out of the trust assets which come into his possession. Both are officers of the court, engaged in the administration of a trust estate, and their actions and compensation are proper subjects of control and supervision by the court. It is true that a lien acquired by an attorney for a bankrupt by employment prior to bankruptcy will not be affected by subsequent bankruptcy, but that is not the case.

An order will be entered, directing F. C. Struckmeyer, the attorney for the trustee, to pay to the trustee the full amount of the recovery in the said superior court, to wit, the sum of $1,500, within five days from the service of the order, and that he submit his claim for services to the referee, for such order as may be proper under all the facts in this case.

No opinion is expressed, or intended to be expressed, as to the value of such services, or the proper amount to be allowed for the same.

UNITED STATES ex rel. HAUM PON v. SISSON, Chinese Inspector.

(District Court, S. D. New York. May 1, 1915.)

1. ALIENS ⇐32—DEPORTATION—CHINESE.
Under the Chinese Exclusion Acts and Immigration Act Feb. 20, 1907, c. 1134, § 21, 34 Stat. 905 (Comp. St. 1913, § 4270), warrant is properly issued for deportation of a Chinese person, a laborer; he not having, and making no claim that he ever had, a certificate, and there being no competent testimony that he was born in the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⇐32.]

2. ALIENS ⇐32—DEPORTATION—CHINESE—COUNTRY OF RETURN.
A Chinese person is properly deported to China, and not to Canada, notwithstanding evidence that he entered through Canada; there being no evidence that he had acquired a domicile there, and he declining to state where he entered.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⇐32.]

Habeas Corpus of Chinese laborer held under warrant of deportation.

Robert M. Moore, of New York City, for relator.

Harold A. Content, Asst. U. S. Atty., of New York City, for respondent.

LACOMBE, Circuit Judge. [1] There is no competent testimony that the relator was born in the United States. See recent decision of Circuit Court of Appeals, Second Circuit, in U. S. v. Hom Lim, 223 Fed. 520; Fong Ping Ngar v. United States, 223 Fed. 523, April 13, 1915. He is indisputably a Chinese person, concededly a laborer, has no certificate and makes no claim that he ever had one. Under the Chinese Exclusion Acts and section 21 of the Immigration Act of 1907, the warrant for his deportation was properly issued.

[2] The evidence satisfies me that relator made his entry through Canada about the time he was arrested. There is no evidence to show that he had acquired a domicile in Canada. Being interrogated as to the place of entry, he replied: "You can find that out yourself." He should be deported to China, not to Canada. United States v. Sisson (D. C.) 220 Fed. 541.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

CONTINENTAL TRUST CO. v. TALLASSEE FALLS MFG. CO. et al.

(District Court, M. D. Alabama, N. D. March 25, 1915.)

No. 298.

1. CORPORATIONS ⊂⊃642—FOREIGN CORPORATIONS—CARRYING ON BUSINESS WITHIN STATE.

Code Ala. 1907, §§ 3642, 3643, which require foreign corporations "before engaging in or transacting any business in this state" to file an instrument with the Secretary of State designating a place of business in the state and an agent thereat, have no application to a mortgage executed in another state by one foreign corporation to another, although it covers real property in Alabama, nor do they apply to a conveyance by a domestic to a foreign corporation which is an executed transaction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520–2527; Dec. Dig. ⊂⊃642.]

2. JUDGMENT ⊂⊃828—JUDGMENT AS BAR—SUIT BETWEEN DIFFERENT PARTIES.

A judgment of a state court dismissing a suit to quiet title on the ground that the plaintiff was out of possession and its remedy was at law is not a bar to a subsequent suit in a federal court by the trustee in a mortgage on the property given to secure bonds against such plaintiff and the defendants in the prior suit to protect the rights of the bondholders in the property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504–1509; Dec. Dig. ⊂⊃828.]

3. QUIETING TITLE ⊂⊃10—JURISDICTION—ABSENCE OF LEGAL REMEDY.

The trustee in a mortgage of real property given to secure bonds, who is not entitled to possession under the terms of the mortgage because there has been no default, and who cannot therefore maintain an action at law to protect his rights against adverse claimants in actual possession, and who are improving and selling to others parts of the property may maintain a suit in equity to cancel the deeds under which they hold as clouds on the title conveyed by the mortgage.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36–42; Dec. Dig. ⊂⊃10.]

4. QUIETING TITLE ⊂⊃16—PERSONS ENTITLED TO CANCELLATION—MORTGAGE TRUSTEE.

Some six acres of land owned by a manufacturing company and adjoining its plant was unoccupied with the exception of an old house and one built for its superintendent. The old house was rented, and the tenant was allowed to build another small building with the right to remove it at the end of his tenancy. At that time, however, with the permission of the company he sold it to one of defendants, but did not sell any land. A subsequent tenant of the old house on leaving it did not surrender possession to the company, but his son, another defendant, through collusion with his codefendant at once moved in. Some two years afterward defendants obtained deeds to the entire six acres from heirs of a former owner, but who in fact had no title or interest in the property; the title of their ancestor having passed by an administrator's sale more than 50 years before. Defendants paid a nominal sum only for the deeds, but agreed to pay a further sum if they succeeded in acquiring title. *Held*, that their attempt to acquire title through adverse possession with color of title under the Alabama statute was collusive and fraudulent, and that the trustee in a mortgage of the property to secure bonds, which was then without right of possession but was bound as such trustee to protect the rights of the bondholders in the property,

was entitled to a decree canceling defendants' deeds and removing them from possession.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 64, 65; Dec. Dig. ⊂⊃16.]

5. LANDLORD AND TENANT ⊂⊃66—ESTOPPEL OF TENANT—CLAIM OF ADVERSE POSSESSION.

Tenants at will cannot initiate a claim to adverse possession without first surrendering possession to their landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 199–209; Dec. Dig. ⊂⊃66.]

6. EQUITY ⊂⊃39—JURISDICTION—RETENTION OF JURISDICTION ACQUIRED TO GRANT COMPLETE RELIEF.

Under the rule that a court of equity which has rightfully acquired jurisdiction of a cause will retain it to do complete justice between the parties, in a suit by a mortgage trustee for a cancellation of deeds as a cloud on the title to the mortgaged property, on a finding that the deeds are fraudulent and that defendants are wrongfully in possession, the court will not leave them in such possession, but will decree possession to complainant, although when the suit was commenced it did not have the right of possession under the terms of the mortgage.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104–114; Dec. Dig. ⊂⊃39.]

In Equity. Suit by the Continental Trust Company against the Tallassee Falls Manufacturing Company, John R. Sayres, James D. Parks, and others. Decree for complainant.

The bill in this cause was brought by the Continental Trust Company, a Maryland corporation, as trustee, on March 18, 1911, under a deed of trust in mortgage form, executed to it by the Mt. Vernon-Woodberry Cotton Duck Company, a Delaware corporation, to secure an issue of $8,000,000 of bonds. John R. Sayres, James D. Parks, J. F. McCluskey, J. H. McBrayer, the Tallassee Falls Manufacturing Company, an Alabama corporation, and the Mt. Vernon-Woodberry Cotton Duck Company are made parties defendant to the bill. The deed of trust includes several manufacturing plants and lands situated in different states, and shares of stock in several corporations, and includes the lands and cotton factory of the Tallassee Falls Manufacturing Company, the Alabama corporation, situated near Tallassee, Ala., together with the capital stock of said corporation, which the mortgagor company then owned or might afterwards acquire. This mortgage and deed was executed August 30, 1899. On February 8, 1900, the Tallassee Falls Manufacturing Company executed a deed to the plaintiff herein confirmatory of the action of the mortgagor company in conveying said property (to which it did not then hold the legal title), and by which it conveyed said property to the plaintiff as trustee on the trust mentioned in said mortgage and then over to the Mt. Vernon-Woodberry Cotton Duck Company.

The deed of trust provided that the mortgagor company should preserve the corporate existence of the different corporations, whose stock or property was conveyed, together with all their corporate rights, and the mortgagor company covenanted that it would not suffer to be created any charge upon the property superior to the lien of the trust deed or mortgage.

By the terms of this mortgage or trust deed the trustee was not to have the right to the possession of this property conveyed unless default should be made in the payment of interest on or the principal of the bonds. At the time the bill was filed no such default had occurred.

The primary purpose of the bill is to conserve certain property belonging to the Tallassee Falls Manufacturing Company, at the time of the two conveyances mentioned, and of which it has since remained in possession in subordination to said conveyances, except as disturbed by the defendants Sayres and Parks, to the end that such property may continue to be security for

the mortgage debt and may be eventually applied to it in case of a default in its payment.

It is further alleged that the right and title of the plaintiff as trustee to this property is endangered by certain claims made in respect to the property by the defendants Sayres and Parks; that the Tallassee Falls Manufacturing Company heretofore instituted unsuccessful proceedings in the state chancery court in the effort to protect and conserve said property against the claims of Parks and Sayres; that since then neither the mortgagor company nor the Tallassee Falls Manufacturing Company had made any effort to protect the property against such claim; that the property so endangered forms a valuable portion of the mortgage security held by the plaintiff and will be lost to the plaintiff as trustee and finally to the bondholders, the cestui que trustent, unless the right of the trustee to it be protected.

The further allegations of the bill are substantially as follows: The Tallassee Falls Manufacturing Company owned and was in the possession of certain lands, between six and ten acres, on the east side of the Tallapoosa river, and between the river and the town of East Tallassee, where the operatives of that company's mills resided and which this company owned. Although this piece, six acres, or more, was in the heart of the company's holdings and immediately adjoining its plant, it had been, in part, allowed to remain unutilized for the reason that the company had reserved it as the place for contemplated improvements for the benefit of its operatives and the inhabitants of the towns of Tallassee and East Tallassee, such as a water basin of the waterworks, schoolhouses, and the like.

There was an old dwelling situated on this six acres, more or less, known as the Barent Du Bois house. On this same tract of land the company had constructed in the year 1900, at a cost of $3,500, a dwelling house for its assistant superintendent, Frank Milstead, and in which he resided for some years.

The cotton mill of the company was on the east side of the river and was operated by water power supplied by a dam across the river, and this dam was anchored on this vacant property here involved. One end of a steel bridge across the river rests on this property. A canal which conveys the water from the pool or pond, made by the dam across the river to the factory or power house of the company, was constructed across the land now in dispute. Through these agencies, the cotton mill on the east side of the river was operated. The plaintiff alleges that, if the title of the defendants Parks and Sayres be held valid, the damage to the plant of the Tallassee Falls Manufacturing Company would be great and irreparable, and that neither the Tallassee Falls Manufacturing Company nor the mortgagor company has any property in the state of Alabama, except that covered by the mortgage, of sufficient value to make good such loss.

During the year 1893, one Howard was put in possession, by the Tallassee Falls Manufacturing Company, of the above-mentioned Barent Du Bois house, situated on the land here involved, as its tenant. At the time this was done, the company was engaged in the construction of a dam across the river, and there were more laborers engaged in the work than could be housed by the company. Howard was granted permission, by the company, to erect a small house within a few feet of such dwelling which he occupied in which to board and lodge these laborers. He erected the small house and furnished lodgings to the laborers as long as he remained in possession. Afterwards, Howard vacated the premises and surrendered the dwelling house to the company, and A. J. Parks, the father of the defendant J. D. Parks, went into possession alone, either as the tenant of the company or with one of his sons (other than J. D. Parks) who became such tenant. By permission of the company, Howard sold the small house which he had erected as aforesaid to one Sayres, but did not convey or pretend to convey to him the land on which it stood. This house was a cheap affair costing about $50. On taking possession, Sayres began the operation of a small beef market in it. This market was a convenience to the employés of the company, and for that reason the company made no objection to Sayres' occupancy for that purpose. So far as the company knew or could reasonably infer, Sayres made no claim while

he was operating such market to the lands on which it was situated or any of the land involved in this controversy; his claim being confined to the house itself. Sayres bought this house about the year 1905, and not until two years after that date did the company receive any information that he was making any claim to any part of the land.

Sometime during 1907, Sayres began to add to the house. The company protested against his right to do so and demanded to know by what authority he was taking such action. It was then informed, for the first time, that Sayres had procured a deed from some one purporting to convey to him the land upon which the house, bought by Sayres from Howard, was situated. He declined to exhibit the deed or to give any information on the subject. In the early part of 1908, the company discovered the existence of the deed to Sayres. In September, 1908, the company discovered that a deed was recorded in the office of the judge of probate of Tallapoosa county (the proper place for the record of such conveyances) on October 30, 1907, and this deed was dated August 1, 1907, was executed by Elizabeth C. Du Bois, and purported to convey "one-fourth interest in all that portion of the north half of section 19 not disposed of in the lifetime of Barent Du Bois to T. M. Barnett, Sr., and Wm. Marks, lying east of the Tallapoosa river in Tallapoosa county." This deed covered the vacant property, six acres more or less, on the east bank of the river, including the land on which the dam and bridge were anchored, and the canal was dug, and on which the power house stood, and probably also the cotton mill of the company.

The Tallassee Falls Manufacturing Company later learned that Parks and Sayres were claiming title under two other deeds, not then recorded, but it never knew what persons had executed these two deeds or what land was included therein until in May, 1909, when Parks and Sayres filed an answer to a certain bill of complaint brought against them by the Tallassee Falls Manufacturing Company, and in which answer copies of said deeds were exhibited. These two deeds were executed by Mrs. Holden and Mrs. Minugh, each a granddaughter of Barent Du Bois, the original owner of the lands, and purported to convey their entire undivided interest in that part of the lands of Barent Du Bois situated in section 19, township 18, range 22, bounded on the west by the Tallapoosa river, on the north by the Tallassee Falls Manufacturing Company's lands, on the east by the Tallassee and Dadeville Road, and on the south by the G. W. Turnipseed lot, containing six acres more or less.

The bill avers that as A. J. Parks, the company's tenant, moved out of the dwelling house on the land in controversy, his son, J. D. Parks, by collusion between Sayres and his father, immediately moved into the dwelling house, never surrendering possession thereof to the Tallassee Falls Manufacturing Company nor giving them the opportunity to retake possession.

It is also alleged that Mrs. Holden, Mrs. Minugh, and Mrs. Du Bois, who executed the deeds to Parks and Sayres, had no interest whatever in the property, and that none of them had ever been in the possession of, that they had never paid any taxes on, and had never exercised any acts of ownership in respect to, it.

The prayer of the bill is sufficiently stated in the opinion.

On the same day the bill was filed, March 18, 1911, a restraining order was issued to all the defendants restraining them "from taking possession by inclosing or otherwise of any property claimed by them," the property in dispute, "except such as they or either of them have actually inclosed, and that they and each of them be restrained and enjoined from selling or from offering for sale or making other disposition, pending the hearing of this cause, of any part of said property." This injunction has been, and is still, in force.

The defendants Parks and Sayres, after the overruling of their demurrers by the court, answered the bill denying that any duty rested upon the complainant to conserve the property, and denied that the Tallassee Falls Manufacturing Company had any title to the property. The defendants admit being in possession of the land under claim of ownership, but deny that the Tallassee Falls Manufacturing Company was in possession when it executed the confirmatory deed of February 8, 1900, to the plaintiff, or that it had

been in possession since. They admit the construction of the canal, bridge, etc., but deny that any of these structures are on the property of which they are in possession. They further admit the occupancy of Howard, but deny that he was a tenant of the Tallassee Falls Manufacturing Company, or that he obtained possession through them, or that he procured permission from that company to erect a small house on the land.

The defendants further admit that Howard vacated the premises in 1905, and that thereafter Sayres went into the possession of the house erected by Howard. They deny that Sayres conceived the idea of acquiring a fictitious title to the land, but they aver that by the deeds from Mrs. Elizabeth C. Du Bois, Mrs. Holden, and Mrs. Minugh they obtained title to the land on which the houses were located and to the adjoining land. They deny that Sayres took possession of the dwelling house by collusion with A. J. Parks, but aver that, after said Parks moved out, Sayres moved in.

The affirmative matter set up in the answer, by way of defense, is that the defendants acquired title to the property by the deeds mentioned, and that the Tallassee Falls Manufacturing Company had already instituted certain litigation in the state courts which they claim is an estoppel in the present suit. And further, as to their title, the defendants alleged that in 1850 or 1851 Mrs. Millie Du Bois, widow of the original entrant of the land, with her son, Barent Du Bois, Jr., and her daughter, afterwards Mrs. Smith, were in the possession of the lands described, and that they continued in the open, notorious, exclusive, and adverse possession, under claim of ownership, until about 1891. They aver that since that time Mrs. Millie Du Bois, her son, Barent Du Bois, Jr., and her daughter had died; that the daughter left two children, Alice V. and Grace Smith; that Alice V. married one Minugh, and Grace one Holden; that Barent Du Bois, Jr., left a son surviving him, Reed Du Bois, who "died four or five years ago," leaving as his only heir at law a widow, Mrs. Elizabeth C. Du Bois, and one child named Gladys. It was alleged that these persons were the only heirs at law of Millie Du Bois, Barent Du Bois, Jr., and of Mrs. Smith, and that they inherited and retained all the title and right that said parties owned to the lands. They (the defendants) then set up their deeds, and alleged that by virtue of the same they acquired title to the land and had been in possession ever since the execution of the deeds, and claim that, with the exception of whatever interest is owned therein by Gladys Du Bois, only child of Reed Du Bois, they are the owners of the property.

In the argument it was contended, as further matter of defense, that the Continental Trust Company, the plaintiff in this case, and the Mt. Vernon-Woodberry Cotton Duck Company, were foreign corporations, not qualified under the laws of Alabama to do business in the state, and for that reason, it was claimed, the mortgage and deed of trust from the Mt. Vernon-Woodberry Cotton Duck Company to the Continental Trust Company is inoperative and void in this state.

John M. Chilton and Benj. P. Crum, both of Montgomery, Ala., and H. N. Randolph, of Atlanta, Ga., for Continental Trust Co.

James W. Strother, of Dadeville, Ala., for defendants.

HENRY D. CLAYTON, District Judge (after stating the facts as above). The bill in this case is framed on the theory that the possession of the land by Parks and Sayres and under the deeds made to them by Mrs. Du Bois, Mrs. Holden, and Mrs. Minugh, constitute imminent waste of such land to the trust estate which was created by the mortgage and deed of trust from the Mt. Vernon-Woodberry Cotton Duck Company to the plaintiff, the Continental Trust Company, and that a court of equity ought to stay such waste.

Following appropriate allegations in the bill, the prayer is: (1) for injunction, pendente lite and perpetual, restraining said Parks and Sayres, and McBrayer and McCluskey (who claim certain lots under

deeds from Parks and Sayres), from selling or disposing of the six to ten acres of land, described in the bill, and the other part of section 19, township 18, range 22, in Tallapoosa county, Ala., which surveyor's subdivision is all the property involved in this controversy; (2) that the land claimed by Parks and Sayres be decreed to be a part of the trust estate conveyed to the plaintiff, as trustee, under the aforesaid mortgage and deed of trust; (3) that it be declared the duty of plaintiff to conserve and protect the trust estate for the benefit of the owners of the bonds issued under said mortgage and deed; (4) that the conveyances under which Parks and Sayres, and their privies, make claim to the land, or any part thereof, be delivered up and canceled; (5) that the plaintiff be put in possession of the land in dispute; and (6) that, "if mistaken in the special relief prayed, the plaintiff prays for such other, further, and different relief as the nature of its case may require and as to equity shall seem meet."

[1] The first objection raised by the defendants is that the plaintiff is not entitled to relief for the reason that at the time of the execution of the mortgage and deed by the Mt. Vernon-Woodberry Cotton Duck Company, a Delaware corporation, to the Continental Trust Company, a Maryland corporation, the plaintiff, and the subsequent ratification of it by the Tallassee Falls Manufacturing Company, the Alabama corporation, neither of these two foreign corporations had on file with the Secretary of State of Alabama an instrument of writing designating a place of business in this state and an authorized agent residing there, as required by the Alabama statute. Code of Alabama 1907, § 3642. This statute provides that:

"Every corporation not organized under the laws of this state shall, before engaging in or transacting any business in this state, file an instrument of writing, * * * designating at least one known place of business in this state and an authorized agent or agents residing thereat."

And section 3643 of the Code of Alabama stipulates that the filing of such instrument shall be with the Secretary of State.

The answer to this contention is apparent when the circumstances of this case are considered. It is not disputed that this mortgage and deed of trust was executed outside of the state of Alabama and at Baltimore, Md., by one of these foreign corporations to the other foreign corporation. Such execution having been outside of Alabama, clearly such action cannot be said to have constituted "engaging in or transacting any business in this state," Alabama. It needs no argument to show that such transaction does not come within the terms of the statute or within the legislative contemplation, and that therefore the statute is not applicable to this case. And, as to the deed of the Tallassee Falls Manufacturing Company, the Alabama corporation, to the Mt. Vernon-Woodberry Cotton Duck Company, the Delaware corporation, here the mortgagor, the transaction is an executed one; and it is well settled that the statute quoted has no application to executed contracts. Cranor v. Miller, 147 Ala. 268, 41 South. 678; Farrior v. N. E. Mort. Co., 88 Ala. 275, 7 South. 200; Kindred v. N. E. Mort. Co., 116 Ala. 192, 23 South. 56; Diefenbach v. Vaughan, 116 Ala. 150, 23 South. 88; Craddock v. Am. F. L. & M. Co., 88 Ala. 281, 7 South. 196.

[2] Another defense interposed is that the subject-matter of the controversy has been finally adjudicated in the Supreme Court of Alabama, and that this operates as an estoppel, barring this plaintiff from the prosecution of the present suit. It is manifest that this is not a sound proposition for the reason that the parties there and issues of law and fact determined by the state court, and the parties and issues of law and fact in the instant case, are so different that res adjudicata cannot be invoked here to defeat this plaintiff. The suit there was begun by bill in the state chancery court, filed by the Tallassee Falls Manufacturing Company, as complainant, now one of the defendants in this case. Neither the plaintiff nor the Mt. Vernon-Woodberry Cotton Duck Company was made a party to that cause. Moreover, not only were the parties in that cause different from these in this, but a different issue was presented and determined, as will appear from a reading of the bill and the opinion of the court in that case. Sayers et al. v. Tallassee F. M. Co., 167 Ala. 555, 52 South. 892.

There the controversy was determined upon the sole ground that the Tallassee Falls Manufacturing Company, which there claimed to have the legal title to the land, was out of the possession of it, and therefore, for that reason, could not maintain its bill to set aside the deeds held by Parks and Sayres as a cloud upon its title. The state court predicated its ruling upon this, and upon no other ground, and held that the remedy of that complainant was ejectment or other action at law, and consequently dismissed the bill for want of equity.

It is true that the plaintiff claims under the Tallassee Falls Manufacturing Company, but it is apparent that in the former case there was no adjudication on the merits of the controversy. In other words, that decision was merely to the effect that, so far as the Tallassee Falls Manufacturing Company was concerned, it, being out of possession of the land, could not assert its legal title and acquire possession of the land through the medium of a bill in chancery. That decision does not conclude this plaintiff, who had nothing to do with that suit, from now proceeding to have its rights and duties as trustee, under its mortgage and deed, determined and vindicated.

In the opinion of the Supreme Court of Alabama in the former case (167 Ala. 555, 52 South. 893) it is said:

"The gist of this bill, by appellee against appellants, is that the respondents claim certain lands and are in possession thereof, and that the complainant, on the other hand, claims to own, in fee, those lands, and desires by this bill to have its rights declared therein and to enforce its rights thereto. The remedy at law is plain, adequate, and complete, dependent in its selection upon the circumstances under which unlawful detainer or ejectment is appropriate. If the complainant is entitled to this property, to the exclusion of the respondents, that result can be readily obtained in one or the other forms of action. The complainant not being in possession, peaceable or otherwise, if those in possession are not still its tenants, the bill is without equity as an appeal to the remedy afforded by our statutes for the quieting of titles and claims to real estate, or as an effort to remove a specific cloud from its title." Citing Lyon v. Arndt, 142 Ala. 486, 38 South. 242, and other cases.

That opinion concludes:

"The decree appealed from is reversed, and a decree will be here entered dismissing the bill for want of equity."

And then the final decree itself ends as follows:

The decree of the chancery court is reversed and annulled, and this court, proceeding to render the decree which the chancery court should have rendered, doth order, adjudge, and decree that the bill of complainant be and is hereby dismissed for want of equity.

The law deduced from the decisions in adjudged cases and determinative of this defense, res adjudicata, here interposed, is that a judgment in a former suit will not be regarded res adjudicata unless there be in the former suit and in the subsequent suit: (1) Identity of the cause of action; (2) identity of the thing sued for; (3) identity of parties and the quality or capacity, for and against whom the claim is made; (4) the judgment in the former suit must have been upon the merits; and (5) upon an issue so directly in point as to control the issue in the subsequent suit. Of course, this last proposition (5) is subject to the qualification that in some cases the duty to have specifically raised the certain issue is so obvious, and the issue itself so necessarily involved, that the court will treat it as having been raised in the former suit.

The theory supporting the doctrine of res adjudicata is that matters, in their nature justiciable, which have once been investigated upon a distinct issue, and finally adjudicated by a court of competent jurisdiction, ought not again be the subject of litigation between the same parties or their privies; and the law in respect to this doctrine, estoppel by judgment, is well settled; but in some cases difficulty lies in the application of the law to the facts. A few of the decided cases will serve to give the correct exposition of the law and its proper application. Gilbreath v. Jones, 66 Ala. 129, 132; Mershon v. Williams, 63 N. J. Law, 398, 44 Atl. 211; New Orleans v. Citizens' Bank, 167 U. S. 371, 396, 17 Sup. Ct. 905, 42 L. Ed. 202; Mason v. Mason, 5 Ala. App. 377, 59 South. 699; Montgomery Iron Works v. Roman, 147 Ala. 434, 41 South. 811; Grant v. Phœnix L. Ins. Co., 121 U. S. 105, 7 Sup. Ct. 841, 30 L. Ed. 905; Durant v. Essex Co., 74 U. S. (7 Wall.) 107, 19 L. Ed. 154; Gould v. E. & C. R. R. Co., 91 U. S. 526, 23 L. Ed. 416; Ryan v. Young, 147 Ala. 660, 41 South. 954; F. & D. Co. of Maryland v. Robertson, 136 Ala. 379, 34 South. 933.

[3] The parties to the bill in chancery in the state court are not the same parties to the case at bar. As it has been stated, the complainant there was the Tallassee Falls Manufacturing Company, suing while out of possession to cancel certain deeds as a cloud upon its title. Here the suit is by the mortgagee, the Continental Trust Company, not a party to the former suit and not entitled to possession at the time of the filing of the bill. The former suit did not determine the merits of the subject-matter, but determined only that the remedy of the complainant there was at law and not in equity. As to who really owned or had title to the land, it was not undertaken to be adjudged in that suit. Certainly the rights of this plaintiff were not so much as even suggested or in any way considered or determined.

In the opinion in McCall v. Jones, 72 Ala. 368, 371, Judge Somerville, for the court, said:

"The rule of res adjudicata * * * is confined to those cases where the parties to the two suits are the same, the subject-matter the same, the identical point is directly in issue, and the judgment has been rendered in the first suit on that point. * * * It is not only essential that the issue, or point in question, must either have been actually decided, or necessarily involved in the first case, but the first judgment, sought to be pleaded in bar in the second suit, will not be available as a defense, unless it was a judgment on the merits of the case. McDonald v. Mobile Life Ins. Co., 65 Ala. 358; Freeman on Judgm. § 460; 1 Greenl. Ev. § 528; Hutchinson v. Dearing, 20 Ala. 798."

It is urged as further defense that inasmuch as the plaintiff, as trustee, has the legal title to the property, according to the allegations of the bill, and is out of the possession of the property itself, this bill cannot be sustained for the purpose of canceling the deeds held by Parks and Sayres and to protect the trust estate against the waste or trespass of these defendants.

It must be remembered that when this bill was filed the title of the plaintiff as trustee was not a ripened legal title that carried with it the present right to possession. This right to possession was inchoate and could not accrue until the law day of the mortgage—until there was default in the payment of interest on, or principal of, the bonds, for which payment the mortgage and deed was given to secure.

It is elementary to say that, if one be not in possession, he cannot sustain a bill to quiet title, for in such case his remedy is an action at law. The defendant insists that this generally recognized rule is applicable in this case, and that the plaintiff has a plain, adequate, and complete remedy at law. Of course, it is indisputable that when a party is in possession his remedy at law is inadequate, or, to be more accurate, he has no remedy there at all; for a suit at law must be brought against the party in possession, and the party who feels himself aggrieved, being in possession, cannot sue himself. If, however, he be out of possession, and there is no obstruction to his remedy at law, the rule would apply, and therefore he could not come into a court of equity.

The statute, section 267 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [Comp. St. 1913, § 1244]), is no more than a legislative expression of pre-existing familiar law. As far back as Boyce v. Grundy, 3 Pet. 213, 7 L. Ed. 655, it was said, and it has been repeated in numerous cases since, including Williams v. Neely, 134 Fed. 10, 67 C. C. A. 171, 69 L. R. A. 232, that such statute is merely declaratory of the well-recognized rule that a suit in equity cannot be sustained where there is a plain, adequate, and complete remedy at law. The converse is equally the settled law; that is, if the plaintiff has a justiciable cause and he has no plain, adequate, and complete remedy at law, he must have one in equity. This plaintiff could not maintain an action at law, ejectment, or other similar statutory action, for the plaintiff did not have, at the time of the filing of the bill, the legal title coupled with the present right to possession.

In Cofer v. Schening, 98 Ala. 341, 13 South. 124, the law is stated:

"A plaintiff in ejectment, or in the corresponding statutory real action, cannot recover, unless at the commencement of the action he has a legal title, entitling him to the immediate possession."

In the case of Lewis v. Alston, 184 Ala. 339, 63 South. 1008, it is said that reversioners are not yet entitled to possession, and not being able to maintain an action at law are, for that reason, entitled to sue in equity to cancel a deed as a cloud on their title.

Of course, the courts have never undertaken to state all the instances where one out of possession can sustain a bill to quiet title. It would be impossible to do this, for the reason that each case must rest upon its own peculiar variety of facts and circumstances. The question presented in each instance is whether there is a remedy at law, and, if so, whether it is plain, adequate, and complete, in view of all the circumstances and as the merits of the particular case require. In other words, the test is that the remedy at law, in order to exclude equity jurisdiction, must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Tyler v. Savage, 143 U. S. 95, 12 Sup. Ct. 340, 36 L. Ed. 82; Preston v. Sturgis, 183 Fed. 1, 105 C. C. A. 293, 32 L. R. A. (N. S.) 1020.

Judge Jones, my predecessor in office, in ruling upon the demurrers to the bill in this case, held correctly, I think, that the special equities alleged in the bill, if established by the evidence, were such as to show that the remedy at law, even if one existed, was not adequate and complete. Perhaps, it is well to say here, by way of parenthesis, that this ruling was made before equity rule No. 29 (198 Fed. xxvi, 115 C. C. A. xxvi), abolishing demurrers in equity cases, was adopted.

In Echols v. Hubbard, 90 Ala. 309, 7 South. 817, a case somewhat analogous in principle to this, it was held that a court of equity will take jurisdiction to remove a cloud upon the title to land, only when there is no remedy at law by which the superiority of apparently conflicting titles may be tried and determined, and this extends to cases where the complainant is in possession and also where, though he may be out of possession, he has only an equitable title which is not available at law.

And in the case of Freeman v. Brown, 96 Ala. 301, 303, 11 South. 249, it is said:

"The demurrers to the bill were properly overruled. On the case presented by complainant, he had no remedy in a court of law. The legal title was in the respondent through the foreclosure of a mortgage which antedated complainant's deed. The claim now advanced by complainant rests upon matter in pais which, he says, estops respondent to assert this legal title against his own superior equity. Of such claims no cognizance is taken by courts of law; equity alone can be invoked to their effectuation. 3 Brick. Dig. p. 448, §§ 26, 27. Ordinarily, a bill to remove clouds from title will not lie in behalf of one out of possession, for the reason that ordinarily under these circumstances an action for possession may be maintained at law, judgment in which would dissipate the alleged cloud. But where, as in this case, the title which is supposed to be clouded is an equitable one, the legal remedy does not exist, no recovery could be had at law, however meritorious plaintiff's title might be in the contemplation of a court of conscience, and upon this consideration the principle has become well established that chancery may be resorted to for relief against the cloud by one out of possession. Echols v. Hubbard, 90 Ala. 309 [7 South. 817]."

It should be borne in mind that it is alleged in the bill that the defendants Parks and Sayres had not only come into the possession of this piece of land, containing from six to ten acres, and were asserting title

thereto, but were from time to time making further aggressions upon the property covered by plaintiff's mortgage and deed, and embraced in the deeds under which Parks and Sayres claimed, and specifically that the deeds to Parks and Sayres (sought to be canceled) included the power house and other property necessary to the operation of the cotton mill, without which the entire value of these mills and other property would be lost to the plaintiff and its cestui que trust, or substantial and irreparable injury would result to the trust estate. It is also alleged that the defendants have sold lots, and were engaged in the effort to sell other lots to other purchasers, and that the purchasers in such cases had erected structures upon the lots, and that this kind of trespass would be repeated in the event other lots are sold; and, again, that all such lots sold and purposed to be sold are alleged to be a part of the property covered by plaintiff's mortgage and deed; and, further, that injunction was necessary to restrain the defendants from committing such trespass or waste. These allegations, in connection with the others in the bill, render this case proper for equity cognizance.

In addition to the ground mentioned, there is another reason why the plaintiff should have brought this bill and why it should be sustained. Under common-law principles, and especially in view of the provisions of the trust deed, it was the duty of the trustee, the plaintiff, to conserve and protect the estate for the benefit of the cestui que trust; the mortgagor having failed to protect it. In short, a failure to do this would subject the trustee to liability to the bondholders whose interests the trustee was in duty bound to protect.

In section 4 of article 2 of the mortgage and deed, it is provided, in part, as follows:

> The mortgagor company will not voluntarily create or suffer to be created any lien or charge having priority to, or preference over, the lien of these presents upon the mortgaged premises, or any part thereof, or upon the income thereof, etc.

In section 5 of the same article the mortgagor is required to pay all taxes, assessments, and governmental charges lawfully imposed upon the premises, franchises, or property mortgaged, or any part thereof, or upon the incomes and profits thereof, the lien of which will be prior to the lien of such mortgage, "so that the priority of this indenture shall be fully preserved in respect to such property," etc.

In subsection 3 of section 7 of said article, it is further provided that:

> The mortgagor company will at all times take such actions from time to time as may be necessary to preserve the corporate existence and rights of every company of whose capital stock the greater part shall be pledged or assigned hereunder.

Moreover, article 4 of said trust deed provides, amongst other things, for possession by the trustee and sequestration of the rents and profits of the mortgaged property by the trustee in case of a default in the payment of the interest on, or principal of, the bonds, and also for foreclosure sale of the property, etc.

In the case of Coosaw Mining Co. v. State of South Carolina, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537, the bill was filed by the state to abate a public nuisance, and the question was whether a court of

equity would take jurisdiction of such a suit. In concluding the opinion, the court said:

"It is contended by the appellant that this case is not one of which a court of the United States, sitting in equity, could take cognizance. * * * But if it was not one of which the Circuit Court of the United States, sitting in equity, could properly take cognizance (Payne v. Hook, 7 Wall. 425-430 [19 L. Ed. 260]; Arrowsmith v. Gleason, 129 U. S. 86, 98 [9 Sup. Ct. 237, 32 L. Ed. 630]), the pleadings, upon the removal of the case from the state court, should have been reformed so as to make it a case to be tried at law. It is necessary therefore to inquire whether, according to the principles of equity, as recognized in the courts of the United States, the state can obtain relief by a suit in equity. The grounds of equity jurisdiction in such cases as the one before us are, substantially, those upon which courts of equity interfere, in cases of waste, public nuisance, and purpresture."

The court then cites the case of the United States v. Gear, 3 How. 120, 800, Appx., 11 L. Ed. 523, 838, where the United States brought ejectment but filed a bill in equity for an injunction to stay waste, and in commenting the court said:

"This court held, in the equity case, that digging ore from lead mines upon the public lands was such waste as entitled the United States to a writ of injunction to restrain it."

The case of Attorney General v. Richards, 2 Anstr. 603, is also cited. In that case an information in equity was filed to restrain the erection of wharves and docks in a certain harbor. In concluding its opinion in this case (Coosaw M. Co. v. South Carolina, supra), the court said:

"The Coosaw Mining Company, unless restrained, will not only appropriate to its use property held in trust for the public, but will prevent the proper administration of that trust, for an indefinite period, by obstructing others, acting under lawful authority, from enjoying rights in respect to that property derived from the state. These conflicting claims cannot be so effectively * * * settled by proceedings at law, as by a comprehensive decree covering all the matters in controversy. Proceedings at law or by indictment can only reach past or present wrongs done by appellant, and will not adequately protect the public interests in the future."

In that case the plaintiff stood in the attitude of a trustee, and as such invoked the aid of the equity court in the performance of a duty in the nature of an implied trust for all of its citizens. The case at bar is stronger than that, for here there is an express trust and it is the duty of the trustee to protect the estate; and, the established facts justifying, this duty should be made effective by this court.

The cestui que trust cannot rightfully complain for any depreciation to or waste of the estate, unless it be shown that the trustee is in default by failure or refusal to act in the protection of the trust estate.

In Royall's Adm'r v. McKenzie, 25 Ala. 363, where a bill was filed to charge the trustee for neglect of duty, it is said:

"No principle is better settled than that it is the duty of a trustee of a chose in action to take every necessary step, compatible with reasonable diligence, to meet the object of the trust (citing cases), and it is not sufficient for the trustee merely to apply for payment, but it is his duty to bring an action, if necessary, for the recovery of the amount."

And in the case of Blackburn et al. v. Fitzgerald, Adm'r, et al., 130 Ala. 584, 36 South. 586, the court held that before beneficiaries under a trust, and as such, could proceed by bill in equity for the enforce-

ment of equitable rights, they must first move the trustee to act, or show some sufficient reason for the failure to do so. See, also, Bailey v. Selden, 112 Ala. 594, 20 South. 854.

It cannot be doubted that it is the duty of the trustee to protect the trust estate against impairment, actual or imminent. If the remedy at law is adequate and complete, he must resort to law. If such remedy be not plain, he must come into a court of equity.

In Davis v. Wakelee, 156 U. S. 680, 688, 15 Sup. Ct. 555, 558 (39 L. Ed. 578), the court said:

"It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

On the facts of this case an action at law cannot be sustained by the plaintiff, the trustee, for it has not the right of immediate possession, although it has the legal title, because its right to the possession of the property of the trust estate is postponed until the law day of the mortgage and trust deed—until default in the payment of interest on, or principal of, the bonds. No such default had occurred when this bill was filed. Therefore, as a part of plaintiff's relief and necessary for its complete remedy, the injunction was proper to preserve the legal status or rights of the trustee and the cestui que trust.

All these considerations lead me to conclude that the plaintiff has no adequate or complete remedy, except in equity, on the issues presented by the pleadings, and that, although out of possession, it is entitled to all the relief prayed for, if the proof supports the averments of the bill.

[4] Turning now to the testimony, I find that one Howard entered into the old Du Bois house on a part of the six to ten acres of land, included in the land involved here, and built the small house while so occupying such premises and by permission of the Tallassee Falls Manufacturing Company, to whose title and interest the plaintiff has succeeded. There is no claim that Howard acquired his possession from any one other than the Tallassee Falls Manufacturing Company. Milstead was the assistant superintendent of the mills at the time, and as such he gave Howard permission to erect this small house which the defendant Sayres afterwards bought. This being so, it was tantamount to an admission, on the part of Howard, that his holding of the house or premises was as the tenant of the company. The company gave Howard permission to remove this small house from the premises within a reasonable time after the expiration of his tenancy. He did not, however, remove it, but at the expiration of his tenancy sold it to Sayres, who never did even so much as pretend to have purchased from Howard the land on which this small house was erected. Furthermore, the answer admits the purchase of the small house, but does not assert that Sayres acquired any right, by virtue of his purchase of the house, to any part of the land. He bought the house and no more, with the permission and understanding, implied at least, that he should have the right to remove it from the land.

It is set up in the answer that the defendants Parks and Sayres procured deeds to the land involved from Mrs. Elizabeth C. Du Bois, the granddaughter-in-law of Barent Du Bois, the original holder and entrant of the land, and from Mrs. Holden and Mrs. Minugh, each a granddaughter of the said Barent Du Bois, and that thereby they acquired paper title to the land. I have no doubt that Sayres, and Parks, who entered under Sayres, derived their possession through privity with Howard, who held the house by permission of the company from 1905, when Sayres bought the house, until said deeds were executed by Mrs. Du Bois, Mrs. Holden, and Mrs. Minugh on August 1, 1907, March 7, 1908, and January 16, 1908, respectively, to the defendants Parks and Sayres. During this two-year period, beginning in 1905, when Sayres bought the small house, until 1907, when said deeds were made, Sayres and Parks never claimed any interest in the land. If they did make any such claim, it was not known to this plaintiff, nor was such claim or assertion of ownership apparently hostile to the Tallassee Falls Manufacturing Company, certainly not open and notorious until the deeds had been acquired from Mrs. Du Bois, Mrs. Holden, and Mrs. Minugh some two years after they (Parks and Sayres) acquired the collusive possession. During that period their holding must have been under the company, which must be, at least, fairly implied from all the facts and circumstances. Finally, Parks and Sayres were the tenants at will of the company, and, as such, they did not acquire any title to any portion of the land because they never surrendered back possession of the land to the company and never acquired any new or other possession of the land except by collusion to defraud the company out of possession.

[5] The defendant Sayres, and Parks, who entered under Sayres, as stated, acquired possession if the small house which the company permitted Howard, as its tenant, to erect and sell, as tenants of Howard, and, in privity with the company, they are not in position to question the title of the company to the property. The defendants Parks and Sayres, being tenants at will of the company of the small house, as such could not acquire any title whatever to any portion of the land without first surrendering back possession of the land to the company. The compelling duty of such prior surrender is well stated in Littleton v. Clayton, 77 Ala. 571, 576, where a tenant moved off the premises, but, before the landlord had opportunity to retake possession, returned and endeavored to set up an adverse title, acquired during the tenancy. The court said:

"No rule of law is more generally settled than that a tenant, while he is in possession, cannot dispute the title of his landlord, nor set up a superior title in himself or a stranger, to defeat an action by the landlord to regain possession. The tenant, by renting and receiving possession from the landlord, recognizes his title, and is precluded from showing that he had no title at the time of the renting. If the tenant desires to assert title in himself or another, he must surrender possession of the premises, and give his landlord the advantage of possession in any litigation as to the title."

And this rule applies where possession is acquired by collusion with the tenant, as the testimony clearly shows was done in this case by the defendants Parks and Sayres.

The same is true of the possession acquired by Sayres of the old Du Bois dwelling house on the property. The testimony shows that A. J. Parks, the father of the defendant J. D. Parks, was in possession of this dwelling, either as a tenant of the company, or by an entry under Howard, who was the tenant of the company. It is not claimed that A. J. Parks acquired possession from any one other than the company, nor is any right or title alleged to have been in A. J. Parks, except as it might have been derived from the company in the manner above stated.

The testimony further shows that as A. J. Parks, the tenant, moved out of the dwelling house, the same wagons that carried his household effects away also carried in the household effects of Sayres —that the abandonment of the possession of the dwelling house by A. J. Parks and the beginning of the occupancy of it by Sayres was practically a simultaneous transaction. There was no appreciable interval between such moving out and such moving in—no hiatus in which the company could have retaken possession of the dwelling house.

Furthermore, the testimony does not show that the defendants Parks and Sayres ever paid Mrs. Elizabeth Du Bois anything, and, even if they had paid her a consideration for her deed, she had no title to the land, was not in possession, and therefore could not convey any title. As to the deeds from Mrs. Holden and Mrs. Minugh, the testimony shows, and it is a pregnant fact, that no consideration passed for such papers other than one dollar paid in each case and also a promise to pay the grantors, each or both, it is not clear, $1,000 if the defendants Parks and Sayres should succeed in holding the property here involved and described in such deeds.

As a part of the fraudulent plan of Parks and Sayres to acquire possession of the property, it seems reasonable to infer that their purpose was, after having first acquired possession in the manner stated, to obtain paper title, assert a bona fide possession adverse to the company, and then hold possession, under such papers as color of title, until such holding would ripen into a defensible title under the Alabama statute.

Section 2830, Code of Alabama 1907, provides:

"Adverse possession cannot confer or defeat title to land unless the party setting it up shall show that a deed or other color of title purporting to convey title to him has been duly recorded in the office of the judge of probate of the county in which the land lies for ten years before the commencement of the action. * * *"

The conduct of the parties was a wrong against the company. And the deeds relied upon by the defendants as their paper title were procured as a part of their scheme invented to defraud the company out of its property.

To defeat this fraudulent purpose and protect the interest of its cestui que trust, the plaintiff, by this bill, has properly invoked the equity jurisdiction of this court.

In addition to what has been said, the law applied to the facts of this case satisfy me that the defendants are estopped from denying the title of the Tallassee Falls Manufacturing Company and the right

and title of the plaintiff derived from that source. If, however, there is in fact any break in the chain of title of the Tallassee Falls Manufacturing Company, the testimony convinces me that such break relates to only a small fractional portion of the land, and that it cannot be of any benefit to the defendants in this cause.

It appears that Mrs. Millie Du Bois, under whom the defendants now claim title, occupied for many years the Barent Du Bois dwelling on the vacant property hereinbefore referred to as a part of the six to ten acres of land, a part of section 19, township 18, range 22, in Tallapoosa county, Ala., the subject-matter of this controversy. A careful consideration of the testimony of all the witnesses, together with the circumstances, leads me to the conclusion that the weight of the testimony shows that her occupancy was not adverse to the holders of the legal title.

It is ascertained that the land involved was sold in 1852 by McKenzie, as administrator of Barent Du Bois, who acquired them by entry from the United States. In the petition filed in the probate court of Tallapoosa county in 1850, the widow, Mrs. Millie Du Bois, and the children of Barent Du Bois, were made parties defendant, and under these proceedings the land was sold for division among those interested. It is a fair presumption that the proceeds were divided and that the widow received her proper share, or, at least, that her dower right was sold. But as to this we are not compelled to resort to conjecture, for the testimony shows that on May 19, 1851, Millie Du Bois, widow and relict of Barent Du Bois, deceased, who had at a former term of the probate court of Tallapoosa county, Ala., filed her relinquishment of dower in the real estate of the said Barent Du Bois, deceased, claimed her dower interest in the money arising from the sale of the lands of Barent Du Bois, deceased. In the same judgment entry of the probate court, from which this fact is ascertained, that statement is followed with this:

"And it appearing to the satisfaction of the court that the report of the sales of said lands by the administrator has been returned into court; and it also appearing from due proof made that the sum of one thousand and five hundred dollars is a fair equivalent for the dower interest of the said Millie Du Bois, widow of Barent Du Bois, as aforesaid: It is therefore ordered, adjudged and decreed that the sum of one thousand and five hundred dollars be, and the same is hereby allowed to the said Millie Du Bois, out of the purchase money arising from the sale of the real estate belonging to the estate of said decedent. It is further ordered, adjudged and decreed by the court, that John McKenzie, administrator of said deceased, pay the amount so adjudged to the said Millie Du Bois, widow as aforesaid within a reasonable time after the said purchase money arising from the sale of said real estate as aforesaid shall become due and payable."

See the following judgment entries by the probate court of Tallapoosa: On Petition to Sell Lands, made December 3, 1850; Relinquishment of Dower by Millie Du Bois, dated January 11, 1851; Order of Sale of Lands of Barent Du Bois, deceased, dated January 13, 1851; Order Approving Sale of Lands and Directing Conveyances executed to Purchasers, entered April 21, 1851; Order Allowing Dower out of Proceeds of Sale of Lands, made May 19, 1851.

In addition to these facts, the testimony shows that the land was

purchased at the sale, had under such proceedings by one Neal, and that he afterwards, during his lifetime, conveyed a part of the lands, and after his death his administrator conveyed the other part, and the Tallassee Falls Manufacturing Company claims under title from the parties who derived their title from that source, and as follows:

In 1878, the title of Gilmer and Jordan to a one-sixth interest each was vested in the Tallassee Falls Manufacturing Company No. 1, the corporation that erected the cotton factory on the west bank of the Tallapoosa river and whose property was afterwards sold under foreclosure proceedings in the chancery court of Montgomery county. At this sale one Chase became the purchaser of one of such interests, and one McKissick of the other, and afterwards both of these interests were acquired by the Tallassee Falls Manufacturing Company as well as all the other interests coming down from Barent Du Bois through subsequent or derivative purchasers.

Properly authenticated copies of the deeds and other papers constituting the chain of paper title of the Tallassee Falls Manufacturing Company were introduced in evidence. The original of such muniments of title were some years ago put in possession of the Mt. Vernon-Woodberry Cotton Duck Company, the mortgagor, at Baltimore, Md., where its principal office was located; and it is reasonably established that these papers were destroyed by the great fire which afterwards occurred in that city.

Predicate was properly laid for the introduction in evidence of the transcripts of title from the records in the office of the judge of probate of Tallapoosa county, Ala., and these records go to sustain the title of the Tallassee Falls Manufacturing Company.

As stated, Mrs. Millie Du Bois had no title to any of this land. The title that her husband had was divested by the proceedings had in the probate court of Tallapoosa county, Ala. When she left the property in May, 1891, she never returned to it; nor did her heirs ever assert any right to the possession of it. The testimony convinces me that she understood her right to the possession of the property, or any part of it, was terminated when she removed from Alabama to the Indian Territory in 1890. It is a significant fact that immediately upon Mrs. Du Bois vacating the property the Tallassee Falls Manufacturing Company made extensive repairs to the house; and the facts attendant upon the making of such repairs are more than persuasive that the Tallassee Falls Manufacturing Company thus asserted possession and ownership of the house and premises, and that during the years intervening from 1890 to 1907 neither Mrs. Du Bois or any of the Du Bois heirs disputed in any way this assertion of ownership and possession.

Again, it must be remembered that when the lands were sold for division Mrs. Millie Du Bois was a party to the sale, the regularity of which has never in any way been questioned. It is reasonable to assume that, inasmuch as her dower right had been sold, she was in possession of the house by permission of the holders of the legal title to the land. I am convinced that this was the character of her holding.

It is true that she may have done acts while in possession consistent with the assertion of adverse title, but the same acts are consistent with a holding not adverse to the Tallassee Falls Manufacturing Company. It is certain that the testimony does not show that she claimed continuous ownership of the land after she left it. A title derived by adverse possession, under the circumstances, would be incompatible with the prior proceedings in the probate court, to which she was a party, and by which whatever title or right she had as widow had been divested out of her and invested in the party who acquired title under such probate court proceedings.

It is also made to appear from the testimony that Mrs. Holden and Mrs. Minugh were out of the possession of the property—indeed, it is not established that they were ever in possession—and it is clear that they had been out of possession for more than ten years when they executed the deeds. The testimony does not connect them in any way with the possession of their mother. It is my opinion that, under the deeds executed by them, the defendants Parks and Sayres, acquired nothing, except that such papers might become color of title in connection with adverse possession which they (Parks and Sayres) might thereafter set up as defensible title under the Alabama statute above quoted.

Mrs. Elizabeth Du Bois, who executed the deed on August 1, 1907, to the defendants Parks and Sayres, is a granddaughter-in-law of Barent Du Bois, the original owner, who, as stated, derived title from the United States. If it be true that Mrs. Barent (Millie) Du Bois, as claimed by the defendants, acquired title by adverse possession, the deed from Mrs. Elizabeth Du Bois, the granddaughter-in-law, would not have conveyed to the defendants Parks and Sayres any interest in the property. And, as to Mrs. Holden and Mrs. Minugh, they were granddaughters of Mr. and Mrs. Barent Du Bois, and would have had a possible interest if the title had ever been vested in Mrs. Barent (Millie) Du Bois, provided they had ever been in possession of the property, either themselves or by tenants. Undoubtedly they could not sell and convey while out of possession of the premises. Neither of them had ever been in possession—certainly not from the time Mrs. Millie Du Bois removed from Alabama to the Indian Territory in 1890, 18 years before the deeds were executed to Parks and Sayres.

Parks and Sayres were bound to know, because they went into possession under the company, as above stated, that the Tallassee Falls Manufacturing Company was claiming adversely to all these parties, and all the circumstances show that in taking the deeds to themselves they acted with reference to that fact. The parties to the transaction all knew that the pretended vendors were selling, and the pretended purchasers were buying, nothing but a lawsuit. The testimony shows that Parks and Sayres contributed only a half a dollar each of the cash payment under the deeds from each of these vendors, and that the contract, made as a part of the consideration of the deeds, provided that Parks and Sayres should pay Mrs. Holden and Mrs. Minugh a thousand dollars—to them jointly or to each of them is not clear—

provided that Parks and Sayres should succeed in their efforts to hold the property. As no one else, except the Tallassee Falls Manufacturing Company, was making any claim, this provisional agreement undoubtedly had reference to the claim of that company. Such an attempted purchase was violative of public policy. Sharp v. Robertson, 76 Ala. 343.

I conclude that Parks and Sayres bought this land when it was adversely held; that they bought either with the intention of forcing a compromise with the company, or of eventually setting up that their adverse possession was in good faith and under color of title, and this, manifestly for the purpose thereby, through such adverse possession for ten years, of acquiring under the Alabama law a defensible title available in probable litigation with the company. In other words, the possession of Parks and Sayres having been obtained by fraud and collusion, and the deeds which they took to the land having been procured in further pursuance of their preconceived design to defraud the Tallassee Falls Manufacturing Company, these deeds were nothing more than a pretense of paper title, but, if allowed to remain unchallenged, would operate wrongfully to deprive this plaintiff of a valuable part of the trust estate which it holds for the benefit of others.

[6] As a part of the relief sought by the bill, it is prayed that the deeds to Parks and Sayres be canceled and that the trustee be put in possession of the property. There is no doubt that the deeds can be canceled, but can this court now put the trustee in possession? To answer this in the affirmative would not, it is contended by the defendants, be consistent with the theory that the trustee was not entitled to possession under the mortgage, at the time of the filing of the bill, as there had been no default in the payment of interest on, or principal of, the bonds secured by the mortgage. But, as it has been stated, the mortgagee who brought this bill before default of the mortgagor, not having the right to the present possession of the property and in protecting the trust estate, was not afforded an adequate and complete remedy at law. This part of the prayer, that the court put the trustee, the Continental Trust Company, not the Tallassee Falls Manufacturing Company, into possession, is not the same thing as asserting the right to such possession independent of action by this court. This, in my opinion, answers the suggestion made by the defendants.

Of course, it is a familiar principle that, when a court of equity once acquires jurisdiction of a particular subject-matter and over particular parties, it will not determine the case by piecemeal, but will settle the whole controversy and will not remit the parties to any other forum for any part of their appropriate relief.

Having determined the issues in favor of the plaintiff, and having directed the delivery up and cancellation of the deeds to Parks and Sayres, this court ought not to leave Parks and Sayres in possession, which possession is wrongful and in fraud of the rights and equities of the plaintiff and its cestui que trust. Parks and Sayres must be put out of possession, and somebody must hold the property for the

benefit of the rightful owners and beneficiaries. Undoubtedly somebody has the right to such possession, and the property must be held and kept for somebody's benefit. This right of possession cannot be left, like Mahomet's coffin, suspended between the floor and the ceiling, or, unlike that coffin, suspended elsewhere.

The court is of opinion, under all the facts and circumstances, that the plaintiff ought to have this possession in order to preserve the property for the payment of the interest on and principal of the bonds provided for in the deed of trust from the Mt. Vernon-Woodberry Cotton Duck Company to the Continental Trust Company. The principle that equity will settle the entire controversy, even though it involves, in part, a pure question of law, is thoroughly settled in Va. & Ala. Mining & Mfg. Co. v. Hale & Co., 93 Ala. 542, 545, 9 South. 256, 257. In that case the court said:

"The general rule is that, when equitable jurisdiction attaches for a rightful purpose, the court will retain it, and proceed to settle and adjudicate all the matters in controversy, granting complete relief, though it may involve the adjudication of purely legal questions."

In cases of foreclosure, the chancery court has frequently decreed that after foreclosure by sale it has the power to put the purchaser in possession, if withheld by the defendant, or any person who has come into possession pendente lite, or who is a mere trespasser, having no legal title to the property. Thompson v. Campbell, 57 Ala. 183; Creighton v. Paine, 2 Ala. 158; Wiley v. Carlisle, 93 Ala. 237, 9 South. 288. This much is necessary to put an end the litigation.

It is said that the better practice is that the order for the surrender of possession should be made before the issue of the writ. Here there is to be no sale and no subsequent proceedings, and it is entirely proper that the decree direct the defendants, on demand of the plaintiff, to deliver up possession. If they fail to do so, then the plaintiff can ask for a writ of assistance.

When the defendants surrender possession of the property, they do no more than they should have done before the suit was commenced. The proof shows that the Tallassee Falls Manufacturing Company objected to the additions to the house, and have from the very beginning and all along objected to the defendants' occupancy, and even shortly after they (Parks and Sayres) acquired their deeds.

The observation may be indulged that, in every lawsuit where the plaintiff is successful, some hardship, more or less, is imposed upon the unsuccessful defendant. But here none seems to be visited upon these defendants Parks and Sayres. They simply engaged in the venture of setting up a claim to the property, based upon possession acquired by collusion and a worthless paper title for which they paid nothing or practically nothing. They bought a chance, they "took a long shot," and ought to lose. In my opinion this is the proper case and this is the proper time for a court of equity to declare that they have lost.

It follows, from what has been said, that it is the duty of the Continental Trust Company to protect the estate of its cestui que trust against loss or waste; that the injunction, heretofore issued, will be

made perpetual; and that the deeds to Parks and Sayres, described in the bill, and also the deeds from Parks and Sayres to McBrayer and McCluskey, be delivered up and canceled; and that the possession of the land involved be surrendered by Parks and Sayres, and those claiming under them, to the plaintiff; and that, if such surrender is not made, then a writ of assistance can be issued.

A decree in harmony with this opinion will be entered.

BOGGS et al. v. BRIGHT.

(District Court, E. D. Virginia. March 13, 1915.)

1. WITNESSES ⊂=268—CROSS-EXAMINATION—SCOPE—HEARSAY.
The mere fact that testimony elicited on cross-examination is not covered by the pleadings and is hearsay does not necessarily require its exclusion.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948; Dec. Dig. ⊂=268.]

2. TRUSTS ⊂=89—RESULTING TRUST—SUFFICIENCY OF EVIDENCE.
In a suit to establish a resulting trust in lands, the legal title to which was held by a sister of plaintiff's ancestor, evidence *held* to show that the ancestor paid for the land, taking the title in his sister's name, and that she lived there dependent upon him, not he on her.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134–137; Dec. Dig. ⊂=89.]

3. TRUSTS ⊂=362—RESULTING TRUST—SUIT—INCONSISTENT DEFENSES.
In a suit to establish a resulting trust, where the holder of the legal title at first claimed that she purchased the property, paying the consideration therefor herself, she should not, after failing to establish that claim, be allowed to claim that it was a gift to her.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 560–562; Dec. Dig. ⊂=362.]

4. GIFTS ⊂=47—PAYMENT OF PURCHASE PRICE—RELATIONSHIP BETWEEN PARTIES.
The rule that, where one who pays the purchase price for a tract of land and has it conveyed to another, whom the purchaser is legally or morally bound to support, a gift will be presumed, does not apply where the circumstances show that no gift was intended.
[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 81–86; Dec. Dig. ⊂=47.]

5. GIFTS ⊂=49—EVIDENCE—PURPOSE.
In a suit by the heirs of one who purchased land, taking title in the name of his sister, to establish a resulting trust therein, evidence *held* to show that the purchaser had no intention of making a gift to his sister, but intended that she should hold the title for him.
[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95–100; Dec. Dig. ⊂=49.]

6. TRUSTS ⊂=365—RESULTING TRUST—ENFORCEMENT—DELAY.
Where the holder of the title of land, which had been purchased by another, was in fact holding it as trustee for the purchaser, the delay of the purchaser and his heirs in asserting a claim to the land does not defeat their right to do so later.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568–573; Dec. Dig. ⊂=365.]

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7. ADVERSE POSSESSION ⊂⊃60 — RESULTING TRUST — POSSESSION BY BENEFICIARY.

Where the purchaser of a tract of land, who had the title conveyed to another, went into actual possession thereof, and remained in possession and control, his sister, who lived with him, and who later acquired the legal title, could not rely on the statute of limitations in a suit by the purchaser's heirs to establish a resulting trust, since she acquired title with the knowledge of the purchaser's possession and subject to equities in his favor.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282–312, 323, 328; Dec. Dig. ⊂⊃60.]

8. EQUITY ⊂⊃65—MAXIMS—CLEAN HANDS.

Equity will not aid persons to get relief from situations which result from the conveyance of their property in fraud of creditors.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185–187; Dec. Dig. ⊂⊃65.]

9. ABATEMENT AND REVIVAL ⊂⊃77—DEATH OF DEFENDANT—SUBSEQUENT PROCEEDINGS—NEW DEFENSE.

Where the original defendant, in a suit to establish a resulting trust, died after all the proofs had been taken, her devisee, when substituted as defendant, should not be permitted to interpose a new defense that the title to the land was placed in the name of the original defendant to defraud the creditors of the purchaser.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 488–494; Dec. Dig. ⊂⊃77.]

10. TRUSTS ⊂⊃372—RESULTING TRUST—EVIDENCE—FRAUD OF CREDITORS.

In a suit to establish a resulting trust, evidence *held* not to sustain a defense that the title was placed in the name of another by the purchaser in fraud of his creditors.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 600–603; Dec. Dig. ⊂⊃372.]

11. TRUSTS ⊂⊃362—RESULTING TRUST—DEFENSE—FRAUD OF CREDITORS.

Where all debts owed by a purchaser of land, who had title placed in the name of his sister, had been settled shortly after the conveyance was made, and more than 20 years before the suit was brought to establish the resulting trust, the devisee of the sister cannot defeat recovery on the ground that the title was placed in the sister's name to defraud the creditors of the purchaser.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 560–562; Dec. Dig. ⊂⊃362.]

In Equity. Suit by one Boggs and others against Nancy J. Bright to establish a claim to an interest in land. On final hearing. Decree entered for complainants.

The complainants, residents and citizens of the states of Ohio and Washington, filed their bill of complaint against the defendant, Nancy J. Bright, a resident and citizen of the state of Virginia and of this judicial district, charging that they are heirs at law of the late William M. McGruder, of Henrico county, Va., and as such entitled to an undivided one-eighth interest in a tract of land containing 335 acres, situated on the north side of the river road, in the county of Henrico, as to which he died intestate; that said land, while standing in the name of the said Nancy J. Bright at the time of his death, as it had been for many years before, was not her property, and she had no beneficial interest therein, but like those who preceded her during the ownership of said McGruder, viz., Fannie Wrenn and John T. Jones, she simply held the naked legal title as trustee for him, and for his convenience, and that the said McGruder, at the time of his death, lived upon said property, in exclusive, open, notorious, and uninterrupted possession thereof, as he had done for more

than 35 years theretofore, and cultivated the same as a farm, and exercised acts of ownership of all kinds over it.

Said Nancy J. Bright filed an answer to this bill, denying that complainants had any interest in the property, or that said McGruder at the time of his death had any interest therein, or died seised thereof, or that during his lifetime, and for years prior to his death, he was in open and notorious possession thereof, holding the same adversely to her. She further averred that she was the fee-simple owner of the property, having acquired the same from John T. Jones more than 20 years before the death of said McGruder, by proper deed, and for full consideration, and denied that she held the mere legal title to the property as trustee for McGruder, and had no beneficial interest therein. She further averred that upon complainants' own showing, the deed having been made to her by one who held the property for said McGruder, her brother, after the long lapse of years, the presumption of a gift from her brother to her was raised in her favor, and that her brother in his lifetime would have been, and his heirs since were, estopped at this late day from setting up their claim. She pleaded, in addition, the statute of limitations of Virginia.

Under this pleading, depositions were taking running through the years 1911, 1912, and 1913, the final proofs filed by the defendant on the 28th of January, and by the complainants on the 30th of January, 1913. Shortly before the case was to have been submitted, Mrs. Bright died, having devised the real estate in question to her niece, Mrs. Fannie W. Higginbotham, formerly Miss Fannie Wrenn, by will admitted to probate on the 10th of October, 1913. On the 8th of November, 1913, the said Fannie W. Higginbotham filed her answer, reaffirming the defenses set up by her devisor, and in addition averred that the deed from Jones to her aunt, under which she held the property, was not made for the convenience of McGruder, as claimed, but, if so held, was intended by McGruder to conceal the same in fraud of his creditors.

No additional or other evidence was taken in the case after the filing of this answer, and it was submitted on the 24th of November, 1913, for final action.

Marshall M. Gilliam and Addison L. Holladay, both of Richmond, Va., for complainants.

Conway R. Sands and W. W. Crump, both of Richmond, Va., for defendant.

WADDILL, District Judge (after stating the facts as above). The court will consider the case, upon the pleadings and proofs arising upon the answer of Mrs. Nancy J. Bright, before reviewing the same in the light of Mrs. Higginbotham's answer, and will first dispose of the two preliminary questions arising upon exceptions taken during the introduction of the testimony.

[1] First, complainants ask that certain portions of the cross-examination of H. A. Atkinson, a witness called by them, be stricken out, for the reason that the same was not responsive to any matter about which inquiry had been made in chief, was irrelevant to any issue raised by the pleadings, and was purely hearsay, consisting merely of the witness' opinion as to matters about which he admitted having no personal knowledge; and, secondly, that certain copies of papers, purporting to be a part of the record of the proceedings in a suit in the circuit court of the county of Henrico, wherein Nancy J. Bright was plaintiff and William M. McGruder's executor and others were defendants, offered to be filed in this cause, might be excluded.

The court, after much consideration, and with considerable doubt as to the last-named exception, has concluded to overrule both motions. As to the first, it cannot be said that the questions objected to were not permissible on cross-examination of the witness, though it

is largely true that the matters sought to be inquired into were not covered by the pleadings, and it is entirely true that Mr. Atkinson's statement is entitled to little or no weight, being purely hearsay. As to the second motion and exception, much greater doubt exists; but the court feels that, although the record involved only incidentally bears on the subject of this litigation and is between different parties, still its rejection might be prejudicial, and hence allows the same to be introduced, although as a record it seems to be incomplete.

Coming to the merits of the case, complainants insist that the land in question was the property of Capt. McGruder, that he paid for the same with his own money, that Mrs. Bright held title thereto as a mere naked trustee, that she was a dependent sister, for whom he cared and provided through a long life; while the defendant Mrs. Bright claimed the property as her own, averring that she paid full consideration therefor to John T. Jones, and was in no way bound or affected by any relation that existed between Jones and McGruder, whatever that relationship may have been. The determination of this question largely depends upon a correct solution of what the real facts are as respects the contentions of the two parties. On the one hand, it is in effect that McGruder was a mere dependent of his sister, Mrs. Bright; whereas, on the other, it is that she was absolutely dependent on him, without means, and that he cared and provided for her, as he also did for another widowed sister, Mrs. Wrenn, the mother of Mrs. Higginbotham, and her two children, through a long series of years.

[2] The court has given much consideration to this phase of the case, and its clear and deliberate judgment is that the complainants, as respects the occupancy and ownership of Capt. McGruder and Mrs. Bright in the property in suit, have established their case. That there is no real foundation in or warrant for the suggestion that during the 35 years William M. McGruder and his sister lived together on this property as their home, that he was a mere dependent, so to speak, of hers, and not the full owner and occupier of the premises, but, on the contrary, she was supported by him, and was the object of his care and solicitude. This record does not sustain the view either that McGruder occupied a subordinate relation to any one during this long period, that he was a mere figurehead, or, as is suggested in taking the testimony, "an overgrown, rollicking, fox hunter"; on the contrary, it shows that he was a man of affairs from his early manhood to the day of his death, that he acquired from his father the ancestral home at Short Pump, Henrico county, Va., a place in those days of no mean importance, that he shortly thereafter entered the Confederate army as captain of the Henrico Cavalry, and when the war was over he returned to his home at Short Pump, and about that time had to care for his two widowed sisters, Mrs. Bright and Mrs. Wrenn —the latter having two children, Fannie, now Mrs. Higginbotham, and another sister, who married Mr. Sinton, the two girls having been born, it appears, in the McGruder home.

In a few years, to wit, in 1870, he was elected treasurer of Henrico county, which was one of the largest and wealthiest counties in the state, and continuously held this position for a period of some 13

years, when he retired from public life. About the time of and shortly after becoming treasurer, Capt. McGruder acquired from the heirs of the late James A. Fisher two valuable tracts of land on the river road, about eight miles west of the city of Richmond, in these proceedings referred to—the first tract on the 29th of June, 1869, being on the south side of the road, and opposite to Duval's; the second tract, of 334 acres (Duval), on the north side of the road, the subject of this litigation, being conveyed by deed of the 13th of September, 1872. During the fall of 1872 McGruder moved from his home at Short Pump down to the newly acquired property, the residence being on the north side of the road, and known as "Sleepy Hollow," bringing with him his two widowed sisters and two nieces. His brother, Dr. McGruder, also removed to the new home, and the four brothers and sisters, with the two nieces, resided there, with the exception of Mrs. Sinton, who moved away, until they one by one were taken by death; Mrs. Higginbotham being now the survivor, Mrs. Bright having survived all the others. Capt. McGruder never married. He was the owner of the property, and head of the new home; his sister, Mrs. Wrenn, having control and management of the housekeeping, especially during her lifetime, and after that the same was assumed by her daughter, Mrs. Higginbotham, and Capt. McGruder's sister, Mrs. Bright. Capt. McGruder managed, controlled, and directed the affairs of the place, and conducted the farm on his acquisition of the property, as an entirety, until the sale of the portion on the south side of the road in May, 1906, and the residue until his death in November, 1907. From the expiration of his office as treasurer in 1893, some 20-odd years before his death, he was engaged exclusively in the cultivation of this large and valuable farm. The testimony seems undisputed that at the time of the purchase of this property McGruder paid for the same, exchanging 200 acres of the Short Pump farm at the price of $2,000 in part payment of the land on the south side of the river road; that he, as testified to by Robert H. Fisher, one of the vendors of the property to him, caused the same to be conveyed to Miss Fannie Wrenn, Fisher's statement being that:

"He (referring to Capt. McGruder) wanted the deeds made to her. He had them made to her."

There is no suggestion that at this time Mrs. Bright or any one else, other than Capt. McGruder, paid anything on account of this property, or had anything whatever to do with its acquisition; and the court thinks the testimony clearly and conclusively establishes the fact that he at that time bought and paid for this property with his own money, that he shortly thereafter took possession thereof, and continued in the exclusive, open, notorious, and uninterrupted occupancy thereof from that time to the day of his death, covering a period of some 35 years.

The suggestion that Mrs. Bright had means with which to acquire this property, or that she subsequently, some 12 years thereafter, acquired it from John T. Jones for full consideration with means of her own, has no substantial support from the testimony in this case. On the contrary, the evidence bears out irresistibly the conclusion that

upon the death of her husband, and as a result of the disasters of the Civil War, she was left without means, and that her brother, Capt. McGruder, as he did for another widowed sister and her two children, faithfully and affectionately supported, maintained, and cared for them for well-nigh half a century.

The complainants' contention respecting the ownership and legal title to this property, and transmission of title thereto, is apparently borne out by the record of transfers and conveyances of the same from time to time; that is, it was first conveyed to Miss Fannie Wrenn, now Mrs. Higginbotham, at the direction of Capt. McGruder, the owner, and she held it from the date of the conveyances to her in 1869 and 1872 down to the 25th of August, 1880, when she executed a power of attorney to her uncle, Capt. McGruder, giving him sweeping and unlimited power to deal with the property, authorizing him to convey the same, with special or general warranty, for such consideration as he deemed proper, and to sign her name to such deed or deeds, and to acknowledge the same as her own proper act and deed, to receive and receipt for all purchase moneys or other consideration in her name and stead, and expressly relieving the purchaser or purchasers from responsibility to see to the application of the purchase money, assuring them full and complete title to the property. On the next day, the 26th of August, 1880, Capt. McGruder, as attorney in fact for Miss Fannie Wrenn, conveyed this property for an apparent consideration of $9,500 to John T. Jones. The testimony respecting this transfer to John T. Jones is to the effect that Capt. McGruder, anticipating his niece Fannie's early marriage, desired that the legal title to his property be not longer held by her, but conveyed to his friend, John T. Jones, and he so conveyed the same, as is shown by the record, under the power of attorney from Miss Wrenn.

This transaction was consummated with due formalities, checks delivered, and a trust deed taken to secure the unpaid purchase money, etc., which was later released; but there is no pretense, as a matter of fact, that any actual consideration ever passed. McGruder was dealing with his own property, and transferring the title from one friend to another. Neither holder, however, of the apparent title to the property, at any time made any actual claim thereto, and each fully and in all respects recognized the ownership thereof by McGruder. John T. Jones continued to hold the legal title to the property from August, 1880, until the 3d day of March, 1884, when he for an apparent consideration of $9,580 conveyed the same by McGruder's direction to the latter's sister, Nancy J. Bright, with general warranty, and the property stands in her name to the present time. Both the grantee therein and Capt. McGruder, at the time of the conveyance from Jones, were living upon the property, McGruder in open, notorious, adverse, and undisputed possession thereof, Mrs. Bright up to that time confessedly having no interest therein; and the two continued to live there to the day of McGruder's death, as they had theretofore done. The testimony as to the reason for this conveyance is that Jones became apprehensive, on account of security obligations of a brother-in-law, that McGruder's property thus standing in his name, and in which he (Jones) had no beneficial interest, might become in-

volved with his; that no consideration was paid for the property upon the execution and delivery of this deed, and the transfer was made at the instance of McGruder, and solely for the purpose of preserving to him his property.

[3] The defendant suggests that no resulting trust arose in this property in favor of Capt. McGruder, assuming him to have paid the purchase price, because, if the same was conveyed by his direction to her, according to complainants' contention, the presumption would be that he intended to give it to her; and she invokes the well-recognized equitable doctrine that, where property is bought by one and conveyed to another, who has a legal or moral claim upon the real purchaser for support, the law presumes that the conveyance was intended as a gift, and cites in support of her contention many cases sustaining that doctrine, among them Humes v. Scruggs, 94 U. S. 22, 24 L. Ed. 51, Jackson v. Jackson, 91 U. S. 122, 23 L. Ed. 258, Beecher v. Wilson, 84 Va. 817, 6 S. E. 209, 10 Am. St. Rep. 883, Trumbo v. Fulk, 103 Va. 73, 78, 48 S. E. 525, White & Tudor, Lead. Cas. pt. 1, p. 314; 2 Min. Inst. 191, and many others.

[4] Just how Mrs. Bright can avail herself of this defense, and at the same time insist that she bought and paid for the property, cannot well be seen. The two positions are entirely inconsistent. If she acquired the property herself, it is hers of course, as it would be if he gave it to her; but she could not get it both ways, and should not, upon failing in her first contention, be allowed to take an entirely different and inconsistent one. But that is not all. Assuming the doctrine to be what she contends for, and there is no dispute about it, still a gift must have been intended. If all the facts and circumstances exclude the theory of a gift at the time of the conveyance, then such conveyance will not be treated as a gift, although the element of moral, if not legal, obligation to support existed.

[5] Here, however, McGruder was having a deed made conveying his own home, where he had lived for many years, his sister residing with him, and upon which property he continued to reside with unbroken exercise of ownership and control thereof; and he placed the legal estate of this property in the name of his sister, as he had carried it in the names of others from time to time since he acquired it; and there is nothing to suggest that he meant in so doing to have it held adversely to him, but, on the contrary, that it should be held by the one to whom it was conveyed, as it had been theretofore by others, and certainly there is nothing to indicate that by this deed he meant to devest himself of his house and home in favor of this sister. If Mrs. Bright had acquired this property in this way, it would not have occurrred to her to attempt to prove her ownership thereof by purchase with her own means, and at least, failing in her first effort, she should be required to introduce some evidence to establish the latter. Certainly, if she purposed to assert a claim through gift of the property, against the one who had theretofore held and continued to remain in open and notorious control thereof, and to manage and treat the same as his own, and had this conveyance been intended as a gift, Mrs. Bright would almost certainly have been able to establish the same by many witnesses, among them members of the household, some

of whom resided on the farm with Capt. McGruder and herself at the time of the alleged gift and to the day of his death.

[6] The defendant says that complainants should not be allowed to assert an interest in the property, which Capt. McGruder himself did not claim, and which he recognized in his will as being her property. With the first part of this contention the court does not agree. The complainants did not unreasonably delay the assertion of their claim, and if it be that this property was held by Mrs. Bright not as her own, but as trustee for Capt. McGruder, then neither he in his lifetime, nor his heirs at law, should be estopped from so doing now; and the court is not greatly impressed with the fact that either Capt. McGruder in his lifetime, or Mrs. Bright in her lifetime, may have referred to the property as that of the other, for the reason that the fact that it belonged to one, and stood in the name of the other, might naturally have made either of them refer to it as the property of the other. Certain it is, so far as the reference of Capt. McGruder in his will to the portion of her landed estate conveyed to T. Percy Davie, in connection with his (McGruder's) disposition by his will of the notes given for the purchase money, is concerned, it is not entitled to great weight in support of the defendant's claim. The property had been sold to Davie. It had stood in Mrs. Bright's name, and she had made the conveyance. McGruder conducted the entire transaction, and when he came to dispose of those notes by his will, made in favor of Mrs. Bright and assigned to him, and by him willed, it was natural that he should have referred to it as her property, because they were notes given for the purchase price of property standing in her name that he was disposing of.

The powerful circumstance that impresses the court in connection with this matter is the fact that those purchase-money notes given for this property were transferred to Capt. McGruder, which is precisely in accordance with the contention made by the complainants as to what was done in every conveyance of this property, viz., that it was conducted by Capt. McGruder, and treated by him as his own; and this is borne out by the entire record, and, considered in the light of McGruder disposing of these notes by his will, is well-nigh conclusive as to what are the real facts in this case, and it certainly removes all doubt as to his understanding of this transaction, and that he did not understand that he had given his interest in his property to, or parted with his actual ownership thereof to any one. On the contrary, he expressly disposed of the purchase-money notes, first providing for the payment of three legacies of $700 therefrom, and the setting aside of $1,000, another part thereof, for the erection of a monument over his grave, and the permanent upkeep of his section, and he provided that the monument should be erected under the direction of the defendant, Mrs. Higginbotham, and a nephew, the son of a deceased sister, to whom he gave the residue of the said purchase money of $9,000, first providing, however, that for a period of five years the said Mrs. Higginbotham and his sister, Mrs. Bright, should be paid the interest on said balance of $7,300, and the bequest was made to his nephew upon this express condition; and the said McGruder further bequeathed to his said sister and niece, subject to the

payment of his funeral expenses and such small debts as he might owe, an amount of "about $3,000" which he had in a savings bank, together with all of his personal property on the farm, consisting of horses, cows, hogs, wagons, carts, buggies, farming implements, corn, and provender, together with his household and kitchen furniture.

The court is not unmindful that the assignment of the notes to Capt. McGruder was set aside in the suit in the Henrico circuit court, and of which portions of the record have been, over the objection of the complainants, introduced herein. This, however, does not change its view of the real merits of this controversy. Many considerations may have caused the Henrico court to annul an assignment of notes, alleged by an old lady nearly 80 years of age to have been conditionally executed, or made under misapprehension. This court is not favored with the evidence in that case, and hence can form no idea of the merits of the controversy, further than that McGruder, whose acts were being expressly assailed, was dead, his reason for and explanation of what he did, which is important as bearing on the merits of this controversy, could not be given. His voice was stilled by death, but, notwithstanding that, the court affirmatively vindicated him from all fraud in the transaction, in the following significant language:

"The court is further of opinion that there is no evidence in the record that Capt. W. M. McGruder attempted or desired to commit fraud upon any one."

[7] The defendant, Mrs. Bright, further relies upon the plea of the statute of limitations, and insists that, having taken immediate possession of the lands upon the acquisition of the same from John T. Jones in March, 1884, and more than 15 years having elapsed before the institution of this suit, the same is barred by the statute. The legislation in question is undisputed, but the same cannot avail this defendant, as against either Capt. McGruder, or his heirs at law. McGruder, from the time of the purchase of this property, was, as he continued to be until the time of his death, in open, notorious, and undisputed control thereof; and, the defendant having acquired her title through John T. Jones, by deed dated March 3, 1884, she took the property charged with knowledge of all the rights and equities that arose in his favor. Authorities to support this view may be said to be almost without number, the leading federal cases being Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303; Noyes v. Hall, 97 U. S. 34, 24 L. Ed. 909; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463, to which special reference is made (the last-named case is of special interest as applicable to the facts in this case). See, also, Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846, a leading Virginia case, to which, with the authorities cited, reference is also made. These cases are apparently conclusive against the right of the defendant to interpose the plea of the statute of limitations, and go far to hold that, Mrs. Bright having acquired the property in 1884, which was then in the open, notorious, and adverse possession of McGruder, the statute in question is a bar against her in enforcing her rights against either McGruder or his heirs, and clearly so if she claims to be a purchaser from John T. Jones,

and an adverse holder as against McGruder. Virginia Midland R. Co. v. Barbour & Jeffries, Trustees, 97 Va. 118, 33 S. E. 554, and cases cited.

Coming, now, to the consideration of the case as presented by the answer of Mrs. Higginbotham, who reaffirmed the defense made by her aunt, Mrs. Bright, of whom she is the sole devisee, no comment need be made, further than that of the new ground of defense that she sets up, not heretofore made in the cause, that the conveyance in March, 1884, from John T. Jones to the said Nancy J. Bright, was not made, as alleged by the complainants, for the convenience of McGruder, with a view of holding the legal title to the property conveyed of which he claimed to be the equitable owner, but for the purpose of concealing any such right, title, or interest from his creditors, and to prevent them from getting knowledge of such right, title, or interest, so they could subject the same to his debts, in order to defraud the creditors of said McGruder; he being at the time of the conveyance, and long prior thereto, greatly in debt, and having judgment debts amounting to several thousand dollars against him unsatisfied, which the property would become subject to.

[8, 9] The fact that courts of equity will not lend their aid to persons to relieve them from embarrassing situations in which they find themselves, as the result of the conveyance of their property in fraud of creditors, is well recognized, and no authority need be cited to maintain so elementary a proposition. But that the same has application to this case, under its peculiar facts and circumstances, does not follow, and whether the defendant would be allowed, under the pleadings in this case, to interpose such defense at the stage she seeks to, and whether she may be so circumstanced as to do so at all, are different propositions. If it be true, as contended by complainants, that McGruder was the beneficial owner of this property always, and that the title was in Mrs. Bright at the time of McGruder's death, as it had been in the names of others from time to time, as a convenience merely to him, then confessedly his heirs, as against such trustee, would not be prevented from claiming the property. This is exactly the claim they make. Mrs. Bright, the new defendant's aunt and devisor, came into court and claimed the property as her own, by purchase, and if not, by gift, and if not, by long acquiescence by McGruder in her right, and made no suggestion of the new defense the new defendant sets up. There exists no doubt of the right of a court of equity to hear and determine the issue thus made between the parties. The evidence was fully taken on both sides, and the case was ready to be submitted when the then defendant died, and this new defense is for the first time interposed by the present defendant, the devisee of Mrs. Bright.

[10] The court holds that the claim of complainants, as thus put in issue, was and had been established upon the proofs adduced, before the interposition of the new defense. Mrs. Bright in her lifetime ought not to have been heard to amend her pleadings at such a stage, to introduce such a defense, and surely one claiming under her should not have a greater right. The court thinks not. The plea has been interposed, however, and the case will be considered in the light of its

introduction, however much it may be regretted that such an issue should have been put forward in the concluding hours of a long litigation, after the original defendant had died, and which so seriously reflects upon the good name of her brother, and that, too, by a niece, as to whom the record is replete with many evidences of facts and circumstances that apparently should have forbidden her from doing anything that would have reflected upon the memory of her foster father and dead uncle. Upon the incoming of this plea, it will be observed, and indeed after the revival of the case in the name of the present defendant, no other or additional testimony was taken, and the case stands, so far as this issue is concerned, as it did before it was presented. The only evidence in the record, as the court recalls, that bore especially upon such defense, was that the defendant, in attempting to prove that Mrs. Bright had means, also proved that McGruder was in debt; that is to say, that there was an old judgment against him as one of the sureties on the bond of a former sheriff of the county of Henrico, coupled with such inferences as might arise from the property having been held from time to time in the names of various persons of record, though Capt. McGruder always was in open, notorious, and uninterrupted possession of it, and was its reputed owner, and also from a statement made by the witness, H. A. Atkinson, Jr., the attorney for Capt. McGruder, who prepared most of the conveyances under which the property was held during McGruder's ownership of it.

This witness, called by the complainants, did state on cross-examination, which counsel for complainants moved to exclude, that he believed that the property was held under these different conveyances on account of an old judgment of the commonwealth; but he expressly stated that this was merely his opinion, and that he knew nothing personally about it, though he believed the other parties to the several transactions did know. The statement of the witness at the time, when no such issue was before the court upon the pleadings, and which merely gave his opinion, clearly, in the absence of other testimony, would not be sufficient to establish this defense, and disentitle the complainants to the benefit of the decree in their favor, if they had shown themselves entitled to it upon the pleadings and proofs in the cause; and especially should it not do so when such defense is interposed by a person who neither offers to testify herself, nor produces other testimony, and having the relation to the several transactions that Mrs. Higginbotham had, if, indeed, she should be allowed to make such defenses at all. If the defense she seeks to set up be true, then there is no fact in this record more patent than that she of all persons had full knowledge of the facts, and was an active party thereto, and participated therein, as she lived in the house with her uncle for years, long held the legal title to the property for him, then executed to him the power of attorney under which he sold, and was his clerk and confidential relative. To allow her to avail herself of this defense, to defeat the lawful heirs of the equitable owner of the property, who had already shown their title thereto, would be a travesty upon justice, and a reversal of the doctrine in favor of one of the very parties it was sought to punish.

[11] Moreover, the suggestion at this late day that the property had been held by her aunt under the deed from Jones to defeat her uncle's creditors, upon the face of this record, should not avail. The deed from Jones to Mrs. Bright was made on the 3d of March, 1884. Four days thereafter, and more than a year before the recordation of the conveyance, the date of delivery not appearing, the Legislature of Virginia, on the 7th day of March, 1884, passed a general act, in effect releasing all judgments upon bonds in favor of the commonwealth, executed prior to the 1st of July, 1870, by public officers, whose duty it was to collect state and county revenues; that is to say, that no proceedings should be had upon said bonds, or to enforce judgments thereon, from and after the 1st day of January, 1885; and, in addition, subsequently to that time, to wit, on the 20th day of December, 1886, the particular judgments against McGruder were settled and compromised, and he released from all liability thereon. Thus, for more than 20 years before his death, there is no suggestion of his owing any one, and the debts sought to be set up by this plea had been fully extinguished.

The conclusion of the court from the whole case is that at the time of her death Mrs. Nancy J. Bright was not the beneficial owner of this property, but held the same as trustee for William M. McGruder, the actual owner thereof; that said property did not pass by the will of Nancy J. Bright to her devisee, the present defendant, Mrs. Fannie Higginbotham; and that the complainants herein, as heirs at law of said William M. McGruder, are entitled to an undivided one-eighth interest in said real estate.

UNITED STATES v. KELLOGG TOASTED CORN FLAKE CO. et al.

(District Court, E. D. Michigan, S. D. April 14, 1915.)

No. 5570.

1. MONOPOLIES ⇐17—RESTRAINT OF TRADE—PRICE RESTRICTIONS ON RESALE—SALE IN PATENTED CARTONS.

A manufacturer cannot, without violating Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, in connection with an absolute sale of its product (though with the patented cartons containing it) to a jobber, control the price at which the package shall be resold by the jobber, or by the retailers who buy from the jobber.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⇐17.]

2. MONOPOLIES ⇐24—PETITION—STRIKING OUT MATTER—IRRELEVANCY.

The allegation in the petition, attacking as violative of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, price restrictions imposed by a manufacturer on the resale of its product, packed in patented cartons, that it resorts to the cartons as a subterfuge to evade such law, is not so clearly irrelevent as to justify its elimination on motion to strike, though the fact of the cartons being resorted to as a subterfuge be not necessary to lack of protection of the transaction by the patent.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⇐24.]

3. MONOPOLIES ⇐17—NECESSITY OF VALID CONTRACT.

Restraint and monopoly being actually effected by price restrictions on resales, imposed by a manufacturer in the absolute sale of its product, it

is not necessary that they constitute a valid contract, to be violative of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⊂⊃17.]

4. MONOPOLIES ⊂⊃17—EVIDENCE—PRIOR TRANSACTIONS.

As elucidating the effect and intent of a plan of sale by a manufacturer of its product, relative to its violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, a prior plan of sale may properly be considered.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⊂⊃17.]

In Equity. Suit by the United States against the Kellogg Toasted Corn Flake Company and others. Heard on motions. Granted in part, and denied in part.

Clyde I. Webster, U. S. Atty., of Detroit, Mich., for the United States.

Chappell & Earl, of Kalamazoo, Mich., for defendants.

Before WARRINGTON and KNAPPEN, Circuit Judges, and TUTTLE, District Judge.

PER CURIAM. The United States filed its petition in equity under section 4 of the Anti-Trust Act of July 2, 1890, attacking, as violative of sections 1, 2, and 3 of the act, certain price restrictions imposed by the manufacturers upon the resale of Kellogg's Toasted Corn Flakes. The case is before us under the Expedition Act. The pertinent allegations of the petition may be thus summarized:

The defendant corporation, which is the owner of the Byrne patent (No. 1,020,536, March 19, 1912), on cartons or packages, manufactures at Battle Creek, Mich., its "corn flakes," which is a breakfast food, selling the product in interstate commerce; sales being made directly to jobbers of cases containing 36 cartons (made under the Byrne patent) filled with its corn flakes, refusing to sell the goods direct to the consumer or the retail trade. The jobbers sell by the case to the retailer, and the latter by package to the consumer. The manufacturer sells at the uniform price of $2.50 per case, exacting from the jobber an agreement to charge the retailer a specified price, uniform in each section (and ranging from $2.75 upwards per case); the jobber's default in this agreement authorizing the manufacturer to refuse to deal further with him. This provision has been strictly enforced by defendants, who refuse to continue dealings with any jobber who fails to maintain prices so fixed. For the purpose and with the intention of fixing and enforcing the observance by the retailer of an absolutely fixed price to the consumer, there is printed on the carton the notice found in the margin of this opinion.[1] Defendants claim that the re-

[1] "This package and its contents are *sold conditionally* by us with the distinct understanding, which understanding is a condition of the sale, that the package and contents shall not be retailed, nor advertised, nor offered for sale at less than 10 cents per package. Retailing the package at less than 10 cents per package is a violation of the conditions of sale, and is an infringement on our patent rights, and renders the vendor liable to prosecution as an infringer. Kellogg Toasted Corn Flake Company,
"Battle Creek, Michigan."

tailer's purchase, and his undertaking after such notice to sell, amounts to an agreement by him to maintain the specified price. The value of the carton is negligible as compared with the value of the contents, and its purchase is a mere incident in the contract of sale; the contents forming the sole consideration therefor, and being all the purchaser desires. This plan of sale and distribution results generally in an exacting of uniform prices by jobbers in a designated section and absolutely by retailers, and thus in lack of competition between either jobbers or retailers which can affect the cost of the product to either retailer or the consumer, and to restraint upon and monopoly of interstate commerce.

The petition contains further allegations, likewise summarized: (a) Previous to the use of the patented cartons, the manufacturer, by a notice inclosed in the case, required the retailer to sell each package at a fixed price, under penalty of paying certain liquidated damages and to assent to the refusal of further supplies until damages are paid and assurance given that the offense would not be repeated, and a recital that opening the package operates as an admission of the purchaser's understanding and assent to these stipulations; (b) that defendants, having sold the cartons and their contents to the jobbers, parted with all title thereto, and have no legal power to fix the price at which the purchaser from the jobber shall sell the same; (c) the use of the cartons is resorted to as a mere subterfuge and device to avoid the provisions of the Anti-Trust Law and pertinent principles of the common law. (An allegation that the carton was nonpatentable will be treated as withdrawn, in view of plaintiff's motion for leave to do so.)

Plaintiff asks that the selling plan in question be declared violative of the Anti-Trust Act, for injunction in terms designed to prevent its further employment, and for general relief. The present hearing is on, first, the motion, under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), to strike out the paragraphs of the petition, which, as summarized, we have indicated respectively as (a), (b), and (c) above (this motion being made by defendants other than Wilfred C. Kellogg, who has answered and disclaimed), and to dismiss the petition as thus reformed; and, second, plaintiff's motion to amend the petition by adding further allegations (which we likewise summarize in substance sufficient for purposes of this opinion) as follows:

(1) Defendant's product is made from corn; by extensive advertising, and especially by enforcement of the selling plan mentioned, a large demand for the food has been created, trade and commerce therein exceeding that of any other breakfast food made from corn—an attempt to monopolize the entire trade and commerce in breakfast foods, and especially in such foods made from corn, being charged; and that this attempt is or will be entirely or in a large measure successful, from the fact that defendant's plan offers a special inducement to retailers, by enabling them to realize a handsome profit from the sale of corn flakes without fear of being undersold by competitors: (2) that the price received by the manufacturer is a full and adequate compensation for the goods sold, and the only consideration which the manufacturer receives or intends to exact as the purchase price for the goods; the retailers likewise considering that their acceptance of the

product with knowledge of the contents of the notice constitutes a binding contract to maintain the price specified therein and to observe the conditions of the notice as such contract, thereby entering into an agreement or combination with defendant corporation to maintain the prices so specified.

The broad questions presented are (1) whether a manufacturer, in connection with an absolute sale of its product (and the patented package containing it) to a jobber, may lawfully control the price at which the complete package shall be resold by the jobber or by the retailers who buy from the jobber; and (2) whether the selling plan in question effects, under the allegations of the petition, an unlawful restraint or monopoly, actual or attempted.

[1] The general rule is well settled that a system of contracts between manufacturers, jobbers, and retailers, by which the manufacturers attempt to control the prices for all sales by all dealers, at wholesale or retail, whether purchasers or subpurchasers, eliminating all competition and fixing the amount which the consumer shall pay, amounts to restraint of trade, and is invalid both at common law and, so far as it affects interstate commerce, under the Sherman Anti-Trust Act. Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 400, 31 Sup. Ct. 376, 55 L. Ed. 502; John D. Park & Sons Co. v. Hartman (C. C. A. 6) 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135. The cases cited hold specifically that such agreements are not excepted from the general rule by the fact that they relate to proprietary products manufactured under secret process. By the cases of Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 350, 28 Sup. Ct. 722, 52 L. Ed. 1086, and Straus v. American Pub. Ass'n, 231 U. S. 222, 234, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369, it is settled that the protection of the Copyright Act does not secure to the owner of the copyright the right to qualify future sales by his vendee, or to limit or restrict such future sales to a specified price.

Coming to the right secured by patents upon inventions: In Bement v. National Harrow Co., 186 U. S. 70, 92, 22 Sup. Ct. 747, 756 (46 L. Ed. 1058), it was broadly said that the Sherman Anti-Trust Act—

> "does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor."

What was there said related to a provision in a royalty contract given by the owner of a patent for the manufacture and sale of the patented articles, with a restriction forbidding "any rebate or reduction from the price or prices fixed in the license."

In Henry v. Dick Co., 224 U. S. 1, 23, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, and following, it was held that, while an absolute and unconditional sale operates to pass the patented article outside of the protection of the patent, a patentee may by a conditional sale so "restrict the use of his vendee within specific boundaries of time or place or method" as to make prohibited sales outside of those boundaries constitute infringement. The subject of sale in the Dick Case was a mimeograph sold "with the license restriction that it may

be used only with the stencil, paper, ink, and other supplies made by" the vendor; and contributory infringement was found in a direct sale to the purchaser of a mimeograph of a kind of ink suitable for use with the machine, with full knowledge by the seller of the restriction, and with the expectation that the ink sold would be used in connection with the machine.

In Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, it was held that, where the transfer of a patented article is full and complete, an attempt to reserve the right to fix the price at which it shall be resold by the vendee is futile. This rule was applied to the sale of a package of Sanatogen, bearing a notice that the package was licensed—

"for sale and use at a price not less than one dollar ($1.00). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent * * * under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injunction and damages. A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation."

The Dick Case was distinguished (229 U. S. 15, 33 Sup. Ct. 619 [57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150]) by the consideration that in the latter case merely a qualified title was passed to the purchaser, "giving a right to use the machine only with certain specified supplies," while in the Sanatogen Case the absolute title passed.

It is clear that the jobbers in the instant case were not merely the agents, but were the vendees, of the manufacturer; and the case as to the jobbers is therefore not within decisions, such as Virtue v. Creamery Package Co., 227 U. S. 37, 33 Sup. Ct. 202, 57 L. Ed. 393, which holds that the contract by which the manufacturers of a patented article appoints another, who does not manufacture or sell like articles, his exclusive agent for the output of the factory, does not violate the Sherman Act; nor within cases like Locker v. American Tobacco Co. (C. C. A. 2) 218 Fed. 447, 134 C. C. A. 247, which holds that an agreement whereby a manufacturer made a certain jobber its sole agent in certain territory, on condition that it should not sell the manufacturer's product at more than list prices, did not violate the federal Anti-Trust Law. Nor do the facts present a case for the application of the rule (illustrated by Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, and Whitwell v. Continental Tobacco Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689), that defendants are not required to sell to any one they do not wish.

It is also clear, in our opinion, that the sales by defendants in the instant case were not conditional, as held to be the case in Henry v. Dick, but absolute, within the rule in Bauer v. O'Donnell. Nor are they brought within Bement v. National Harrow Co., supra. Whether the value of the carton is negligible as compared with the value of the contents of the package, and its purchase a mere incident in the contract of sale, or whether, as urged by defendants, the carton has itself a substantial value, is not controlling of the ultimate merits; for its use can surely give no greater right than if it were the only article sold, as

in the Sanatogen Case, nor was it sold for use with subsequent purchases of the food. Defendants were thus given by the patent no warrant to impose upon either jobbers or retailers restrictions limiting the resale price of the product after an absolute sale had once been had by defendants.

We find in United States v. Keystone Watch Case Co. (D. C.) 218 Fed. 502 (recently decided by the Circuit Judges of the Third Circuit), nothing conflicting with this view as respects restrictions upon jobbers; for we assume, as we must, that the case there considered was thought to fall within Bement v. National Harrow Co. and Henry v. Dick, rather than within Bauer v. O'Donnell. The Keystone Case is express authority for the invalidity of the plan as respects restrictions upon retailers. Nor is there in United States v. United Shoe Machinery Co., 222 Fed. 349 (recently decided by the judges sitting in the District Court of Massachusetts), anything opposed to the conclusion we have reached in the instant case. The Shoe Machinery Case relates wholly to restrictions under leases of patented machines, and thus in no way to absolute sales of patented articles.

Obviously the California decree (Kellogg Toasted Corn Flake Co. v. Weinstein Co., no opinion), in no way, as against the United States, amounts to an adjudication of the validity of defendants' selling plan under the anti-trust act.

It should be unnecessary to add that we see nothing in the prayer of the petition contravening section 2 of the Clayton Act, which forbids discrimination in price on the part of one engaged in interstate commerce; nor that it is immaterial that defendants' selling plan is open to its competitors, or that no attempt to corner the market is shown.

[2] It results from these views that the motion to strike out the paragraph of the petition we have identified as (b) must be denied. As to the paragraph referred to as (c), the motion to strike should likewise be denied; for, while a resort to the cartons as a subterfuge to evade the anti-trust act is not essential to a lack of protection under the patent, the fact of such resort may have some relation to the alleged fact of combination. In any event, it is not so clearly irrelevant as to justify its elimination. It seems entirely clear that defendants' selling plan here in question goes beyond any protection afforded by the patent on the carton, and is in its essential principles violative of the Sherman Act.

[3] But defendants urge that no contract in restraint of trade is consummated, because the notice on the carton does not constitute a valid contract, although counsel say it was believed by the company that such would be its effect when it was put on the package. Defendants invoke Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 350, 28 Sup. Ct. 722, 52 L. Ed. 1086, which holds that the notice printed on the title page of the copyrighted book (to the effect that no dealer is licensed to sell it for less than $1, and that "a sale at a less price will be treated as an infringement of the copyright") was ineffective to secure to the owner of the copyright the protection sought. And it is said that Bauer v. O'Donnell, 229 U. S. at page 16, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50

L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, holds that the contract there in question could not be enforced or accomplished by notice. But we see nothing in either of these cases lending color to the proposition that a legally effective and enforceable contract in restraint of trade is necessary to a violation of the Sherman Act. Bobbs-Merrill Co. v. Straus and Bauer v. O'Donnell were infringement suits—the one under a copyright, and the other under a patent. The primary question involved in each case was whether complainant's exclusive right to sell, once exercised, continued after the sale to the extent of controlling prices on resale. The pith of the decisions, as distinguishing absolute sales from qualified sales or license agreements, is contained in the sentence (in the Bobbs-Merrill Case at page 350 of 210 U. S., at page 726 of 28 Sup. Ct. [52 L. Ed. 1086]), "There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book," and (in Bauer v. O'Donnell at page 16 of 229 U. S., at page 619 of 33 Sup. Ct. [57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150]), "There was no transfer of a limited right to use this invention, and to call the sale a license to use is a mere play upon words."

A legally enforceable contract or system of contracts is not required in order to render obnoxious to the Anti-Trust Act a selling plan which unreasonably restrains or monopolizes trade or commerce. The Sherman Act is not aimed alone at contracts, but embraces combination schemes of any and every kind which amount to an undue or unreasonable restraint of trade in interstate commerce, "without regard to the garb in which the acts were clothed." Indirection will not afford escape. American Tobacco Co. Case, 221 U. S. 180, 181, 31 Sup. Ct. 632, 55 L. Ed. 663; Standard Oil Case, 221 U. S. at page 59, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; Northern Securities Co. v. United States, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679; Standard Sanitary Mfg. Co. v. United States, 226 U. S. at page 49, 33 Sup. Ct. 9, 57 L. Ed. 107; United States v. Union Pacific R. R. Co., 226 U. S. 61, 85, 33 Sup. Ct. 53, 57 L. Ed. 124; United States v. Great Lakes Towing Co. (D. C.) 208 Fed. 733, 741.

The petition charges that restraint and monopoly are actually effected. When it is once established that the monopoly of the patent does not continue after the right of sale has once been exercised, the case is to be considered as if there were no patent; and, so considered, the case falls directly within cases such as the Miles Medical Co. and the Park Cases, and others cited in this opinion.

[4] The motion to strike out the paragraph of the petition which, as summarized, we have referred to as (a) must be denied. The prior plan may properly be considered as elucidating the effect and intent of the later plan. United States v. L. S. & M. S. Ry. Co. (D. C.) 203 Fed. 295, 307. We cannot say that the matter sought to be introduced into the petition by way of amendment may not be germane to the ultimate controversy.

It follows, from the views we have expressed, that the entire motion to strike out, as well as the motion to dismiss, presented by defendants, should be denied, and petitioner's motion to amend the bill granted. An order will accordingly be so made.

GARVEY v. COMPANIA METALURGICA MEXICANA et al.

(District Court, W. D. Texas, at El Paso. April 16, 1915.)

No. 503.

1. REMOVAL OF CAUSES ⊂=117—PLEADING IN FEDERAL COURT—OBJECTION TO JURISDICTION—"PLEAD."

In Judicial Code (Act March 3, 1911, c. 231) § 29, 36 Stat. 1095 (Comp. St. 1913, § 1011), requiring a party removing a cause to the federal court within 30 days thereafter to plead, answer, or demur to the declaration or complaint, the word "plead" includes a plea to the jurisdiction, especially in view of the provision of Judicial Code, § 38 (Comp. St. 1913, § 1020), that in suits removed the District Court shall proceed as if the suit had been originally commenced therein, and the same proceedings had been taken in such suit in the District Court as were taken in the state court prior to the removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 249; Dec. Dig ⊂=117.]

2. CORPORATIONS ⊂=668 — FOREIGN CORPORATIONS — SERVICE — MOTION TO QUASH—EVIDENCE—AGENT.

On a motion to quash service of summons on a foreign corporation, evidence *held* to show that the one on whom the process was served as agent was no longer employed by the corporation when service was had.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. ⊂=668.]

3. REMOVAL OF CAUSES ⊂=112—PETITION FOR REMOVAL—APPEARANCE—JOINT DEFENDANT.

The fact that a foreign corporation, sued jointly with an individual who was personally served, joined with its codefendant in a petition for the removal of the cause to the federal court, does not constitute an appearance by the corporation, so as to preclude it from objecting to the service.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 238; Dec. Dig. ⊂=112.]

4. APPEARANCE ⊂=9—REQUEST FOR DEPOSITION—MOTION TO QUASH—"GENERAL APPEARANCE."

A request by a foreign corporation for the taking of deposition in aid of its motion to quash for failure to serve process is not a general appearance, which prevents the corporation from questioning the validity of the service.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. ⊂=9.

For other definitions, see Words and Phrases, First and Second Series, General Appearance.]

At Law. Action by Francis Garvey against the Compania Metalurgica Mexicana and another. On motion of the defendant Compania Metalurgica Mexicana to quash the service upon it. Sustained.

Stanton & Weeks, of El Paso, Tex., for plaintiff.

Davis & Goggin and Paul D. Thomas, all of El Paso, Tex., for defendant Compania Metalurgica Mexicana.

Before HENRY D. CLAYTON, District Judge, sitting by designation.

HENRY D. CLAYTON, District Judge. Plaintiff, Garvey, on July 9, 1914, filed in the special district court of El Paso county, Tex., his original petition against the Compania Metalurgica Mexicana, a corporation, and R. G. Dufourcq, claiming the sum of $15,000 as damages

for certain personal injuries alleged to have been sustained by plaintiff at Sierra Mojada, Mexico. He alleges that such injuries were received by him while he was in the employ of the defendant company, and while acting under the direction of the defendant Dufourcq, alleged to be an employé of defendant company.

Citation out of said state court was duly issued the same day the petition or complaint was filed, and the return of the sheriff recited the execution of same on August 8, 1914, by delivering to the defendants true copies of the citation; the citation being served upon Compania Metalurgica Mexicana, the return showed, by delivering a copy thereof to defendant company "in person of R. G. Dufourcq, superintendent and agent."

On September 5, 1914, defendants filed their petition for the removal of said cause to the District Court of the United States for the Western District of Texas, at El Paso, alleging that the amount in dispute exceeded, exclusive of interest and costs, the sum or value of $3,000; that the defendant company was a New Jersey corporation, having no office or place of business in Texas, and was a nonresident of the state of Texas; that defendant Dufourcq was a resident and citizen of New York, and that Garvey was a resident of El Paso county, Tex. A removal bond was given and approved, and the order of removal was duly made by the state court on September 8, 1914, and on September 25, 1914, the certified copy of the record was duly filed in this court.

The defendant Compania Metalurgica Mexicana, on October 16, 1914, filed a motion in this court to quash and set aside the service alleged to have been made upon it by the sheriff of the state court. It appeared specially for this purpose, and in the motion specifically disclaimed any and all intention of entering an appearance to the cause. The ground of the motion to quash the service is:

That said court and this court has acquired no jurisdiction of this action of the person or property of this defendant, this defendant not having been served with summons herein, and no property belonging to it having been seized, or any other process whatsoever, nor has any writ of garnishment been issued or served upon any person or persons in any way indebted to or having property of this defendant in their possession or under their control, or being indebted to this defendant in any way, and this defendant being a nonresident of the state of Texas and absent from said state, and because this defendant is neither a citizen or resident of the state of Texas, being a citizen of the state of New Jersey, under the laws of which state it is incorporated, having its principal office in the city and county of New York, and having no place of business in the state of Texas. That neither this defendant, nor any agent of this defendant, nor any person in any wise authorized to represent this defendant has ever been served with process of the state court or with process issued out of this court, and that the service attempted to be made upon this defendant by service of citation upon R. G. Dufourcq, as the representative or agent of this defendant, was no service upon this defendant, for the reason that said R. G. Dufourcq was not at the time of said service upon him an agent of this defendant, nor was he representing this defendant in any capacity whatsoever. That the said Dufourcq has not since the time of said service represented this defendant in any capacity, nor has he at any time been the agent of the defendant, and that the said Dufourcq was not at the time of said service, and has not been since that time, and in fact has never been, either the president, vice president, secretary, treasurer, or general manager of this defendant. That the said Dufourcq had at one time been an employé of this defendant in the republic of Mexico, but at the

time of said pretended service upon him had long ceased to have any connection with this defendant, as is shown by the affidavit of said Dufourcq, hereto attached and made a part of this pleading. That the said Dufourcq is not a citizen or resident of the state of Texas, and was neither a resident nor a citizen of the state of Texas at the time of said pretended service upon him, but a citizen of the state of New York, temporarily residing in the republic of Mexico, and at the time said pretended service was had upon him was only temporarily in the city and county of El Paso and state of Texas on his own private business, and in no way connected with this defendant or its business.

The affidavit of Dufourcq, made a part of the motion, showed that at the time of the service had upon him he was not an agent of Compania Metalurgica Mexicana or in any way connected with that corporation. Dufourcq has appeared generally and answered the petition, so that no question is raised as to the jurisdiction of the court over his person.

When the motion to quash and set aside the service of the citation came on for hearing at the October, 1914, term of the court, plaintiff's counsel was not present, although notified of the date for the hearing of the motion. The term of the court was adjourned sine die that day, and the court, being unable to dispose of the motion, then ordered:

That the said motion, and a right to a hearing thereon, be and the same is hereby continued until the next regular term of this court, without prejudice to the right of said Compania Metalurgica Mexicana to present and have the same passed upon at said next regular term before being required to answer herein, and without prejudice to its right to file, present, and have passed upon such plea or pleas in abatement as it may see fit to interpose in this cause.

At this term of the court plaintiff, Garvey, moved to remand the cause to the state court. Thereupon the defendant Compania Metalurgica Mexicana, appeared specially and asked leave of the court to amend its petition for removal in matter of form. Leave was granted, the petition for removal amended, and thereupon plaintiff's motion to remand was overruled and denied. Plaintiff then demurred to the motion to quash, and filed his contest of the motion, alleging that said motion was insufficient in law for the following reasons:

(b) Because said defendant company under section 29 of the act of Congress approved March 3, 1911, and which went into effect on January 1, 1912, by removing said cause, is required in law, to "plead, answer or demur to the declaration or complaint in said cause," upon the merits, and is not entitled to interpose in said cause its plea in abatement or to the jurisdiction of said court, in that said defendant company by removing said cause waived its right so to do.

(c) Because, by filing the aforesaid motion to quash service of citation, the said defendant company has not pleaded, answered, or demurred to the declaration or complaint in this cause, but is merely contesting the service of citation by a plea attacking the service thereof, which in no manner pleads, answers, or demurs to the declaration or complaint in this cause, as required by said statute.

[1] Counsel for plaintiff thus earnestly insist that section 29, Judicial Code, amending the former removal acts, by prescribing that, after the certified copy of the record in the state court has been filed with the federal court, "the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause," requires of the removing defendant an ap-

pearance and answer, plea, or demurrer, within that time, to the merits, and that a pleading in abatement of the writ or citation is not an answer, plea, or demurrer, as contemplated by section 29 of the Judicial Code. In other words, the contention of counsel for plaintiff is that section 29 of the Judicial Code abolishes pleas to the jurisdiction for want of proper service in the state court.

In the case of Cain v. Commercial Publishing Co., 232 U. S. 124, 34 Sup. Ct. 284, 58 L. Ed. 534, decided January 19, 1914, this very question came before the Supreme Court of the United States, and counsel for plaintiff in error there urged the same contention that is now insisted upon here. Mr. Justice McKenna, delivering the opinion of the court, and answering the argument that section 29 of the Judicial Code was intended to abolish delay in removal proceedings and prevent a removing defendant from raising in the federal court any question as to the jurisdiction of the court over its person, said:

"It may be conceded that the purpose of the amendment was to secure expedition in the disposition of the case, but a revolution in the practice and efficacy of the right of removal is not lightly to be inferred. And a revolution it would be. It would take from the federal courts the power they have possessed under the cases cited, a power not only to pass upon the merits of the case, but upon the validity of the service of process; that is, upon the question of jurisdiction over the person of the defendant. How essential this power is to the right of removal is obvious. Without it a state could prescribe any process or notice, or a plaintiff, as in the pending case, serve process on a person having no relation with a defendant and compel him to submit to it and to a jurisdiction not of his residence, or give up his right to take the case to what in contemplation of law may be a more impartial tribunal for the determination of the action instituted against him, and which it is the purpose of the removal proceedings to secure to him, and, it must be assumed, completely, not by surrender of any of his rights, but in protection and security of all of them. The weakness of plaintiff's contention is demonstrated, not only when we consider all of the language of section 29, but the language of section 38, which provides that in all suits removed the District Court shall proceed therein as if the suit had been originally commenced in the District Court, 'and the same proceedings had been taken in such suit in said District Court as shall have been had therein in said state court prior to its removal.' In other words, the cause is transferred to the District Court as it stands in the state court, and the defendant is enabled to avail himself in the latter court of any defenses, and, within the time designated, plead to the action 'in the same manner as if it had been originally commenced in said District Court.' And these words, we have seen, were explicitly given such effect in the cited cases. It is clear, therefore, that plaintiff gives too restricted a meaning to the word 'plead' in section 29. It must be construed to include a plea to the jurisdiction, and, so construing it, all of the provisions for removal of causes become accordant and their purposes fulfilled—the right of a speedy disposition of the suit to the plaintiff and the right of the defendant to have all questions determined by the federal tribunal."

In the light of this decision, the question is no longer open and the defendant company is entitled to have its plea in abatement considered by this court.

[2] The only evidence before the court bearing upon the validity of the service of the citation by the sheriff of El Paso county is the affidavit of Dufourcq, above referred to, and the testimony of Towne and Safford, whose depositions were taken at the request of the defendant company. They were examined upon interrogatories propounded by the defendant company, and upon cross-interrogatories

propounded by plaintiff, Garvey, who has offered no evidence in rebuttal. The court is satisfied, from an examination of the affidavit of Dufourcq and the depositions of Towne and Safford, that Dufourcq was not the agent of the defendant company, or in any way connected with it, when the attempted service was had upon him, and that at that time the defendant company was a nonresident of Texas, and had no office or place of business in the state. The defendant company has not been legally served with process, and the motion to set aside and annul the pretended service must be granted. St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; N. E. Mut. Life Ins. Co. v. Woodworth, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379.

[3] The only other question raised and requiring consideration is whether the defendant company has made a general appearance or taken any other action recognizing the case as in court. Of course, the filing of the petition for removal does not amount to a general appearance. Wabash W. Ry. Co. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. However the plaintiff contends that a general appearance was made by the defendant company joining with Dufourcq in removing the case to this court. The court is of opinion that the defendant company's action in this respect is not a general appearance, and that it does not now preclude the defendant company from challenging the jurisdiction of the court over its person.

[4] Nor did the taking of the depositions of Towne and Safford at the request of the defendant company amount to an appearance in the cause, preventing the Compania Metalurgica Mexicana from now raising the question of the validity of the service alleged to have been had upon it. The depositions were taken and offered, and the notice to plaintiff of the taking of the depositions so stated, only in support of the motion to quash, and for no other purpose, and these depositions had no relation to anything else than the motion to quash.

The defendant company has continually, by its special appearances in the court, insisted upon the illegality of the service had upon it, and it has taken no action which can be regarded as a general appearance in the cause.

An order in harmony with this opinion will be entered.

PENN BRIDGE CO. v. CITY OF NEW ORLEANS et al.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1915. Rehearing Denied May 28, 1915.)

No. 2728.

1. APPEAL AND ERROR ⟸274—PRESENTING QUESTIONS IN LOWER COURT—SUFFICIENCY OF EXCEPTION—DIRECTED VERDICT.

In an action by a bridge contractor for sums claimed to be due for the construction of a bridge which collapsed, and for the construction of a new bridge in place thereof, where, on defendant's motion for a directed verdict, the court, after expressing its opinion that there could be no recovery for the construction of the bridge which collapsed, directed a verdict for the balance due for the work on the second bridge, and the bill of exceptions stated that thereupon counsel for plaintiff excepted and reserved its bill of exceptions, which was then and there noted, the exception was manifestly directed to the disposition of the motion for a directed verdict, and was sufficient to present for review the act of the court in denying a recovery for the bridge which collapsed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605, 1606, 1607, 1624, 1631–1645; Dec. Dig. ⟸274.]

2. CONTRACTS ⟸302—PERFORMANCE—DESTRUCTION BEFORE COMPLETION—STATUTE.

Civ. Code, La. art. 2758, providing that when the undertaker furnishes materials for the work, if the work be destroyed, in whatever manner it may happen, previous to its being delivered to the owner, the loss shall be sustained by the undertaker, unless the proprietor be in default for not receiving it, though notified to do so, does not render a bridge contractor liable for the loss caused by the collapse of the bridge, due to faulty plans and specifications which he was required by the owner to follow without deviation, since it cannot be supposed, in the absence of a clear expression, that the Legislature intended to make the contractor liable for an injury caused by the owner.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1401–1408; Dec. Dig. ⟸302.]

3. STATUTES ⟸226—RULES OF DECISION—LOUISIANA STATUTE—FRENCH DECISION.

A decision of the French Court of Cassation, construing a provision of the Code Napoléon, is not binding authority on the Circuit Court of Appeals as to the construction of a similar provision in the Louisiana Code, especially where the decisions of Louisiana, though not directly in point, indicate that it has not been considered that the statute had the meaning given by the French decision.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. ⟸226.

Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

4. CONTRACTS ⟸302—PERFORMANCE—DEFECTIVE PLANS.

A contractor, who agreed to construct a bridge in accordance with the plans and specifications furnished by the other party, from which the contractor was not permitted to deviate, can recover for material and labor furnished thereunder, where the bridge collapsed just prior to its completion because of a defect in the plans and specifications.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1401–1408; Dec. Dig. ⟸302.]

Maxey, District Judge, dissenting.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by the Penn Bridge Company against the City of New Orleans and another. From a judgment for the plaintiff for a part only of the amount claimed, plaintiff brings error. Reversed and remanded for new trial.

R. E. Milling, Irving R. Saal, William Grant, and William B. Grant, all of New Orleans, La., for plaintiff in error.

I. D. Moore, City Atty., and John F. C. Waldo, Asst. City Atty., both of New Orleans, La., for defendant in error City of New Orleans.

Percy S. Benedict, of New Orleans, La. (McCloskey & Benedict, of New Orleans, La., on the brief), for defendant in error New Orleans Ry. & Light Co.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. Omitting mention of details not necessary to be considered in reviewing the ruling of the trial court which is assigned as error, the petition alleged, and there was evidence tending to prove, the following facts:

The plaintiff in error contracted with the defendant in error the city of New Orleans to build for it a bridge of the bascule or lift type, strictly in accordance with plans and specifications furnished to the city by bridge architects employed by it alone. After the plaintiff in error had, in pursuance of the terms of the contract and under the supervision of the city engineer, carried the work to a point nearing the completion thereof, the bridge collapsed and fell while it was being lowered from a vertical to a horizontal position upon the request and order of the official of the city who had the supervision for it of the construction work. This collapse of the bridge was not due to any fault or omission of the plaintiff in error, its agents, servants, or employés, nor to any defective material used therein, nor to any nonobservance by it of any requirement of the contract, but was due altogether to the plans and specifications, which, as above stated, the contract required the builder strictly to observe and follow, being fundamentally defective and insufficient. That contract contained the following provisions:

"14. Damage to Bridge.—The contractor shall be responsible for all damages the bridge might suffer from fire, storm, or whatsoever cause during erection or after completion until accepted by the city engineer and the commissioner of public works. * * *

"20. Maintenance.—The contractor guarantees, at his expense, to maintain to the satisfaction of the commissioner of public works, in good condition, for a period of one (1) year from the day it is accepted by the city engineer, all of the work executed under the contract."

During the progress of the work, before the collapse of the bridge, payments had been made thereon as provided for in the contract; but the proportion of the work contracted for which had then been done was considerably greater than that which the amount that had

been paid thereon bore to the contract price. After the collapse of the bridge the city procured new and revised plans and specifications for its erection, and it was completed under a new contract entered into between the city and the plaintiff in error, which provided for the payment of a specified sum for the work called for by that contract. It was expressly stipulated in that contract that the making of it was "without prejudice, waiver, or admission of liability by or on behalf of any party hereto, either to each other or to third persons, each denying that it is liable either to the other, or to third persons, for the collapse of said bridge, or for any damage, injury, loss, or liability flowing therefrom." There was evidence tending to prove that an unpaid balance was due under this second contract.

[1] At the close of the evidence the counsel for the defendants moved the court orally to instruct the jury to find a verdict for the defendants. Thereupon the presiding judge made some remarks to the jury as to his views of the rules of law applicable to the case, which he concluded with this statement:

"However, there is due the plaintiff an amount of $2,551.93 for matters arising after the failure of the bridge, and I will direct a verdict for that amount."

Immediately following its recital of this statement, the bill of exceptions states:

"And thereupon, and before the said jury retired, immediately after said charge, counsel for the plaintiff then and there, in the presence of the jury, excepted and reserved this its bill of exceptions, which was then and there noted."

The counsel for the defendants in error suggest that the exception which was reserved was insufficient to present for review any action of the trial court, in that it failed to direct the attention of the court to any particular ruling sought to be made the subject of objection. There is no merit in this suggestion. Manifestly the exception reserved was directed, not to what the court said in explanation of the ruling it was about to make, but to the action of the court in so disposing of the motion submitted as to deny the plaintiff's right to recover anything for work done under the original contract. The exception sufficiently directed the attention of the court to the ruling made on the motion for a directed verdict, and it duly presents that ruling for review. E. H. Rollins & Sons v. Board of Commissioners, 80 Fed. 692, 26 C. C. A. 91.

[2] The effect of the court's ruling was to deny the plaintiff in the case any right to recover for work done under the original contract, though its failure to complete the work called for by that contract was due, not to any fault on its part, but to a collapse of the bridge because the plans and specifications for it, to which the plaintiff had to conform, were fundamentally wrong, and though neither the agreed price for building the bridge nor so much of that price as was proportionate with the part of the work which had been done at the time of the collapse had been paid. This amounted to holding that any loss resulting from the collapse of a structure while in course of erection must fall on the party who undertook the work of construc-

tion, though the collapse was due, not at all to his fault or omission, but wholly to the fatal insufficiency of plans and specifications for which he was in no way responsible and from which he was not permitted to deviate. The remarks made by the presiding judge in explanation of the ruling he was about to make show that he regarded the provision contained in article 2758 of the Civil Code of Louisiana as determinative of the question presented for decision. That provision is as follows:

"Art. 2758. Accidental Destruction Before Delivery.—When the undertaker furnishes the materials for the work, if the work be destroyed, in whatever manner it may happen, previous to its being delivered to the owner, the loss shall be sustained by the undertaker, unless the proprietor be in default for not receiving it, though duly notified to do so."

This article provides when the loss resulting from the destruction of a work before it has been completed and delivered is to fall on the undertaker or builder. Another article of the same Code (article 2762) provides when the loss due to a building falling to ruin after its completion and delivery is to fall upon the builder. It is to be noted that neither of these provisions contains language which makes it plain that it was a part of the legislative purpose to subject the builder to the loss occasioned by a destruction of the work, due to a cause for which he was not responsible and of which the owner alone had control. In the framing of each of these articles use was made of provisions on the same subjects contained in the Code Napoléon (articles 1788, 1792). They were redrafted and somewhat changed in phraseology before being incorporated in the Louisiana Civil Code.

It is not without significance that a change made in the redrafting of the last-mentioned article consisted in its omission of a clause found in the corresponding article of the Code Napoléon—one making the contractor responsible for the loss resulting from the fall or collapse of a building as a result of a defect in its foundation—the effect of which would have been to make the builder bear a loss due to a cause for which he may not have been at all responsible, and for which the owner may have been solely responsible. The difference between the last-mentioned provision and the corresponding one of the Code Napoléon has been noted in Louisiana decisions. Fremont v. Harris, 9 Rob. (La.) 23; Powell v. Markham, 18 La. Ann. 581. To say the least, the history of the enactment of that provision, which is cognate with the one which is claimed to have a bearing upon the decision of the instant case, contains some evidence of a lack of intention on the part of the Legislature to cast upon a builder the loss consequent upon the destruction of his work due to a cause for which he was in no way responsible, and for which the owner was solely responsible.

But, without regard to this consideration, we do not think that with any plausibility it can be contended that the Legislature, in using the words, "if the work be destroyed, in whatever manner it may happen, previous to its being delivered to the owner," had in contemplation a destruction of the work due to the owner's fault while it is still incomplete in the hands of the contractor. It seems to be more rea-

sonable to infer that in such a use of the words quoted in the connection in which they are found there was a tacit assumption that a destruction of the work would not be attributable to the owner when it occurred before there had been a delivery to him. In stating the builder's responsibility for the structure before its delivery to the owner, it is not to be supposed, in the absence of a clear manifestation of a purpose in that regard, that the Legislature had in mind an injury caused by the owner himself, or intended to charge the builder with liability therefor. Even in the case of the common-law liability of a common carrier, generally stated as extending to any loss or injury not due to an act of God or the public enemy, the responsibility of the carrier for damage to the thing carried caused by the shipper himself is impliedly excluded.

The provision relied on evidences an intention of the Legislature to go so far as to cast upon the builder a loss occasioned by a destruction of the work before delivery, though such destruction was without fault on his part, or is unexplained, but by no means evidences a purpose to cast upon one party to a building contract a loss for which the other party to that contract is solely responsible. More definite language than that found in the provision in question would be required to warrant the imputation to the Legislature of such a purpose. We do not think that it would be more permissible to give to the provision in question the meaning which is sought to be attributed to it than it would be to construe section 14 of the contract, above set out, as having the effect of enabling the city willfully to cause the destruction of the bridge before its completion, and then hold the contractor responsible for the damages so sustained.

While there has not come to our notice any decision of a Louisiana court specifically to the effect that the article of the Civil Code which is invoked does not make a contractor liable for a failure of his work due to the badness of the plan made for it by another, and which the contractor was required to follow, decisions which have been rendered to the effect that a builder is not responsible for results attributable to defects in the architect's plans (Hebert v. Weil, 115 La. 424, 39 South. 389; Mahoney & Co. v. St. Paul's Church, 47 La. Ann. 1064, 17 South. 484) indicate that the opinion has not heretofore been entertained that the statute in question has the meaning now imputed to it. And we are not of opinion that it has that meaning.

[3] We have been referred to a decision of the French Court of Cassation as giving the meaning contended for by the counsel for the defendants in error to the article of the Code Napoléon corresponding with article 2758 of the Louisiana Civil Code. Such rulings on questions of the interpretation of Code provisions are not to be followed when found to be inconsistent with the jurisprudence of Louisiana, as evidenced by the decisions of its own courts, as, in view of the two rulings last above cited, the one relied on seems to be. Hubgh v. New Orleans & Carrollton R. Co., 6 La. Ann. 495, 510. At any rate, that decision of the French court is not authoritative in this jurisdiction, and we think that the considerations stated above are

such as to require the conclusion we have reached on the question presented.

[4] The inquiry, then, is as to the rule to be applied in the absence of a governing statute. The transaction disclosed is the familiar one of a contractor undertaking to furnish the material and work called for in a contemplated structure required to be erected in conformity with plans and specifications supplied by the owner or his architect; no more being expected of the contractor than that he follow such plans and specifications, without critical investigation of their sufficiency. Such a contractor loses any right to recover on the contract by a performance not in substantial conformity with the requirements of it. If, because of the badness of the plan, the contemplated structure cannot be brought to successful completion in the way required to be pursued, and nevertheless the contractor can be entitled to nothing unless he follows the plan prescribed, the contract has the effect of placing him in a dilemma from which there is no chance for him to escape without loss, though this situation is brought about by requirements imposed by the other party to the contract.

It cannot be supposed that such contracts would be matters of such common occurrence—that owners would be able to secure them, or that contractors could be found who would be willing to subject themselves to such risks of loss due to no fault on their part—if it was understood by the parties that the making of such contracts involved such results; and there is abundant authority for the assertion that such transactions do not have such consequences. We understand it to be well settled that by the making of such a contract as the one involved in this case the owner impliedly warrants the sufficiency for the purpose in view of the plans and specifications which the contractor is required to follow, and subjects himself to liability to the contractor for loss or damage entailed upon the latter in consequence of a fatal deficiency or fault in the plans or specifications not discoverable by him by the exercise of ordinary diligence upon inspection. Bentley and Others v. State, 73 Wis. 416, 41 N. W. 338; MacKnight Flintic Stone Co. v. Mayor, 160 N. Y. 72, 54 N. E. 661; Murphy v. National Bank, 184 Pa. 208, 39 Atl. 143; Filbert et al. v. Philadelphia, 181 Pa. 530, 37 Atl. 530; Continental & C. T. & S. Bank v. Corey Bros. Const. Co., 208 Fed. 976, 126 C. C. A. 64; Bush v. Jones, 144 Fed. 942, 75 C. C. A. 582, 6 L. R. A. (N. S.) 774; Sickels v. United States, 1 Ct. Cl. 214; 6 Cyc. 63.

A contractor's right to recover for material and labor furnished under such a contract as the one involved in this suit is not to be denied when he shows a performance of all that he undertook to do, except in so far as performance was rendered impossible by a fatal fault of the plan he was required to follow, the responsibility for which fault and for the failure to discover it in time to avoid the consequent loss to the contractor was solely that of the owner or his architect or supervisor.

The conclusion is that the court was in error in making the ruling complained of. It follows that the judgment should be reversed, and the cause be remanded for a new trial; and it is so ordered.

MAXEY, District Judge (dissenting). In addition to the reasons assigned by the District Judge for giving an affirmative instruction in favor of the defendants in error, it is thought by the writer that the instruction was proper for the reason that it was justified by the very terms of the following provision of the contract, entered into between the bridge company and the city of New Orleans. Section 14 reads as follows:

"Damage to Bridge.—The contractor shall be responsible for all damages the bridge might suffer from fire, storm, or *whatsoever cause during erection* or after completion until accepted by the city engineer and the commissioner of public works."

By this contract the parties are bound just as they have bound themselves. Its language is plain and unambiguous. By its terms the contractor bound itself, without reservation and with no provision for dispensation, to be responsible for all damages the bridge might suffer from any cause whatsoever during its erection or after completion until accepted by the proper authorities. During its erection, and therefore before acceptance by the city engineer and the commissioner of public works, the bridge collapsed without negligence on the part either of the city or of the bridge company. It is said that the collapse was due to defective plans and specifications furnished by the city's architect. Let that view of the case be granted, and it still remains true that the bridge company is responsible, unless the court interpolates in the contract a provision which the parties, with the plans and specifications before them, failed to do. To relieve the bridge company of the responsibility which it voluntarily assumed, the court must make a new contract for the parties, by inserting at the end of section 14 the following, or equivalent, words: Except damages arising from defective plans and specifications. It is quite clear that the court is without power to effect such a change. The contract must stand, with its benefits and burdens, as the parties themselves have made it. And this view of the law is supported by the highest authority. The case of Dermott v. Jones, 2 Wall. 1–9, 17 L. Ed. 762, is so directly applicable to the case before the court that an apology for a lengthy quotation from it is not deemed necessary. In the Dermott Case the pertinent facts were as follows:

Jones, a mason and housebuilder, contracted with Miss Dermott to build a house for her, the soil on which the house was to be built being her own. The house was to be built according to very detailed plans and specifications, which the "architect" of Miss Dermott had prepared, and which were made part of the contract. In the contract, Jones covenanted that he would procure and supply all matters requisite for the execution of the work "in all its parts and details, and for the complete finish and fitting for use and occupation of all the houses and buildings, and the several apartments of the house and buildings, to be erected pursuant to the plan of the work described and specified in the said schedule, and that the work, and the several parts and parcels thereof, shall be executed, finished, and ready for use and occupation, and be delivered over, so finished and ready," at a day fixed. Jones built the house according to the specifications, except in so far as Miss Dermott had compelled him, according to his account of things, to deviate from them. Owing, however, to a latent defect in the soil, the foundation sank, the building became badly cracked, uninhabitable, and so dangerous to passers-by, that Miss Dermott was compelled to take it down, to renew the foundation with artificial "floats," and to rebuild that part of the structure which had given away. This

she did at a large expense. As finished on the artificial foundations the building was perfect.

With the foregoing facts in view, it was said by Mr. Justice Swayne, as the organ of the court:

"The defendant in error insists that all the work he was required to do is set forth in the specifications, and that, having fulfilled his contract in a workmanlike maner, he is not responsible for defects arising from a cause of which he was ignorant, and which he had no agency in producing. Without examining the soundness of this proposition, it is sufficient to say that such is not the state of the case. The specifications and the instrument to which they are annexed constitute the contract. They make a common context, and must be construed together. In that instrument the defendant in error made a covenant. That covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building 'fit for use and occupation.' It could not be occupied with safety to the lives of the inmates. It is a well-settled rule of law that, if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. Paradine v. Jayne, Alleyn, 27; Beal v. Thompson, 3 Bosanquet & Puller, 420; Beebe v. Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; 3 Comyn, Digest, 93. The application of this principle to the class of cases to which the one under consideration belongs is equally well settled. If a tenant agree to repair, and the tenement be burned down, he is bound to rebuild. Bullock v. Dommett, 6 Term, 650. A company agreed to build a bridge in a substantial manner, and to keep it in repair for a certain time. A flood carried it away. It was held that the company was bound to rebuild. Brecknock Company v. Pritchard, Id. 750. A person contracted to build a house upon the land of another. Before it was completed it was destroyed by fire. It was held that he was not thereby excused from the performance of his contract. Adams v. Nickols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; Brumby v. Smith, 3 Ala. 123, is to the same effect. A party contracted to erect and complete a building on a certain lot. By reason of a latent defect in soil the building fell down before it was completed. It was held (School Trustees v. Bennett, 27 N. J. Law, 513, 72 Am. Dec. 373, a case in New Jersey, cited by counsel) that the loss must be borne by the contractor. The analogies between the case last cited and the one under consideration are very striking. There is scarcely a remark in the judgment of the court in that case that does not apply here. Under such circumstances equity cannot interpose. Gates v. Green, 4 Paige (N. Y.) 355, 27 Am. Dec. 68; Holtzaffel v. Baker, 18 Vesey, 115. The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated." 2 Wall. 7, 8, 17 L. Ed. 762.

See, also, United States v. Gleason, 175 U. S. at page 602, 20 Sup. Ct. 228, 44 L. Ed. 284.

In the judgment of the writer, the ruling of the court in Dermott v. Jones is decisive of the present case, and he is therefore of the opinion that the judgment should be affirmed. The foregoing views are strongly supported by the case of Lonergan v. San Antonio Trust Company, decided by the Supreme Court of Texas and reported in 101 Tex. 63-81, 104 S. W. 1061, 106 S. W. 876, 130 Am. St. Rep. 803.

This case should have been added to the opinion before filing, but counsel in the cause made no reference to it and it has only been recently called to the attention of the writer.

NOTE.—Upon the trial of the cause Judge Foster delivered the following charge to the jury:

"Gentlemen, in this case you have listened very patiently to the evidence for some days, and no doubt you are entitled to know what the court thinks about the law. Under the Code of Louisiana, article 2758, if a contractor is putting up a building, and of course a bridge is a building, and it falls for any reason before the completion of the work, the loss falls on him. Now there would be an exception if it failed from any act of the owner, if he had willfully destroyed it or had been negligent in his duty. The only question, then, in this case, is whether or not, under the facts of the case, there was either an express or implied warranty in the contract that the plans were sufficient; in other words that a bridge could be built that would sustain itself and do the work required of it under the plans and specifications. There is no express warranty in the contract, and the parties had equal opportunity of possessing themselves with knowledge as to the sufficiency of the plans. The city was building a structure that had been designed by engineers of reputation and had been patented, and the contractors had to look to these engineers for the plans, and the evidence shows conclusively that they were in constant correspondence. The proof also shows conclusively that, if the contractor had chosen to do so, he could have figured the stresses of these members of the bridge before erecting them, though I think the proof would warrant the conclusion that it was not easy to do so. However, he could have done so; he had just as much opportunity as the city. Furthermore, the contractor was obliged to pay the fee of these engineers and submit the shop drawings for their approval. Under all the facts I am forced to the conclusion that there was no implied warranty on the part of the city that the plans were sufficient. Therefore, the buildings having fallen without any fault or breach of warranty on the part of the city, under the article of the Code, the burden must be borne by the contractor. There is no appreciable conflict in the evidence on the material points, and therefore nothing for you to do, especially in view of the pleadings. However, there is due the plaintiff an amount of $2,551.93 for matters arising after the failure of the bridge, and I will direct a verdict for that amount."

WHITFIELD, Immigrant Inspector, et al. v. HANGES et al.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1915.)

No. 4175.

(Syllabus by the Court.)

1. HABEAS CORPUS ⊂⊃23—DEPORTATION.

Where an alien is deprived of his liberty, or is about to be deported, by means of the abuse of the discretion, or the arbitrary action, of an immigration inspector, or other executive officer, or without a full and fair hearing on the charges against him, the power is conferred and the duty is imposed upon the courts of the United States to issue a writ of habeas corpus and relieve him.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. ⊂⊃23.]

2. ALIENS ⊂⊃54—CONSTITUTIONAL LAW ⊂⊃252—DUE PROCESS—DEPORTATION—FAIR HEARING—REQUISITES.

An alien, as well as a citizen, is protected by the universal principle that no person shall be deprived of life, liberty, or property without due

process, and his hearing must be in accord with "the fundamental principles which inhere in due process of law."

Indispensable requisites of such a hearing are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine witnesses against him; that after all the evidence against him is produced and known to him, he may have time and opportunity to produce evidence and witnesses to refute it; that the decision or order shall be governed by and based upon the evidence at the hearing, and that only; and that it shall not be without substantial evidence taken at the hearing to support it.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⊂⊃54; Constitutional Law, Cent. Dig. §§ 728–731; Dec. Dig. ⊂⊃252.]

3. ALIENS ⊂⊃54—DEPORTATION PROCEEDINGS—FAIR HEARING—WHAT CONSTITUTES.

That is not a fair hearing in which the inspector chooses or controls the witnesses, or prevents the witnesses the accused desires from appearing or testifying.

Where an inspector acquires, or has such complete control of important witnesses in a case that they will not testify without his call or request, and will do so upon his call or request, his refusal, on the request of counsel, to call or request them to testify prevents the accused from obtaining the benefit of their testimony as effectually as a prevention by physical force or prohibition.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⊂⊃54.]

4. ALIENS ⊂⊃44, 54—DEPORTATION PROCEEDINGS—RULES OF SECRETARY—VALIDITY—FAIR HEARING.

Although the rule of the Secretary be fair and just in appearance, yet if it is applied and administered by public authority with an evil eye and an oppressive hand, so as to deprive a person of his fundamental rights, it is inconsistent with law and void.

The fixing by the inspector of the time when the alien may inspect the warrant, or the time when he may have counsel, so late as to deprive him of a substantial portion of the benefit of an inspection of the warrant, and of the benefit of counsel, is an abuse of discretion which renders the hearing unfair.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 102–104, 112; Dec. Dig. ⊂⊃44, 54.]

5. ALIENS ⊂⊃54—DEPORTATION PROCEEDINGS—JURISDICTION OF IMMIGRATION OFFICERS—REVIEW BY COURTS.

Whether or not the weight of the evidence in substantial conflict sustains the charges against an alien is a question in the exclusive jurisdiction of the immigration officers and is not reviewable by the courts.

But administrative findings and orders quasi judicial in character are void if there was no substantial evidence to support them, or if they are contrary to the "indisputable character of the evidence." Whether or not there was any substantial evidence at the hearing to sustain a finding, order, or report of an immigration officer, to the effect that an alien is guilty of the charges against him, is a question of law the power and duty to determine which is vested in the courts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⊂⊃54.]

6. ALIENS ⊂⊃54—DEPORTATION PROCEEDINGS—FAIR HEARING—HEARSAY AND RUMOR.

That is not a fair hearing in which the inspector after the hearing imports into the case and bases his finding and recommendation of deportation upon hearsay and rumor of facts, regarding which there was no evi-

dence at the hearing, and which the accused had no notice of and no opportunity to refute.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⊂⊃54.]

7. HABEAS CORPUS ⊂⊃50—RIGHT TO WRIT—PREMATURITY—DEPORTATION PROCEEDINGS.

Where an alien resident is deprived of his liberty in proceedings for his deportation under a finding and report of an inspector upon an unfair hearing which cannot support an order of deportation, the issue of a writ of habeas corpus is not premature or unauthorized, although the Secretary of Labor has not yet rendered his decision whether or not he shall be deported.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 48; Dec. Dig. ⊂⊃50.]

8. HABEAS CORPUS ⊂⊃92, 110—DEPORTATION PROCEEDINGS—TRIAL DE NOVO —BAIL.

Where it is decided, after a hearing on a writ of habeas corpus, that the alien is deprived of his liberty after an unfair hearing, which cannot sustain an order of deportation, the court may, and it should, proceed to try de novo the question whether or not he is guilty of the charges against him before absolutely discharging him, and meanwhile it may admit him to bail.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96, 99; Dec. Dig. ⊂⊃92, 110.]

Appeal from the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Habeas corpus by George Hanges and others against S. L. Whitfield, Immigrant Inspector, etc., and others. Petitioners were ordered discharged (209 Fed. 675), and defendants appeal. Remanded, with directions.

F. A. O'Connor, U. S. Atty., of New Hampton, Iowa (Grover M. Neese, Asst. U. S. Atty., of Ft. Dodge, Iowa, on the brief), for appellants.

J. E. Williams, of Mason City, Iowa (Williams & Breese and Rule & Shipley, all of Mason City, Iowa, on the brief), for appellees.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. George Hanges, Demetrios Lamper, Steve Pantza, and Peter Francas, citizens of Greece, were resident aliens who had been admitted to the United States pursuant to its acts of Congress prior to 1907. Two of them owned and operated the Main Café in Mason City, Iowa, where they had lived for years, and two of them were employed in the café. They were arrested by the immigrant inspector on October 24, 1913, and such proceedings were had that he found them guilty, recommended their deportation, and held them in confinement in the charge of the sheriff when, on their petition, the court below issued a writ of habeas corpus and, after a return thereto, an answer to the petition, and a full hearing, ordered their discharge. The inspector has appealed from this order on the grounds that the hearing of the appellees was full and fair, and that he committed no abuse of discretion or arbitrary action.

The deportation of the appellees was recommended by the inspector, and they were held in confinement under his finding that they were guilty of the charge that they were aliens employed by or in connection with a music or dance hall, or other place of amusement, habitually frequented by prostitutes, or where prostitutes gather, that they were aliens connected with the management of a house of prostitution, and that they were aliens found receiving, sharing or deriving benefit from a part or the whole of the earnings of prostitutes. Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899, as amended by Act March 26, 1910, c. 128, § 2, 36 Stat. 264 (Comp. St. 1913, § 4247). Before entering upon a review of the proceedings of the inspector, the hearing he gave to the appellees, and the finding and recommendation of deportation he made to his superior, under which appellees were held, it is well to call to mind the rules and principles which govern proceedings in cases of this nature.

[1] A full and fair hearing on the charges which threaten his deportation and an absence of all abuse of discretion and arbitrary action by the inspector, or other executive officer, are indispensable to the lawful deportation of an alien. Where, by the abuse of the discretion or the arbitrary action of the inspector, or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or is about to be deported, the power is conferred and the duty is imposed upon the courts of the United States to issue a writ of habeas corpus and relieve him. The Japanese Immigrant Case, 189 U. S. 86, 100, 101, 23 Sup. Ct. 611, 47 L. Ed. 721; Chin Yow v. United States, 208 U. S. 8, 10, 12, 13, 28 Sup. Ct. 201, 52 L. Ed. 369; Low Wah Suey v. Backus, 225 U. S. 460, 468, 32 Sup. Ct. 734, 56 L. Ed. 1165; Ex parte Petkos (D. C.) 212 Fed. 275; United States v. Chin Len, 187 Fed. 544, 109 C. C. A. 310; United States v. Williams (D. C.) 185 Fed. 598, 604; United States v. Williams (D. C.) 193 Fed. 228, 231.

[2] An alien, as well as a citizen, is protected by the prohibition of deprivation of life, liberty, or property without due process and the equal protection of the law. This principle is universal. It applies "to all persons within the territorial jurisdiction of the United States without regard to any differences of race, of color, or of nationality." Yick Wo v. Hopkins, 118 U. S. 356, 369, 6 Sup. Ct. 1064, 30 L. Ed. 220; U. S. Rev. St. § 1977 (2 Comp. Stat. 1913, § 3925).

An alien is entitled to a hearing upon and a decision of the charge that he has violated the acts of Congress and is therefore liable to deprivation of his liberty and deportation, according to "the fundamental principles that inhere in due process of law." It is not competent for an inspector, or the Secretary of Labor, or any executive officer—

"arbitrarily to cause an alien who has entered this country and has become subject in all respects to its jurisdiction and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him an opportunity to be heard upon the questions involved, his right to be and remain in the United States. No such arbitrary power con exist where the principles involved in due process of law are recognized." Japanese Immigrant Case, 189 U. S. 86, 100, 101, 23 Sup. Ct. 611, 47 L Ed. 721; Wong Wing v. United States, 163 U. S. 228, 237, 238, 239, 16 Sup. Ct. 977, 41 L. Ed. 140.

[3] Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it. In re Rosser, 101 Fed. 562, 567, 41 C. C. A. 497; In re Wood & Henderson, 210 U. S. 246, 254, 28 Sup. Ct. 621, 52 L. Ed. 1046; Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 91–93, 33 Sup. Ct. 185, 57 L. Ed. 431; Ex parte Petkos (D. C.) 212 Fed. 275–278; United States v. Sibray (C. C.) 178 Fed. 144, 149. That is not a fair hearing in which the inspector chooses or controls the witnesses, or prevents the accused from procuring the witnesses or evidence or counsel he desires. Chin Yow v. United States, 208 U. S. 8, 11, 12, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Sibray (C. C.) 178 Fed. 144, 149; United States v. Williams (D. C.) 185 Fed. 598, 604; Roux v. Commissioner of Immigration, 203 Fed. 413, 417, 121 C. C. A. 523.

[4] The Secretary of Labor is authorized to make or approve such rules "not inconsistent with law" for the enforcement of the immigration laws as he deems desirable. Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, 36 Stat. 263 (Comp. St. 1913, § 4244), and Act March 4, 1913, c. 141, 37 Stat. 736 (Comp. St. 1913, § 932). Rule 22 of the Department of Labor provided in effect that the inspector prior to any arrest might procure the best proof that could be obtained to the effect that the aliens belonged to one or more of the classes subject to deportation after entry; that he might state the facts evidenced by this proof and apply for a warrant of arrest; that telegraphic application for such a warrant might "be resorted to only in case of necessity"; and that it must state that the usual written application had been made and mailed and the substance of the facts and proof contained therein. The inspector had no authority to administer an oath in the cases in hand. His power so to do is limited to administering oaths touching the right of any aliens to enter the United States. Act Feb. 20, 1907, c. 1134, § 24, 34 Stat. 906 (Comp. St. 1913, § 4273). Nevertheless, between October 7 and October 23, 1913, the inspector gathered, mainly by the use of police officers of Mason City, a large number of prostitutes in the grand jury room in that city, and in the presence of the captain of police, or some other police officer, there questioned them, wrote down in narrative form purported statements made by them, went through the form of administering oaths to them, and on these statements applied for and obtained a telegraphic warrant for the arrest of the appellees, although they were permanent residents, two of them property owners and business men of Mason City, and there seems to have been no necessity

whatever for desperate haste. One of these women testified that she refused to go to the grand jury room, whereupon a policeman came after her with an automobile, told her that he had a warrant for her arrest in the auto, and that his orders were to take her if she had to be taken in pieces. She then submitted and was carried to the grand jury room, where she testified that she was examined before Campbell, the captain of police, and the inspector, and that both took part in the examination. The inspector and Campbell, however, denied that Campbell participated in the examination, but admitted that he was present.

Rule 22, subd. 4 (a) provides that upon receipt of the warrant of arrest the alien shall be taken before the person or persons therein described and granted a hearing to enable him to show cause, if any there be, why he should not be deported, and that in the discretion of the immigration officer in charge he may, pending determination of his case, be taken into custody or allowed to remain in some place deemed by such officer secure and proper, and that—

"(b) during the course of the hearing the alien shall be allowed to inspect the warrant of arrest, and all the evidence on which it was issued, and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel. * * * If counsel be selected he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the government. * * * (c) At the close of the hearing the full record shall be forwarded to the Bureau, together with any written argument submitted by counsel and the recommendations of the examining officer and the officer in charge as to whether or not a warrant for deportation shall issue."

The appellant received a telegraphic warrant of arrest, caused the appellees to be arrested, and was examining one of them and with his employés, Capt. Campbell and another police officer, was holding them in confinement and preventing them from seeing or consulting with any other person, when their counsel appeared and demanded to see and consult with them and to take part in the examination. The inspector refused this request, permitted no one to see and consult with them until after he had examined each of them in secret. After their examination was completed he permitted them for the first time to see any one but himself and the police officers and to have counsel and to introduce the testimony of witnesses. It will be noticed that the rule gives the inspector no authority secretly, in the presence of no one but himself and his police officers, whose presence and power unavoidably places the defenseless alien under fear and restraint, to examine or question him. It is limited to giving authority to the inspector to give the alien a hearing to enable him to show cause why he should not be deported, and by its terms it excludes a secret examination of the alien to extort a confession or evidence unfavorable to him. The provisions of the rule that the inspector shall grant the alien a hearing, that during the hearing he shall be permitted to inspect the warrant, and that at such stage thereof as the officer deems proper he shall be permitted to have counsel were made for the benefit of the alien for the purpose of giving him a fair trial. The liberty, and the property also, for if he is imprisoned and deported he must lose his business and sacrifice his

property, of a permanent resident alien, like the appellees, as well as their deportation, are involved in the issue, and these provisions of the rule should be liberally construed to accomplish their plain purpose. To the same end the discretion of the inspector in determining when the alien shall inspect the warrant and when he shall have counsel should be exercised, so that his hearing shall be full and fair. A denial of permission to him to see the warrant and to have counsel until within five minutes of the close of the hearing would be a clear abuse of discretion, and would render the provisions of the rule as administered "inconsistent with law" and void. Although a law or rule be fair and just in appearance, yet if it is applied and administered by public authority with an evil eye and an oppressive hand, so as to deprive a person of his fundamental rights, it cannot be sustained. Yick Wo v. Hopkins, 118 U. S. 356, 374, 6 Sup. Ct. 1064, 30 L. Ed. 220; Henderson v. Mayor of New York, 92 U. S. 259, 23 L. Ed. 543; Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145.

One of the objects of this rule was to give, not to deprive, the alien of the benefit of counsel. The time when an alien, who is ordinarily ignorant of the law, of legal procedure and of his rights, may derive the most benefit of counsel is when he is arrested and his hearing begins. It would have been no abuse of the discretion of the inspector to have permitted the appellees to have counsel to advise them immediately upon their arrest, and to have permitted them and their counsel to inspect the warrant of arrest, to be present and to take part in the proceedings at and after the first stage of the examination and hearing of the aliens. Such a course would have been in accord with the fundamental principles of English and American jurisprudence consistent with the law, and it should have been pursued. The refusal of the inspection of the warrant of arrest and the refusal to permit the aliens to see and consult their counsel before, and to permit them to participate in the proceedings at, their examination directly tended to prevent a fair hearing upon the charges against them.

[5] Whether or not the weight of the evidence, in substantial conflict at the hearing, sustained the charges against the appellees is a question of fact within the exclusive jurisdiction of the officers of the Department of Labor, and the courts, in the absence of fraud or mistake, are without jurisdiction to review or reverse their finding thereon.

But whether or not there was any substantial evidence at the hearing in support of those charges and of the finding of the inspector that they were proved, and of his recommendation that the aliens be deported, under which the appellees were being deprived of their liberty, is a question of law, the power and duty to determine which are vested in the courts, and any injurious error in deciding that question by any executive or quasi judicial officer or tribunal is reviewable and remediable by them. Administrative orders and findings quasi judicial in character are void if the finding is contrary to the "indisputable character of the evidence." School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 108, 23 Sup. Ct. 33, 47 L. Ed. 90; Interstate Commerce Com-

mission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 91, 33 Sup. Ct. 185, 57 L. Ed. 431, and cases there cited; Howe v. Parker, 190 Fed. 738, 746, 111 C. C. A. 466, 474, and cases there cited.

For the purpose of determining the question of law whether there was any substantial evidence to support the finding and recommendation of the inspector the evidence in this case has been carefully read and examined, and the irresistible conclusion is that there was no such evidence at the hearing, and that the undisputed evidence was that the charges against the appellees were baseless. This state of things resulted from the fact that the government introduced no evidence whatever at the hearing in support of the charges, the appellees under oaths administered by the inspector introduced their own testimony on which they were cross-examined by the inspector, and the testimony of 15 other witnesses on which they were cross-examined by the inspector, all of which tended to show that the charges were not true. Business men of Mason City and boarders at the Main Café of the appellees came to say that their restaurant was orderly and respectable, was patronized by all classes of people, business men, professional men, clerks, and that they never saw any evidence of the truth of the charges against the aliens. For example, J. C. Buchanan testified that he was 41 years of age; that he had been either a deputy sheriff or a police officer in Mason City most of the time from 1907 to 1913; that from February 13 to May 20, 1913, he was a police officer; that during these three months he passed appellees' Main Café two or three times each night; that he reported to the police department from it each night; that during March his beat extended past it; that its reputation was good; that it was patronized by the general run of people; that he had eaten there; that he had taken his wife to midnight lunches there several times; that at these times there were other people in the restaurant; that he certainly would not have taken his wife there if he had thought the place disreputable; that he noticed the conduct of the employés and patrons, and saw nothing there disreputable or disorderly.

During the hearing the inspector permitted counsel for the appellees to read the statements he and the police officers had drawn from the prostitutes before the arrest was made, but neither he nor the government offered or introduced these statements in evidence, nor would they have constituted evidence if offered, because, since the inspector had no authority to administer an oath, they were not sworn to, because they were the statements of the prostitutes extracted in secret under the ever-present fear which the call or seizure by police or other officers of persons of their character unavoidably imposes upon them, and because these women had not been called to the hearing and the appellees had no opportunity to cross-examine them. These women were at the command of the inspector. He called them by means of the police, and he had the power to call them again. The record convinces that he or his servants, the police officers, caused them to be notified that they were not required to respond to the call of the appellees. During the hearing counsel for the appellees requested the inspector to call them in order that the counsel for the appellees might examine them, re-

quested that in the interest of a fair hearing he exercise the same power to procure evidence of the truth from the same parties that he had exercised to procure statements from them against the appellees. The appellees had no right to a subpœna and no other method to get these women to come and testify, but the inspector refused to call them. The chief of police, and Campbell, the captain, were present at the hearing. Counsel for the appellees requested each of them to take the stand and testify. The chief refused to do so, but said he might do so if the inspector requested him. Campbell said he would testify if the government man allowed him to. Counsel for the appellees asked the inspector to assist in developing the truth by requesting the officers to testify. He refused, and they did not testify, except at the subsequent call of the inspector in rebuttal, and then only to matters not relevant to the charges against the aliens. When an inspector acquires or has such complete control of important witnesses in a case that they will not testify without his call or request, and will do so upon his call or request, his refusal on the request of the accused to call or request such witnesses to testify prevents the accused from obtaining the benefit of their testimony as effectually as a prevention by physical force or prohibition; and that is not a fair hearing in which the inspector with his control of important witnesses takes their statements in a secret ex parte examination before himself prior to the hearing, and then refuses the request of the accused to call them, or to request them to testify at the hearing, and thereby deprives the accused of the opportunity to examine or cross-examine them and to have the benefit of their testimony. Chin Yow v. United States, 208 U. S. 8, 11, 12, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Sibray (C. C.) 178 Fed. 144, 149; United States v. Williams (D. C.) 185 Fed. 598, 604; Roux v. Commissioner of Immigration, 203 Fed. 413, 417, 121 C. C. A. 523.

After the hearing the inspector made and forwarded his report and recommendation to the effect that the appellees were guilty of the charges, and that they should be deported. This report states the evidence on which it is founded, and discloses the fact that it is based, not on the evidence at the hearing, but on the statements of the prostitutes extracted before the arrest, which are condensed and recited in the report, and on rumors and hearsay which are set forth in the report, in support of which there was no evidence in the case, of which the accused had no notice and which he had no opportunity to refute by evidence or otherwise. For example, there was no evidence or mention before or at the hearing of these and many other statements in the report of the inspector regarding the witnesses for the accused:

"I was informed that witness J. C. Buchanan only served about four months on the police force altogether at different times; that he was discharged twice from the police force for inefficiency, and also discharged twice from the sheriff's office when he was serving as deputy, for overindulgence in liquor and inefficiency. * * * I was informed that A. M. L. Urdangen, who is a Jew, has a bad record from other towns where he has been located in business, and that the fire insurance companies would allow him little insurance because of his having had numerous fires."

Here is another statement unsupported by any evidence, and not mentioned at the trial, a statement illustrative of the basis of the finding and recommendation of the inspector:

"I inclose herewith a newspaper article taken from the Mason City Gazette of November 5, 1913, showing that the body of the murdered child of Ada Burgess has been removed from its burying place, and it is believed to be the work of Greeks, friends of Louis Chirikos. The police officers tell me they have had a great deal of trouble with the Greeks of Mason City."

[6] That was not a fair hearing in which the inspector after the hearing imported into the case and based his finding and recommendation of deportation on hearsay and rumors of alleged facts which there was no evidence to support, and which the accused had no notice of and no opportunity to refute at the hearing. Interstate Commerce Comm. v. Louisville & Nashville R. R. Co., 227 U. S. 88, 93, 33 Sup. Ct. 185, 57 L. Ed. 431; Ex parte Petkos (D. C.) 212 Fed. 275, 277, 278. The remarks in the opinion of the Supreme Court in the Louisville & Nashville Railroad case at page 93 are apt, persuasive, and applicable here. The Commerce Act June 18, 1910, c. 309, § 12, 36 Stat. 551 (Comp. St. 1913, § 8583) gave the Commission power to gather the necessary information to make rates and to discharge other duties of the Commission, and the power after a hearing to find and make the rates. The Commission contended that its findings after the hearing must be presumed to be supported by the informaton it had acquired under section 12, pursuant to the act, before the hearing, although the evidence of this information had not been formally introduced at the hearing. "But," said the Supreme Court, "such a construction would nullify the right to a hearing; for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of section 12 [like the information gathered by the inspector before the arrest] may be used as a basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Int. Com. Comm. v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860. But the more liberal the practice in admitting testimony the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptive-

ly sufficient, information to support the finding. United States v. Baltimore & Ohio S. W. R. R., 226 U. S. 14, 33 Sup. Ct. 5, 57 L. Ed. 104."

And because the inspector arbitrarily prevented the aliens from consulting their counsel and arbitrarily prevented their counsel from being present and participating in the hearing until after the inspector had examined the aliens in secret, while he and the police officers held them in confinement; because there was no substantial evidence at the hearing in support of the charges against them; because the inspector prevented the accused from procuring testimony of important witnesses; because the inspector based his findings and recommendation of deportation on hearsay that was not in evidence at the hearing, and much of which the accused had no notice of and no opportunity to refute at the hearing—the conclusion is that the court below fell into no error and committed no mistake in its finding that the hearing of the accused was unfair and unjust and entitled the appellees to the relief of the court.

[7] But counsel for the inspector contend that the action of the court was premature because the final order of deportation had not been issued by the Secretary of Labor, and they invoke the decision of the Supreme Court in United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917. In that case the inspector had decided that a person was not entitled to enter the United States, the law gave him an appeal from that decision to the Secretary, he had not taken the appeal, and the court held in analogy to the rule in Ex parte Royall, 117 U. S. 241, 251, 252, 6 Sup. Ct. 734, 29 L. Ed. 868, that, "save under exceptional circumstances" (194 U. S. 168, 24 Sup. Ct. 621, 48 L. Ed. 917), the writ of habeas corpus should be denied, unless the accused has appealed to the Secretary and obtained a final decision. There are, however, reasons why this decision is not controlling in the case at bar. First, in that case the alien had the right to an appeal from the finding and decision which had been made by the inspector. In the case in hand the finding and recommendation of the inspector and the evidence go forward to the Secretary of Labor at Washington, and upon these he decides the case and orders the deportation or discharge of the prisoners, and there is no appeal. Second, there are two decisions of the Supreme Court and one decision of a Circuit Court which have come to our attention, to the effect that a person confined under the unauthorized decision of the inspector may have the benefit of a writ of habeas corpus and be released, although he has not availed himself of his right to appeal. Gonzales v. Williams, 192 U. S. 1, 13, 15, 24 Sup. Ct. 171, 48 L. Ed. 317; United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; Ex parte Koerner (C. C.) 176 Fed. 478, 479. Third, it is conceded in Sing Tuck's Case and in Ex parte Royall that in exceptional cases, in cases of urgency (194 U. S. 168, 24 Sup. Ct. 621, 48 L. Ed. 917; 117 U. S. 241, 251, 252, 6 Sup. Ct. 734, 29 L. Ed. 868), the writ may issue, and the prisoner may be released on habeas corpus without pursuing another remedy to the end. The case at bar was one of urgency. Prominent alien residents, business men, and their employés were con-

fined pursuant to an unfair hearing and an unwarranted finding and recommendation of deportation by the inspector. The deprivation of their liberty was present, instant, and continuing. Their liberty and some of their property were necessarily at stake. If by the finding and report of the inspector the Secretary should be misled, and should issue an order of deportation, that order might, and probably would, be issued to the inspector who arrested them, and he might deport them, as he examined them, without permitting them to communicate with any one, and thus render them remediless. Again, no order of deportation ever could be sustained upon the proceedings and hearing in this case. Refusal to issue the writ and consider their deprivation of liberty would be, in effect, to prolong the period of that deprivation. The only certain remedy the accused had before they might be seized and deported was a writ of habeas corpus before the possible decision and order of deportation came. The circumstances of this case warranted, and law and justice (Revised Statutes, § 761 [Comp. St. 1913, § 1289]) required, the issue of the writ and the finding and decision of the court below, and they were neither unauthorized nor premature.

[8] The order of the court below was that the appellees be discharged without prejudice to the right of the Bureau of Immigration to proceed against them in a lawful manner to prove, if it could do so, the grounds alleged in the warrant of arrest. The practice approved by the Supreme Court and generally prevailing, however, seems to be that the court which takes jurisdiction and custody of the alien under the writ of habeas corpus and finds that his hearing has been unfair retains custody and jurisdiction of him and of the case, and tries on the merits de novo on evidence introduced before that court the question whether or not the alien is guilty of the charges made against him in the warrant of arrest before making his discharge absolute. Meanwhile the court has ample power to admit the alien to bail or to take his own recognizance. Chin Yow v. United States, 208 U. S. 8, 13, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Williams (D. C.) 193 Fed. 228, 231, 232; In re Can Pon, 168 Fed. 479, 483, 484, 93 C. C. A. 635; Ex parte Petkos (D. C.) 212 Fed. 275, 278; Ex parte Koerner (C. C.) 176 Fed. 478, 479.

Let the case be remanded to the court below, with directions to modify the order from which the appeal was taken to conform to this practice, and to proceed further in accord with the views expressed in this opinion.

JOURAS v. ALLEN, Immigration Inspector.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1915.)

No. 4236.

ALIENS ⇐54—DEPORTATION—HEARING—DUE PROCESS OF LAW.

The rules of the Department of Labor require that, during the hearing, aliens arrested for deportation shall be allowed to inspect the warrant and provide that telegraphic application for a warrant of arrest may be resorted to only in case of necessity. Though an alien was quiet and in

business, and it did not appear that he had concealed his whereabouts or fled from arrest, he was arrested on a telegraphic warrant from the Department, in code, pursuant to a telegraphic application, and kept in solitary confinement from 4 p. m. Saturday until 11 a. m. Monday. The inspector then handcuffed him, and with a weapon at his command examined him in the absence of counsel and the alien's friends in an exceedingly threatening manner. He left instructions at police headquarters, where the alien was confined, not to let him see an attorney until he was given a hearing, and told a witness whose testimony was taken before the arrest that she need not come back, that the alien's attorneys would have no business to subpœna her, and that if she came back for cross-examination and made any change in her testimony, she would be guilty of perjury and would be sent "over the road." He also told the alien's partner, who was going to the hearing to help defend him, not to go. *Held*, that the inspector's course of action was arbitrary, contrary to the rule regarding telegraphic applications, and a clear abuse of his discretion, and the hearing was unfair and denied the alien due process of law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⊂=54.]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Petition by Gust Jouras for a writ of habeas corpus against Harry C. Allen, Immigration Inspector. From an order denying the petition, the petitioner appeals. Reversed, with directions.

Charles M. Blackmar, of Kansas City, Mo. (Henry A. Bundschu, of Kansas City, Mo., on the brief), for appellant.

Sam O. Hargus, Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., of Kansas City, Mo., on the brief), for appellee.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from an order denying the petition for a writ of habeas corpus to release Gust Jouras, a resident alien, from confinement under an order of deportation upon the charge that he had been found receiving, sharing, and deriving benefit from the earnings of a prostitute or prostitutes. The Acts of Congress, the principles of jurisprudence, and the rules of law and practice applicable to this case may be found in the opinion in Whitfield v. Hanges, 222 Fed. 745, — C. C. A. —, filed herewith, and reference is made to that opinion for them.

Gust Jouras is a Greek. He entered the United States in accordance with its laws in 1903, when he was about 16 years of age, and has resided in it ever since. For 5 years prior to his arrest by the inspector he lived in Kansas City. He was, and long had been, engaged in operating restaurants and lunch wagons in that city, and at the time of his arrest he and his two partners were the owners of two restaurants worth $1,500, which they were operating. The record convinces that he was a quiet, peaceable business boy. There is no evidence that he was violent, passionate, or dangerous, or that he ever concealed, or intended to conceal, his whereabouts, or to flee or clandestinely escape from any charge or arrest. Prior to January 5, 1914, the inspector took the ex parte statements of Mrs. Brown and other prostitutes in

reference to the charge subsequently made against Jouras, and on that day made a telegraphic application for a telegraphic warrant of arrest. He received such a warrant of arrest which read in this way:

"Arrow Gust Jouras receiptor relay thirty. W. B. Wilson, Secy.
"4:05 P. M."

The meaning of this statement is said by the inspector to be:

"Arrest following named alien (Gust Jouras) and bring before yourself for hearing, forwarding record of proceedings to the department; alien found receiving, sharing in and deriving benefit from the earnings of a prostitute or prostitutes. Authority granted for release under bond in the sum of three thousand dollars."

Rule 22b of the Department of Labor requires that during the hearing the alien shall be allowed to inspect the warrant. The purposes of that portion of that rule are to inform the accused of the genuineness of the signature to the warrant and of the charges against him. But such a telegraphic warrant in a code of which the alien is ignorant accomplishes neither of these objects. The signature to it is not the genuine signature of the Secretary, or any officer, and the telegram gives the accused no information. Hence rule 22, subdivision 2, requires that "Telegraphic application may be resorted to only in case of necessity." There was neither necessity nor reason for a telegraphic application in this case. But the inspector having made a telegraphic application and procured the telegraphic warrant, at about 4 p. m. on Saturday, January 5, 1914, went to Jouras' restaurant, seized him, and caused him to be thrown into and kept in solitary confinement in a dark cell at police headquarters "for investigation" during Saturday night, Sunday, Sunday night, and until Monday at 11 a. m., when he took him to his room, handcuffed him, and with a weapon at his command, gave him a hearing there without counsel or friend, which consisted of questioning him in an exceedingly threatening manner, and writing down what he succeeded in extracting from him. This course of action was arbitrary, contrary to the rule regarding telegraphic applications, a clear abuse of the discretion of the inspector, and a hearing thus conducted is unfair and contrary to the fundamental principles which inhere in due process of law. United States v. Ruiz, 203 Fed. 441, 443, 121 C. C. A. 551.

Before the arrest of Jouras the inspector examined Mrs. Brown, and in answer to her question whether or not she would have to come back at the hearing of Jouras, he replied: "No, I have your statement. I don't need you any more." Mrs. Brown testified that he also said:

"Of course, if you want to take chances on coming here on cross-examination and you make one mistake in your statement, that for you [witness snapping her finger]—over the road; and you know what that means. Furthermore, those lawyers that the Greeks have have no business to serve a subpœna on you—have no right whatever, and if they serve it, you take it and bring it to me."

She testified that she understood that "over the road for you" meant "you to the penitentiary." After the arrest and before the hearing was concluded Mrs. Brown went to the inspector and asked him if she could do anything to help Jouras, and he said:

"No, Mrs. Brown, you can't help him, all the money in the world if Christ was here wouldn't save him. * * * He told me if I came up there and made one mistake in that statement that I would go over the road; that the lawyers and all the witnesses could do whatever they liked, but if they fooled with him he would perjure every one of them."

George Boutulas, a partner of Jouras, who was going to the hearing to help defend him, testified that the inspector told him not to go any more because they (the lawyers) were looking after our money. The character of the testimony of the inspector is well disclosed by the following excerpt from his cross-examination:

"Q. Did you have any particular reason in keeping him down there for two days before taking his statement? A. Nothing particular. Just to keep him until I could get ready. The law provides to keep them in a safe place. It does not specify any particular jail. Q. You didn't have any particular object in taking him down there and booking him for investigation? A. I didn't know the man. Q. Did you bring him to your office? A. I don't know whether I did or not. Q. Personally I mean. A. I forget whether I did or not. Q. As a matter of fact, you did bring him there and put handcuffs upon him there? A. No question; if I brought him myself. Q. You showed some kind of a weapon to him and told him that if he tried any funny business you would get him? A. I would judge the character described—he was a dangerous man. Q. You told him that? A. I could when it is necessary. I never tell what I might do. Q. You assumed a very threatening manner towards him? A. I necessarily would. That is probably my natural attitude. I am nervous. Q. Didn't you tell him the dagoes in Chicago had tried the same business and you would kill him? A. I have been in close quarters, on the Canadian border, with Japanese, Chinese, etc. Q. Did you tell him in words? A. No; I don't have to intimidate anybody. Q. You say that you didn't intimidate him? A. No. Q. Mrs. Brown came to you, and told you that she didn't tell what was true, didn't she? A. I don't know whether she did or not. She came back and said she didn't want to get him in trouble. Q. At that time you told her she was guilty of perjury, and it was over the road for her? A. I told her positively if she changed her statement she was guilty of perjury, and I would take the case up with the officials. Q. Yes, sir; and that she had better not come back for cross-examination? A. Positively no. My memory is very clear. Q. Did you leave instructions at police headquarters? A. Not to see any attorney until such time as he was given a hearing. Q. You told them down there not to see any friends? A. Not—"

That is not a fair hearing in which the inspector by threats and notices to witnesses prevents their attendance at the hearing, or prevents their testimony, or prevents the correction of their previous testimony. Chin Yow v. United States, 208 U. S. 8, 11, 12, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Sibray (C. C.) 178 Fed. 144, 149; United States v. Williams (D. C.) 185 Fed. 598, 604.

Let the order from which the appeal was taken be reversed, let the court below admit the prisoner to bail and proceed to try the merits of the charges as indicated in Chin Yow v. United States, 208 U. S. 8, 13, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Williams (D. C.) 193 Fed. 228, 230, 231, 232; In re Can Pon, 168 Fed. 479, 483, 484, 93 C. C. A. 635; Ex parte Petkos (D. C.) 212 Fed. 275, 278; Ex parte Koerner (C. C.) 176 Fed. 478, 479.

TOBEY et al. v. KILBOURNE et al.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2531.

1. APPEAL AND ERROR ⟸1009—REVIEW—FINDINGS—EQUITABLE SUIT.
The trial court's findings in a suit in equity are presumptively correct, and will not be disturbed on appeal, unless an obvious error has intervened in the application of the law, or serious or important mistake has been made in consideration of the evidence, especially in a case in which the testimony was taken in open court, so that the trial court had the opportunity of observing the demeanor of the witnesses, while the appellate court has before it only a condensed printed statement of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. ⟸1009.]

2. VENDOR AND PURCHASER ⟸220—FRAUD—BONA FIDE PURCHASER—PURCHASER OF EQUITY.
The defense of bona fide purchaser without notice is not applicable to the purchase of an equity only in land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 461–465, 720; Dec. Dig. ⟸220.]

3. VENDOR AND PURCHASER ⟸220—FRAUD—BONA FIDE PURCHASER—ASSIGNEE OF CONTRACT.
Where a contract for the purchase of land was procured by fraud, but was assigned to an innocent purchaser, and by agreement of all the parties the deed was made directly to the assignee, he can defend as a bona fide purchaser, the same as if the deed had been made to the original purchaser and the land then conveyed to the assignee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 461–465, 720; Dec. Dig. ⟸220.]

4. VENDOR AND PURCHASER ⟸242—FRAUD—BURDEN OF PROOF—BONA FIDE PURCHASER.
In a suit to set aside a conveyance for fraud, the burden of proving the defense of bona fide purchaser is on the defendant.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603–605; Dec. Dig. ⟸242.]

5. VENDOR AND PURCHASER ⟸229—FRAUD—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE.
To affect a bona fide purchaser for value of land with constructive notice of fraud by his predecessor, the means of knowledge must be such that it was gross or culpable negligence not to acquire the knowledge; it not being sufficient that he could have obtained the knowledge by prudent caution.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477–494; Dec. Dig. ⟸229.]

6. VENDOR AND PURCHASER ⟸244—REMEDIES OF VENDOR—FRAUD—SUFFICIENCY OF EVIDENCE—NOTICE.
In a suit to recover land from the assignee of the original purchaser because of fraud in procuring the contract, evidence *held* to sustain a finding that the assignee had no notice of the fraud at the time he paid the consideration therefor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609–611; Dec. Dig. ⟸244.]

Appeal from the District Court of the United States for the District of Oregon; R. S. Bean, Judge.

Suit by Frank L. Tobey and others against Edward C. Kilbourne and others to set aside a conveyance of land for fraud. Decree for the defendants, and plaintiffs appeal. Affirmed.

The appellees were the principal stockholders of the Kilbourne & Clark Company, a corporation of Seattle, Wash., engaged in furnishing electrical supplies, machinery, and installing pumping plants for irrigation projects. De Larm and Biehl were the managers and the principal stockholders in the Columbia River Orchards Company, which had an irrigation project at Wahluke, in Washington. To finance the project they had issued $300,000 of bonds, of which a trust company at Seattle was the trustee. In 1910 De Larm, for his corporation, made a contract with Kilbourne & Clark Company, whereby the latter was to build a concrete pumping station and install the necessary machinery thereat, including pipes from the Columbia river to the irrigation ditch. The building of the irrigation ditch was let to another contractor. Before proceeding with the contract the appellees inquired of De Larm concerning the financial resources of his company, and De Larm made a statement showing apparent net assets of about $600,000 over and above debts, including the bond issue above referred to. The appellees made inquiry of others, and obtained verification of De Larm's statement concerning the bonds. They proceeded with the contract, and expended thereon about $47,000, upon which De Larm made payments of about $4,000. In July, 1910, the appellees ceased work, for the reason that De Larm could not pay them as the work progressed, and as provided in the contract.

The appellants owned 4,350 acres of land in Gilliam county, Or., with an equipment of tools, machinery, and stock for operating the same. They entered into negotiations with De Larm with a view to selling said property to his company. De Larm, at his own expense, took E. C. Kilbourne, as a soil expert and irrigation engineer, to inspect the land. This was in February, 1911. De Larm proposed to buy the land and to pay for the same with the bonds of his corporation. W. L. Tobey, one of the appellees, went to Seattle to investigate the bonds, and while there talked with several persons whose names had been suggested to him by De Larm. The information which he received was to the effect that, if the securities behind the bonds had to be sold, the bonds would realize about 80 per cent. of their face value. The appellants had offered the land and its equipment for sale at $120,000. After the investigation made by W. L. Tobey, they demanded more bonds as the purchase price, and the result was that a contract was made whereby they were to receive $140,000 in bonds. On March 4, 1911, deeds to the lands were made out, and were placed in escrow until March 24, 1911. In the meantime, about March 6th, De Larm proposed to Kilbourne that he take the land in payment for the debt of the irrigation company to Kilbourne & Clark Company of $43,000, and in further payment of the expense of the Kilbourne & Clark Company in proceeding and finishing the plant at Wahluke. On March 8th an understanding was reached whereby the appellees were to take the ranch as security for the claim of their company, and for the expenses that they would incur in finishing the plant. Subsequently the agreement was changed, and the appellees agreed as individuals to assume the $43,000 debt which was owing to their company, and as individuals they agreed to complete the pumping plant at Wahluke, the estimated cost of which was about $16,000. They also agreed to install a second pumping unit at the demand of De Larm. In consideration thereof, De Larm agreed to turn over to them the land in controversy, and the equipment of the same, and to pay a debt of $7,500 which Kilbourne & Clark owed the Puget Sound Bridge & Dredging Company, and a debt of $2,200 which the appellees' corporation owed the Moran Company. There were other details of the agreement which need not here be referred to. The deed conveying the land to E. C. Kilbourne was delivered to him on March 24, 1911, and he shortly thereafter deeded the land to C. A. Kilbourne. The appellees thereafter carried out their agreement with the irrigation company. In September, 1911, De Larm proposed to the appellees that they place a second mortgage of $17,500 on the land in controversy, and that of the money so obtained $10,000 should be paid De Larm, in consideration for which he would release

them from their obligation to install the second unit and from their obligation to complete the intake, the $7,500 remaining of the money realized on the mortgage to be paid to the Puget Sound Bridge & Dredging Company in consideration of their release of the lien which they had placed on the pumping plant. This proposition was assented to. The mortgage was placed of record, but $7,500 of the money realized thereon was never paid to the mortgagor. De Larm received $10,000 of the money, but no money was paid to the dredging company. Early in 1912 the Columbia River Orchards Company's scheme collapsed. De Larm had gone wrong, and he became a fugitive from justice, leaving the irrigation project overwhelmed with additional issues of bonds and forged securities. Thereafter the appellants, finding their bonds worthless, brought the present suit, charging the appellees as co-conspirators with De Larm in a scheme to defraud, and alleging that De Larm had falsely represented to the appellants that the bonds were secured by mortgages to the value of 125 per cent. of the bonds issued, and that the bonds were further secured by land contracts, and that the irrigation company owned some 4,000 acres of land, and had options upon 10,000 acres of railroad lands, all within the project, which allegations were false, and known by De Larm to be false. The appellants alleged that they relied upon these representations and believed them to be true, and were induced thereby to convey their land. They alleged that the appellees had knowledge of the fraud and were parties thereto. The appellees in their answer alleged that, if there was any fraud, they had no knowledge or notice thereof, that they paid a valuable consideration for the land, and that they were therefore innocent purchasers for value without notice, and that they fully complied with their contract with the Orchards Company, without any knowledge, notice, or suspicion of any of the frauds alleged in the bill.

The court below found that there was fraud as alleged in the bill, but found that the appellees were innocent purchasers for value without notice, and dismissed the bill.

A. C. Woodcock, E. R. Bryson, R. S. Smith, John M. Williams, and Louis E. Bean, all of Eugene, Or., for appellants.

C. E. S. Wood and Erskine Wood, both of Portland, Or., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The court below, upon the evidence, found that the appellees were not parties to the fraud, and that they knew nothing about it until long after they had paid the full consideration which they agreed to pay for the property; that they did not know the amount of bonds issued by the Orchards Company, or the securities behind the bonds, or the truth or falsity of any representations made by De Larm or others concerning the same, or the details of the transactions between the appellants and De Larm; that in compliance with their agreement when they took the deed to the land the appellees assumed and paid a debt of about $43,000 due the Kilbourne & Clark Company from the Orchards Company, completed the pumping plant at an expense of $16,000 or $17,000, and paid De Larm $10,000, all before they had any notice or knowledge of the alleged fraud; that during the time covered by these transactions, the bonds of the Orchards Company were generally regarded as valid securities, and were being repeatedly exchanged at par for property in Seattle and elsewhere; and that the appellees paid for the property an amount not so disproportionate to its value as to amount to a fraud, and paid the same in good

faith and without notice or knowledge that the property had been obtained by De Larm from the appellants through fraud and deceit.

[1] It is the established rule that the findings of the trial court in a suit in equity must be taken as presumptively correct, and that unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the findings will not be disturbed by the appellate court. This rule is especially applicable in a case in which, as here, the testimony was taken in open court, where the trial court had the opportunity to observe the demeanor of the witnesses and their manner of testifying, and the appellate court has before it only a condensed printed statement of the evidence as it is presented under the new equity rule. Thorndyke v. Alaska Perseverance Mining Co., 164 Fed. 657, 90 C. C. A. 473; Brandt v. United States, 198 Fed. 449, 117 C. C. A. 208; Harper v. Taylor, 193 Fed. 944, 113 C. C. A. 572.

[2] It is contended that the decree of the court below involves error of law, in that it disregards the rule that one who purchases merely an equity cannot be a bona fide purchaser. It is true that the defense of bona fide purchaser without notice is not applicable to the purchase of an equity; but that principle is not applicable here, for the reason that the appellees purchased no equity, but purchased the legal title to the property in controversy. The contention would seem to be based upon the first agreement between the appellees and De Larm, which contemplated the conveyance of the property to the appellees as security only; but that agreement was changed before the appellants made their deed, and the result of the changed agreement was that all of De Larm's interest in his contract with the appellants was transferred to the appellees for a valuable consideration, and the deed was made directly to them.

[3] But it is said that where, by virtue of the assignment of a contract procured by fraud and by direction of the defrauding party, the deed is made directly to a third person, such third person will stand in no other or better position than the defrauding party, and is not an innocent purchaser. We know of no principle of law upon which that proposition can be sustained. The appellants cite in its support Torrey v. Buck, 2 N. J. Eq. 366, Seibel v. Higham, 216 Mo. 121, 115 S. W. 987, 129 Am. St. Rep. 502, and Bonelli v. Burton, 61 Or. 429, 123 Pac. 37. In the case first cited the court held that the mere substitution of the name of another person as the grantee in a deed, at the instance of the original contractor, cannot place that person in the position of a bona fide purchaser without notice. But it does not appear in that case that the person whose name was thus substituted was without notice of the fraud practiced by the contractor. Both parties joined in the answer to the bill, and it would seem from the opinion that the court dealt with them as conspirators. In Bonelli v. Burton the court said:

"Burton did not allege in any answer that he was an innocent purchaser, for a valuable consideration, without notice. * * * The answer was insufficient in the particulars noted; and, such being the case, the court properly disregarded all testimony on that subject."

In Seibel v. Higham, the person to whom the deed was made was held to be not an innocent purchaser, for the reason that the evidence showed him to be a coconspirator with other parties to wrong the plaintiff. Cases holding the contrary are McCleery v. Wakefield, 76 Iowa, 529, 41 N. W. 210, 2 L. R. A. 529, Hall v. Kary, 133 Iowa, 468, 110 N. W. 930, 119 Am. St. Rep. 639, Augustine v. Schmitz, 145 Iowa, 591, 124 N. W. 607, and Clemmons v. McGeer, 63 Wash. 446, 115 Pac. 1081.

The controlling facts here are that, at the time when the appellees purchased the property and received their deed, De Larm had a contract with the appellants by which the latter were to convey the property to the Orchards Company in consideration of bonds of that company. The transfer so contemplated in the contract, instead of being made by a conveyance to De Larm, and a second conveyance from him to the appellees, was accomplished, with the assent of all parties, by a deed directly from the appellants to the appellees. But the situation is precisely the same that it would have been if two conveyances had been made, instead of one, and we think the court below properly so held.

[4] It is urged that the appellees have not met the requirement of the rule that where fraud is proved, and a defendant relies upon the defense that he is a bona fide purchaser, he must allege and prove that he was a bona fide purchaser for a valuable consideration paid by him, without notice of the fraud or of such facts as would put a reasonably prudent man upon inquiry, and that the burden of proof is on him to establish the defense. In this case the appellants in their bill of complaint anticipated and negatived the defense that the appellees were bona fide purchasers for value. It has been held that in such a case the burden of proof is placed upon the plaintiff. Verner v. Verner, 64 Miss. 184, 1 South. 52. But in the federal courts it may be doubted whether, in a case of this kind, the burden of proof is, by the condition of the pleadings, ever shifted from the defendant. The rule is that the defendant must allege that the purchase was bona fide and that the consideration was actually paid prior to the receipt of notice of the fraud. Boone v. Chiles, 10 Pet. 177, 9 L. Ed. 388; Simmons Creek Coal Co. v. Doran, 142 U. S. 437, 12 Sup. Ct. 239, 35 L. Ed. 1063; Johnson v. Georgia Loan & Trust Co., 141 Fed. 593, 72 C. C. A. 639; United States v. Hill (D. C.) 217 Fed. 841; United States v. Brannan, 217 Fed. 849, 133 C. C. A. 559.

[5] And it is not held in the federal courts that notice of facts such as would put a reasonably prudent man upon inquiry is constructive notice of the fraud. The rule of those courts is that, where it is sought to affect a bona fide purchaser for value with constructive notice, the question is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether his not obtaining it was an act of gross or culpable negligence. Wilson v. Wall, 6 Wall. 83, 18 L. Ed. 727; United States v. Detroit Lumber Co., 200 U. S. 321–333, 26 Sup. Ct. 282, 50 L. Ed. 499; Reed v. Munn, 148 Fed. 737, 80 C. C. A. 215.

[6] It is said that the failure of the appellees to testify to lack of

knowledge prior to the performance of their contract, and prior to their release from the contract to install the second unit, warrants a presumption of notice of the fraud practiced by De Larm upon the appellants. In considering this contention we first inquire: What was the fraud? According to the bill it was the false representation that the bonds were secured by mortgages to the value of 125 per cent. of the amount issued, and were also secured by land contracts, and that the Orchards Company owned 4,000 acres of land, and had options on 10,000 acres of railroad lands within the project. There is nothing whatever in the testimony to show that the appellees were ever aware of any representations made by De Larm to the appellants, and it is not contended that they had such knowledge. But the effort of the appellants is to show that the appellees must have known, before they completed their contract with the Orchards Company, that the bonds transferred to the appellants in payment for their property were practically valueless. The court below credited the appellees' testimony to the contrary, and although that testimony is not as explicit and direct as it probably would have been if the issues had been differently framed, we find sufficient in the evidence to support the conclusion of the court below. C. A. Kilbourne testified that neither he nor his corporation, directly or indirectly, had any connection with De Larm or his projects, other than their contract to build the pumping plant, and that he knew nothing about the value of the bonds. "I knew that they had a good proposition, and supposed there was $300,000 authorized, and that the property ought to be perfectly good for that issue." He testified that he had had no experience in handling bonds, never owned one in his life. In answer to the question whether, in dealing with a corporation claiming to own property, where it claimed that its resources consisted of real estate, it would not be his duty as a business man to investigate, he said:

"It might be. It would vary under different circumstances, according to the degree of confidence I had in them, and I certainly had a good deal in Mr. De Larm. At that time he impressed me very favorably indeed."

And when asked about the Orchards Company's delay in paying the appellees, he said:

"They showed at the time a very plausible reason for not paying then, but made assurances which seemed to be all right that they would be able to pay in a very short time—a few weeks. * * * I knew that, if they could sell enough bonds to pay for their plant, they would then be in very excellent shape as far as I knew."

When asked as to his knowledge up to the time that the Orchards Company's scheme collapsed that they were unable to negotiate their bonds for money, he answered:

"No, I didn't know they were not able to. I knew they had not sold any so far for cash; that is, that I knew of."

Again, he testified:

"I thought they had the basis of a fine proposition there, and it was only a matter of being able to dispose of their securities when they would pay us and go along splendidly."

In speaking of De Larm, he testified:

"He made a great many promises that he never carried out, and still he had a way about him that, up until January, 1912, I really believed the fellow was sincere and honest, and would carry out his scheme."

E. C. Kilbourne, referring to the letter which he wrote on May 27, 1911, to Glover, advising Glover, who desired to sell certain land to the appellees, to take up the matter with De Larm and Biehl, who had made some extensive purchases of lands, and saying, "They bought the Tobey Bros. ranch, and paid for same in bonds of the Columbia River Orchards Company," testified that he believed the bonds were good, "because we had practically completed the pumping plant then. Fox was about through with his ditch—well along with it—and it looked as though things were going to be all right." He testified that he thought the limit of the bond issue was $300,000, and that Mr. De Larm inspired perfect confidence. The appellants, notwithstanding their interest in the matter, did not discover, until the collapse of the scheme, about April 1, 1912, that they had been defrauded. They had far greater reason to inquire concerning the value of the bonds than had the appellees, for they took bonds in payment for their property, and after investigation, while the appellees were not to receive bonds, but money, in payment for their contract. The principal fraud practiced upon the appellants by De Larm was his inflation of the bond issue and his forgeries, and it is in evidence that the appellees were informed by De Larm, at the time when he made his contract with the appellants, that the bonds which he transferred to the appellants were a portion of the original issue of $300,000. The evidence tends to show that the sum of $69,000 paid by the appellees for the property was in excess of its actual value.

The decree is affirmed.

JUNG QUEY et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2527.

1. CONSPIRACY ⊂⊃43—INDICTMENT—OVERT ACTS—INTENT.

An indictment which alleges that the defendant willfully, unlawfully, and feloniously conspired to willfully, fraudulently, and knowingly receive opium, which, as they knew, had been imported into the United States contrary to law, and charged the commission of certain overt acts in pursuance of the alleged conspiracy and to effect and accomplish its object, sufficiently alleges that the overt acts were knowingly and fraudulently done.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⊂⊃43.]

2. CONSPIRACY ⊂⊃27, 41—ELEMENTS OF OFFENSE—OVERT ACT.

One overt act is all that is required to complete the offense of conspiracy, and the act of one conspirator is the act of all.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39, 74; Dec. Dig. ⊂⊃27, 41.]

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3. CRIMINAL LAW ⊂⊃1035—APPEAL—PRESENTING QUESTIONS BELOW—JUROR—WAIVER OF OBJECTIONS.

Defendants cannot object, on error to their conviction on the second trial, to the presence on the jury of one whom they peremptorily challenged at the first trial, but who was not shown to be disqualified, and whom they did not again challenge, though they did not exhaust their peremptory challenges.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2633–2638, 2643, 2644; Dec. Dig. ⊂⊃1035.]

4. WITNESSES ⊂⊃274—CROSS-EXAMINATION—CHARACTER WITNESS.

A witness who testified to the good reputation of one accused of a crime may be properly cross-examined as to whether he has ever heard of the defendant being accused of acts inconsistent with the character attributed to him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 965, 966; Dec. Dig. ⊂⊃274.]

5. CRIMINAL LAW ⊂⊃1170½—APPEAL—HARMLESS ERROR—QUESTION TO WITNESS.

Questions to witness, who had testified to the good reputation of one charged with conspiring to receive opium imported contrary to law, as to whether defendant had been in the opium business, and whether it was part of his general reputation that opium had been found in his room time and time again, and that he had tried to enter into an unlawful combination with customs inspectors, though erroneous in form, were not so prejudicial to defendant as to require a reversal, especially where the answers were favorable to the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. ⊂⊃1170½.]

6. CRIMINAL LAW ⊂⊃37—DEFENSE—CONSENT OF GOVERNMENT OFFICERS.

It is no defense to a prosecution for conspiracy to receive opium imported contrary to law that the opium was taken ashore by a steward, not one of the defendants, with the permission of the United States officers, given for the purpose of detecting the criminals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 42; Dec. Dig. ⊂⊃37.]

In Error to the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

Jung Quey, alias Sam Kee, and others, were convicted of conspiring to import opium contrary to law, and they bring error. Affirmed.

Wm. Hoff Cook and J. C. Campbell, both of San Francisco, Cal., for plaintiffs in error.

John W. Preston, U. S. Atty., of San Francisco, Cal., for the United States.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. Section 37 of the Criminal Code of the United States, as amended (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1913, § 10201]), declares:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the

conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

By its act of January 17, 1914, entitled "An act to amend an act entitled 'An act to prohibit the importation and use of opium for other than medicinal purposes'" (St. Leg. 1913–14, p. 275, c. 9), Congress provided as follows:

"That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: Provided, that opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.

"Sec. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any maner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding $5,000 nor less than $50 or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.

"Sec. 3. That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption."

Under those laws the plaintiffs in error were indicted in the court below—the indictment containing two counts. The first count charged in substance that within the jurisdiction of the court below, and on the 29th day of January, 1914, they and one Yik Fat willfully, unlawfully, and feloniously conspired and agreed together, and with divers other persons to the grand jurors unknown, to willfully, unlawfully, and knowingly import, and assist in so doing, from some foreign port or place to the grand jurors unknown, seven skins or bladders containing 14 pounds of opium prepared for smoking purposes, contrary to law; that the said conspiracy continued in existence to and including the commission of the overt acts alleged, and that in furtherance of the said conspiracy, and to effect and accomplish the object thereof, the said Li Cheung and Yik Fat, on or about the 30th day of January, 1914, brought into the port of San Francisco, in the state and Northern district of California, from some foreign port or place to the grand jurors unknown, seven skins or bladders containing 14 pounds of opium prepared for smoking purposes, contrary to law; that in further furtherance of the said conspiracy, and to effect and accomplish its object, the said Li Cheung and Yik Fat on the same day, to wit, January 30, 1914, on the steamship China, then and there lying and being in the port of San Francisco, prepared seven skins or bladders containing 14 pounds of opium prepared for smoking purposes, which

said opium had theretofore been brought into the United States from some foreign port or place to the grand jurors unknown, for the purpose of causing the same to be delivered to the said Jung Quey, alias Sam Kee; that in further furtherance of the said conspiracy, and to effect and accomplish its object, the said Li Cheung and Yik Fat on the same day, to wit, January 30, 1914, on the said steamship China, then and there lying and being in the port of San Francisco, then and there delivered seven skins or bladders containing 14 pounds of opium prepared for smoking purposes, to one H. Matthaei, a quartermaster on said steamship China, for the purpose of having the said opium delivered to the said Jung Quey, alias Sam Kee; that in further furtherance of the said conspiracy, and to effect and accomplish its object, the said Mon Hing and Jt Yee, on the 31st day of January, 1914, at the city and county of San Francisco, in the state and Northern district of California, received seven skins or bladders containing 14 pounds of opium prepared for smoking purposes, which said opium had theretofore been brought into the United States from some foreign port or place to the grand jurors unknown, contrary to law, by the said Li Cheung and Yik Fat—against the peace and dignity of the United States, and contrary to the form of its statute in such case made and provided.

The second count charged in substance that the said Jung Quey, alias Sam Kee, Li Cheung, Yik Fat, Mon Hing, and Jt Yee, on the 29th day of January, 1914, and within the jurisdiction of the court below, did willfully, unlawfully, and feloniously conspire together, and with divers other persons to the grand jurors unknown, to willfully, fraudulently, and knowingly receive and conceal seven skins or bladders containing 14 pounds of opium prepared for smoking purposes, which they then and there well knew had been imported into the United States contrary to law; that the said conspiracy was continued in force to and including the commission of each of the overt acts thereinafter alleged; that in furtherance of the said conspiracy, and to effect and accomplish its object, the said Li Cheung and Yik Fat, on or about the 30th day of January, 1914, brought into the port of San Francisco, in the state and Northern district of California, from some foreign port or place to the grand jurors unknown, seven skins or bladders containing 14 pounds of opium prepared for smoking purposes, contrary to law; that in further furtherance of the said conspiracy, and to effect and accomplish its object, the said Li Cheung and Yik Fat on the same day, to wit, January 30, 1914, on the steamship China, then and there lying and being in the port of San Francisco, in the state and Northern district of California, prepared seven skins or bladders containing 14 pounds of opium prepared for smoking purposes, which said opium had theretofore been brought into the United States from some foreign port or place to the grand jurors unknown, contrary to law, for the purpose of causing the same to be delivered to the said Jung Quey, alias Sam Kee; that in further furtherance of the said conspiracy, and to effect and accomplish its object, the said Li Cheung and Yik Fat on the same day, to wit, January 30, 1914, on the steamship China, then and there lying and being in the port of San Francisco, in

the state and Northern district of California, then and there delivered seven skins or bladders containing 14 pounds of opium prepared for smoking purposes to one H. Matthaei, a quartermaster on said steamship China, for the purpose of having the said opium delivered to said Jung Quey, alias Sam Kee; that in further furtherance of the said conspiracy, and to effect and accomplish the object thereof, the said Mon Hing and Jt Yee, on the 31st day of January, 1914, at the city and county of San Francisco, in the state and Northern district of California, received seven skins or bladders containing 14 pounds of opium prepared for smoking purposes, which said opium had theretofore been brought into the United States from some foreign port or place to the grand jurors unknown, contrary to law, by the said Li Cheung and Yik Fat—against the peace and dignity of the United States, and contrary to its statute in such case made and provided.

The defendants questioned the sufficiency of the indictment by demurrer, which being overruled, they pleaded not guilty, and the case came on for trial, resulting in an acquittal of all of the defendants on the first count, and an acquittal of the defendant Yik Fat on the second count, and a disagreement of the jury as to the other defendants upon the second count of the indictment. Those defendants subsequently came on for a second trial on the second count, upon which second trial they appear to have interposed "pleas of former acquittal" as to each of them, and that trial resulted in this verdict:

"We, the jury, find Jung Quey, Li Cheung, Mon Hing, and Jt Yee, the defendants at bar, guilty on the second count of the indictment herein.

"John G. Barker, Foreman."

"We, the jury, find for the defendants at the bar upon their pleas of former acquittal of the offenses charged in the first count of the indictment.

"John G. Barker, Foreman."

"We, the jury, find for each of the defendants at the bar upon his pleas of former acquittal of conspiracy with Yik Fat alone.

"John G. Barker, Foreman."

Upon that verdict, judgment was entered against the plaintiffs in error upon the second count of the indictment.

[1] It is here contended on their behalf that the second count fails to allege a conspiracy to do any unlawful act, that none of the overt acts are therein alleged to have been knowingly and fraudulently done, and that there is no overt act alleged as to the defendant Jung Quey. The second count expressly alleges that the present plaintiffs in error and Yik Fat did willfully, unlawfully, and feloniously conspire and agree together and with divers other persons to the grand jurors unknown—

"to willfully, fraudulently, and knowingly receive and conceal seven skins or bladders containing 14 pounds of opium prepared for smoking purposes, which, as they, the said Jung Quey, alias Sam Kee, Li Cheung, Yik Fat, Mon Hing, and Jt Yee, then and there knew, had been imported into the United States contrary to law."

It is perfectly clear that such agreement, if so entered into, was in direct violation of the act of Congress above set out. And as the overt acts are alleged to have been committed in pursuance of the alleged conspiracy, and to effect and accomplish its object, necessarily, if committed, they were knowingly, unlawfully, and feloniously committed.

[2] That the overt act of one conspirator is the act of all does not admit of question, nor that the commission of one such overt act is all that is required to complete the offense. There is no merit in the demurrer, and it was properly overruled.

[3] The bill of exceptions shows that on the first trial of the defendants four talesmen were peremptorily challenged by them, and their names were thereupon restored to the jury box of the court, and that upon the impanelment of a jury for the second trial the names of those four were again called among the first twelve drawn from the box for examination as to their qualifications to serve as jurors upon the second trial; that the defendants again peremptorily challenged three of the four, but the fourth was not challenged, and was sworn and impaneled as a juror before the defendants had exhausted their peremptory challenges. There is nothing in the record to show that that juror was in any respect disqualified, and his acceptance by the defendants under the circumstances stated is a sufficient answer to their present objection that he was upon the jury.

[4] On the trial a witness—one Belden—was called on behalf of the defendants and testified that the general reputation of the defendant Jung Quey was good, and on cross-examination was questioned and answered as follows:

"Q. I will ask you if it is not a fact that he was in the opium business in Nevada?

"Mr. Cook: Objected to, and I assign it as a prejudicial error on the part of the district attorney.

"A. I never heard of it; I never heard of his connections with opium at all

"Q. Is it not a part of his reputation that opium has been found in his room time and time again?

"Mr. Cook: The same objection.

"A. Never.

"Q. Is it not a part of his general reputation that he has sent for customs inspectors and other people, and tried to enter into unlawful combination with them for the purpose of getting opium?

"A. I never heard of it. I have known of his reputation from his associations from his connections with my father-in-law in Nevada, in the railroad business furnishing contract labor. My father is general superintendent of the Southern Pacific Railroad, and I believe Jung Quey furnishes Chinese labor to the railroad. I never heard anything against his reputation."

[5] Where a witness testifies to the good reputation of a party, he may be properly asked on cross-examination whether he has ever heard if the person in question has been accused of doing acts wholly inconsistent with the character which he has attributed to him. People v. Gordan, 103 Cal. 573, 37 Pac. 534; People v. Mayes, 113 Cal. 624, 45 Pac. 860; People v. Perry, 144 Cal. 750, 78 Pac. 284. While the form of the questions propounded to the witness in this case was, we think, objectionable, we do not think they justify a reversal of the judgment, especially in view of the fact that the answers of the witness were favorable to the defendant.

[6] An instruction requested by the defendants to be given to the jury, and which the court refused, to which action an exception was taken and is here assigned as error, is as follows:

"I instruct you that, if you find from the evidence that the quartermaster, Matthaei, took any opium prepared for smoking purposes from the steamship

China on January 30, 1914, while she was in the port of San Francisco, and that he did so with the permission of the government, through its duly authorized officers, then I instruct you that such opium was not being unlawfully transported after its importation, and the receipt of such opium by any person thereafter, by any person, from said quartermaster, was not an unlawful act, and therefore cannot be considered by you as an unlawful act done in pursuance of the conspiracy, as alleged in the indictment, and such testimony cannot be considered by you as establishing in any degree the guilt of any of the defendants of the conspiracy as alleged in the indictment."

The correctness of the ruling of the trial court in respect to that matter may be sufficiently shown by a reference to the case of Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, where a post office inspector, Robert W. McAfee, sent through the post office certain letters to fictitious persons. The court there said:

"That McAfee was and had been for years a post office inspector in the employ of the United States, and at the same time an agent of the Western Society for the Suppression of Vice; that for some reasons not disclosed by the evidence McAfee suspected that defendant was engaged in the business of dealing in obscene pictures, and took this method of securing evidence thereof; that after receiving the letters written by defendant, he, in name of Huntress and Waters, wrote for a supply of the pictures, and received from defendant packages of pictures which were conceded to be obscene. Upon these facts it is insisted that the conviction cannot be sustained, because the letters of defendant were deposited in the mails at the instance of the government, and through the solicitation of one of its officers; that they were directed and mailed to fictitious persons; that no intent can be imputed to defendant to convey information to other than the persons named in the letters sent by him; and that, as they were fictitious persons, there could in law be no intent to give information to any one. This objection was properly overruled by the trial court. There has been much discussion as to the relations of detectives to crime, and counsel for defendant relies upon the cases of United States v. Whittier, 5 Dill. 35 [Fed. Cas. No. 16,688], United States v. Matthews [C. C.] 35 Fed. 890 [1 L. R. A. 104], United States v. Adams [D. C.] 59 Fed. 674, and Saunders v. People, 38 Mich. 218, in support of the contention that no conviction can be sustained under the facts in this case. It is unnecessary to review these cases, and it is enough to say that we do not think they warrant the contention of counsel. It does not appear that it was the purpose of the post office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that he was a government official—a detective, he may be called—do not of themselves constitute a defense to the crime actually committed. The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by such government official. The authorities in support of this proposition are many and well considered."

See, also, Andrews v. United States, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023.

The charge of the court below presented the case to the jury fully and fairly, and we discover in the record no error for which a reversal of its judgment would be justified.

The judgment is affirmed.

GLASS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2485.

1. INDICTMENT AND INFORMATION ⊂=125—DUPLICITY—MAILING MATTER CONCERNING LOTTERIES.

An indictment alleging that defendants "deposited and caused to be deposited in the post office" mailing matter concerning lotteries is not duplicitous as charging two separate crimes.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. ⊂= 125.]

2. POST OFFICE ⊂=48—OFFENSES AGAINST POSTAL LAWS—INDICTMENT—SUFFICIENCY.

An indictment alleging in various counts that defendants, who platted land into lots of varying size and value, and improved a few, and offered all for sale at a uniform price of $130 each, while each unimproved lot was worth from $4 to $10, while the few lots improved by buildings were valuable, willfully, knowingly, unlawfully, and feloniously deposited in the post office matter concerning the plan and in furtherance thereof, is good as to each count either under Rev. St. § 3894, or Cr. Code, § 213 (Comp. St. 1913, § 10383), punishing the depositing in the mails of matter concerning any lottery or gift enterprise.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⊂=48.

Nonmailable matter, see notes to Timmons v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

3. CRIMINAL LAW ⊂=1177—APPEAL—HARMLESS ERROR—MAILING MATTER CONCERNING LOTTERIES—PUNISHMENT.

Where accused, convicted of mailing matter concerning a lottery under an indictment good either under Rev. St. § 3894, or Cr. Code, § 213, was sentenced to imprisonment and fined within the limits prescribed by section 3894, while section 213 authorized a more severe punishment, he could not complain of the extent of the punishment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3183–3189; Dec. Dig. ⊂=1177.]

4. INDICTMENT AND INFORMATION ⊂=99—REFERENCE FROM ONE COUNT TO ANOTHER.

Where the first count of an indictment sets out a lottery scheme of defendants, charged with mailing matter concerning a lottery, subsequent counts charging the mailing of matter in furtherance of the scheme may refer to the scheme set out in the first count.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 270, 270½; Dec. Dig. ⊂=99.]

5. INDICTMENT AND INFORMATION ⊂=129—JOINDER OF OFFENSES—STATUTORY PROVISIONS.

Under Rev. St. § 1024, providing that, where there are several charges against any person for the same act or for two or more acts connected together, the whole may be joined in one indictment in separate counts, acts charged against defendant, based on their mailing matter concerning a lottery scheme or any promotion thereof, may be joined in one indictment in separate counts.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 414–418; Dec. Dig. ⊂=129.]

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

R. E. Glass and another were convicted of crime, and R. E. Glass brings error. Affirmed.

The plaintiff in error and one W. A. Ridgway were jointly indicted in an indictment containing ten counts, the first, second, third, fourth, and seventh of which are as follows:

"That heretofore, to wit, on or about the 13th day of April, 1909, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, county of King, state of Washington, within the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there willfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Seattle, to be sent and delivered by the post office establishment of the United States, a certain circular concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called 'Jovita Land Company,' and which said circular was then and there intended for the purpose of promoting, aiding, and furthering the carrying on of the business of said scheme, and which said circular, so far as can be represented and set forth herein, and omitting therefrom certain pictures and designs, was as follows:

" 'Jovita's Twelve Houses.

" 'Attractive Houses Now Being Built for Twelve Fortunate Lot Buyers.

" 'Few suburban homes in the Sound country are the equal of Jovita's magnificent $10,000 house, interior views of which are shown herewith. It was built without regard to cost and contains every modern convenience.

" 'There are 12 commodious rooms, and an 8-foot basement extends beneath the entire house. In every bedroom are marble stationary washstands. The plumbing is complete in all respects, and the water pressure is ample.

" 'Bookcases and sideboards are built in. A number of the bedroom closets are as large as ordinary rooms. The ballroom on the second floor is big enough for pretentious private dances. The pantry and kitchen arrangements are perfect. There is even an automatic fuel lift from the basement.

" 'This house, together with two acres of ground, is being sold for $130. So are the eleven other brand-new houses now in course of construction, each on a specially sightly lot. Several of the new houses are already completed, and all will be finished this summer. Each one of them is a desirable residence, suitable for the requirements of people of taste.

" 'The company is spending over $30,000 on improvements at Jovita, and all visitors wax enthusiastic over what is being accomplished. Jovita is unquestionably the most attractive suburb between Seattle and Tacoma. It is not remarkable under the circumstances that the sale of Jovita lots is beating all records, and it will be only a short time until every one of them is on contract.

" 'Jovita Land Co.
" 'Offices:

" 'Seattle, Wash.	St. Paul, Minn.
" 'Tacoma, Wash.	Butte, Mont.
" 'Chicago	Fargo, No. Dakota.
" 'Minneapolis, Minn.	Missoula, Mont.

" 'Main Office, 219–220 Epler Block, Seattle, Wash.'

"And which said circular was contained in a certain sealed envelope, then and there addressed and directed as follows, to wit:

" 'Carrie M. Buck,
" '212 S. Washington St.,
" 'Centralia, Wash.'

"And upon said envelope in the upper left-hand corner thereof, among other things, appeared the words and figures:

"'Return in five days to
"'Jovita Land Co.
"'Main Office:
"'219–220 Epler Block,
"'Seattle, Washington.'

"And which said scheme hereinbefore referred to was as follows: That the said W. A. Ridgway and R. E. Glass should acquire in the name of the Jovita Land Company, a corporation, certain vacant, unimproved lands within King county, in the Western District of Washington, which they should plat and cause to be platted into lots and blocks under the name of Jovita, which said lots should be of different and unequal values; and it was further a part of said scheme to build houses of different values upon 12 of said lots, thereby rendering said lots of more value than the other lots which were unimproved by buildings of any kind; and it was a part of said plan of said defendants to offer said lots for sale to persons throughout the United States and to enter into contracts with said purchasers, whereby said lots were to be sold to them for the sum of $130 each, but at the time of such sale the lot or lots so purchased should not be identified, but, after all of said lots were so sold and contracted to be sold, a drawing should be had by which said lots should be parceled out to each purchaser by lot and chance, which said drawing was to be conducted on said property under the supervision of said W. A. Ridgway and R. E. Glass and their agents and employés, and that, after said drawing, a deed or deeds should be issued to each purchaser conveying to him the lot or lots so drawn by him, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

"Count II.

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That heretofore, to wit, on or about the 12th day of June, 1909, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, county of King, state of Washington, within the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there willfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Seattle, to be sent and delivered by the post office establishment of the United States, a certain letter concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called 'Jovita Land Company,' and which said letter was then and there intended for the purpose of promoting, aiding, and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows:

"'Payment No. 4. "'Seattle, Wash.

"'M—— Carrie M. Buck, 212 S. Washington Ave., Centralia, Wash.: The next monthly payment of ten dollars on your Jovita lot will be due on June 16th, 1909, and is payable at our main office, 219 Epler Block, Seattle, Wash. Kindly remit by check, post office money order or express money order.

"'Yours truly, Jovita Land Company.'

"And which said letter was contained in a certain sealed envelope, then and there addressed and directed as follows, to wit:

"'M—— Carrie M. Buck,
"'212 S. Washington Ave.,
"'Centralia, Wash.'

"And upon said envelope in the upper left-hand corner thereof, among other things, appeared the words and figures:

"'Return in five days to
"'Jovita Land Co.,
"'219–220 Epler Block, Seattle, Washington.'

"And which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words 'that the said W. A. Ridgway and R. E. Glass should acquire,' in lines 19 and 20, on page 3, to and including the words 'conveying to him the lot or lots so drawn by him,' in lines 11 and 12, on page 4, of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this second count, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

"Count III.

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That heretofore, to wit, on the 2d day of May, 1910, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, county of King, state of Washington, within the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there willfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Seattle, to be sent and delivered by the post office establishment of the United States, a certain letter and receipt concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called 'Jovita Land Company,' and which said letter and receipt were then and there intended for the purpose of promoting, aiding, and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows:

" 'Seattle, Wash., May 2, 1910.

" 'Mr. Ira C. Luman, Centralia, Washington—Dear Sir: Herewith please find our Final Clearance Receipt No. 1066 in return for your remittance of $10.00 covering last payment on your Jovita lot. Thanking you, we are,

" 'Yours very truly, Jovita Land Company,

" 'Dict. EP/MP. By E. L. P.'

"And which receipt, as near as the same can be set out in this indictment, was in words and figures as follows:

" 'Original.

" 'Jovita Land Co.

" 'Main Office: 219–220 Epler Block,

" 'Seattle, Washington.

" 'Final Clearance Receipt.

" 'This is to certify that we have received from Ira C. Luman, Centralia, Wash., one hundred and thirty dollars ($130.00) in full payment for one lot in Jovita, King county, Washington, situated between Seattle and Tacoma on the Puget Sound Electric Ry. Interurban, as purchased by him upon the terms and conditions set forth in his application to purchase same.

" '[Signed] Jovita Land Co.,

" 'No. 1066 May 2, 1910, 190 By R. E. Glass, Manager.

" 'R.'

"And which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words 'that the said W. A. Ridgway and R. E. Glass should acquire,' in lines 19 and 20, on page 3, to and including the words 'conveying to him the lot or lots so drawn by him,' in lines 11 and 12, on page 4, of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this third count, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

"Count IV.

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That heretofore, to wit, on or about the 23d day of June, 1910, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, county of King, state of Washington, within the Western District of Washington, and

within the jurisdiction of this court, then and there being, did then and there willfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Seattle, to be sent and delivered by the post office establishment, of the United States, a certain letter concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called 'Jovita Land Company,' and which said letter was then and there intended for the purpose of promoting, aiding, and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows:

" 'Seattle, Wash., June 20, 1910.

" 'Dear Sir or Madam: The representative of Jovita lot buyers from your locality who is to attend the lot buyers meeting at Jovita, Wash., July 1, 1910, is

" 'Geo. D. James, 607 Walnut St.

" 'Herewith you will find a proxy form. You may fill out the proxy and sign it in favor of the above-named representative if you are personally unable to attend the meeting. Hand or mail it to him.

" 'Yours very truly, Jovita Land Co.'

"And which said letter was contained in a certain sealed envelope, then and there addressed and directed as follows, to wit:

" 'Mr. Ira C. Luman,
" 'Centralia, Wash.'

"And upon said envelope in the upper left-hand corner thereof, among other things, appeared the words and figures:

" 'Jovita Land Co.
" 'Main Office: 219-220 Epler Block,
" 'Seattle, Wash.'

"And which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words 'that the said W. A. Ridgway and R. E. Glass should acquire,' in lines 19 and 20, on page 3, to and including the words 'conveying to him the lot or lots so drawn by him,' in lines 11 and 12, on page 4, of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this fourth count, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

"Count VII.

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That heretofore, to wit, on or about the 23d day of October, 1909, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, county of King, state of Washington, within the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there willfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the post office of the United States of America, at said city of Seattle, to be sent and delivered by the post office establishment of the United States, a certain letter concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington, by a certain corporation called 'Jovita Land Company,' and which said letter was then and there intended for the purpose of promoting, aiding, and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows:

" 'Seattle, Wash., Oct. 23, 1909.

" 'Messrs. Geo. Speicher & H. Giesy, Menlo, Wash.—Dear Sirs: Your valued application of Oct. 21st and first payment of $10.00 of a lot in Jovita has been duly received at this office through Mr. V. M. Bullard. We will mail all communications regarding same to you c/o Mr. R. V. McCash, according to instructions from Mr. Bullard. The unusual advantages afforded at Jovita have

undoubtedly been explained to you, but we might add that a better real estate proposition is not being offered anywhere in this Sound country for the amount of money involved, and the improvements we are putting on this property are increasing its value every day. We have a large force of men at work at the present time and are making rapid progress with our improvements.

" 'Yours very truly, Jovita Land Company,
" 'Dict. E/P. By E. P.'

"And which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words 'that the said W. A. Ridgway and R. E. Glass should acquire,' in lines 19 and 20, on page 3, to and including the words 'conveying to him the lot or lots so drawn by him,' in lines 11 and 12, on page 4, of said first count, and said first count within the limits aforesaid is herewith repeated and incorporated in this seventh count, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

It was with respect to counts 2, 3, 4, and 7 only of the indictment that the government introduced evidence on the trial, resulting in the conviction of each of the defendants under those counts—the judgment against Glass, the plaintiff in error here, being that he be "imprisoned in the King county jail, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of 60 days on each count, each sentence to run concurrently in all counts, at hard labor, from and after this date, and that he pay a fine of $300 on each count, totaling $1,200, and that execution issue therefor, and that he be further imprisoned in the said King county jail until such fine is paid, or until he shall be otherwise discharged by due process of law."

The offenses charged in the first and fifth counts of the indictment were held by the court below to be barred by the statute of limitations, and, as respects counts 6, 8, and 9, the government introduced no testimony, and the verdict was accordingly in favor of the defendants under them.

The bill of exceptions shows that in the latter part of 1908 Ridgway and Glass caused the Jovita Land Company to be incorporated, of which the former became president and the latter secretary and treasurer, and which corporation they dominated and controlled. To it they caused to be conveyed a tract of land of about 500 acres in extent, and had it platted into lots and block; there being 2,713 lots, ranging in size from 40 by 120 feet to 2½ acres. The company proceeded to improve the property by clearing the land, building houses, grading streets, and building sidewalks, and offered it for sale, in part by means of circulars and letters sent through the United States mail by direction of Ridgway and Glass; each undivided interest in the property being offered for the uniform price of $130, the sales made being evidenced by a written contract which did not specify any particular lot or lots, but stated "that, after all the land had been sold, the purchasers or their representatives should meet upon the property, and at that time the Jovita Land Company would deliver to the purchasers or their representatives deeds to all the property so sold by the Jovita Land Company and purchased by the lot buyers, at which time the lot buyers could divide the property among themselves." Prior to July 4, 1910, the land company caused notice to be given to the lot buyers of the appointment of certain representatives who would act for the contract holders and who were requested to meet on the day mentioned on the land of the company, and on that day a meeting was there had, at which were present several hundred of such contract holders or their representatives, to whom Ridgway announced that the land company was ready to turn over deeds to such trustees as they might select. Five trustees were then thus chosen, to whom Ridgway then delivered "deeds to each and every lot or tract of the property sold," taking the receipt of such trustee therefor, which deeds, "covering substantially all of the 2,713 lots to be distributed, had prior to the drawing been prepared and signed and acknowledged by the defendant W. A. Ridgway. These deeds were executed in blank form as to the name of the grantee in each case. On the day of the drawing, many of these deeds so prepared were by the employés of the company at the time filled in and actually distributed to the grantees selected by lot at the drawing, and thereafter from

time to time the remaining number of deeds were sent through the mails and distributed from the offices of the company to the various and numerous alleged purchasers in various parts of the district and surrounding country."

Immediately after the deeds had been so delivered by Ridgway to the trustees, the latter "proceeded to divide the property among the purchasers by drawing lots therefor, in the following manner: The name of each purchaser had prior to the day of the drawing been written upon separate cards and placed in a box, which revolved upon an axis. Upon other cards had been written the description of each lot or tract of ground contained in the 500 acres, known as 'Jovita,' and placed in another similar box; that is to say: If there were 2,713 lots sold, there were 2,713 names put in one box, and in another box there were placed 2,713 cards, on each of which was written the description of a lot. These five trustees then drew one name from one box and at the same time drew a card containing the description of a lot from the other box, and the purchaser whose name was drawn from one box was given a deed to the property described on the card drawn from the other box at the time his name was drawn."

There was evidence given going to show that the appliances for such drawing were prepared and the drawing itself was made by direction of Ridgway and Glass, and there was evidence tending to show that what few cottages were built upon the few small lots could be built for from $600 to $1,000 each, and that the 40-foot lots were not worth more than from $4 to $10 each, and that the acreage lots were not worth to exceed $75 per acre.

F. E. Hammond, of Seattle, Wash., for plaintiff in error.

Clay Allen, U. S. Atty., of Seattle, Wash., and G. P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for the United States.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge (after stating the facts as above). Section 3894 of the Revised Statutes reads as follows:

"No letter or circular concerning (illegal) lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punishable by a fine of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution."

And section 213 of the Criminal Code, so far as applicable, is in these words:

"No letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, * * * shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier. Whoever shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years. * * *"

It is contended on behalf of the plaintiff in error that counts 2 and 7 of the indictment are based upon section 3894 of the Revised Statutes, and that counts 3 and 4 are based on section 213 of the Criminal Code; that the first-mentioned section defines a misdemeanor and the last a felony; and that a misdemeanor and a felony cannot be included in the

same indictment, and therefore the demurrer to the indictment should have been sustained; and further that each count is bad for duplicity in that, as the defendants thereto are charged with "depositing" and "causing to be deposited" the letters and circulars, "two separate crimes are charged"; that it is not charged that the defendants knew the contents of the letters or circulars; that it is not specifically charged that the defendants "knew the letters were concerning a scheme offering prizes," and, as respects counts 3 and 4, that the scheme alleged is not a scheme "similar to a lottery or gift enterprise offering prizes dependent upon lot or chance," nor is it alleged that the letters charged to have been deposited "concerned a scheme similar to a lottery offering prizes."

[1-3] We see no merit in any of those contentions. Each of the counts is good under either of the sections of the statute that have been quoted. Whether section 3894 of the Revised Statutes is merged in section 213 of the Criminal Code (which latter is undoubtedly an enlargement of the provisions of the former statute) we are not called upon to decide in this case, for the reason that the punishment imposed upon the plaintiff in error is much less than that prescribed by the latter statute. It is apparent that each of the counts in question was treated in the court below as being based upon section 3894 of the Revised Statutes, as the plaintiff in error was only sentenced to imprisonment under each count for 60 days and a fine of $300, whereas the punishment prescribed by section 213 of the Criminal Code is much heavier. The plaintiff in error, therefore, has no right to complain of the extent of the punishment.

We say that each of the counts here in question is good under either of the sections of the statute quoted, for each of them alleges in effect that the instrument alleged to have been willfully, knowingly, unlawfully, and feloniously deposited by the defendants in the mail concerned a scheme dependent upon lot or chance carried on through a corporation organized and controlled by the defendants, and was intended to promote, aid, and further the said scheme, which scheme is specifically set out and shows upon its face that it was dependent upon lot or chance, and was designed and calculated to deceive and defraud the unwary in an endeavor to obtain money from them under false pretenses.

[4] All of the counts here in question refer, as they properly may, to the scheme set out in the first count. Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097. The scheme so set out in effect offered prizes dependent upon lot or chance, for, as has been shown, the various lots and parcels into which the land was divided were of grossly unequal values. Yet each purchaser was to and did pay precisely the same amount, $130. Those at least who paid $130 each for the hundreds of lots that the evidence tended to show were only worth from $4 to $10 each doubtless had no more difficulty than have we in concluding that the very few lots upon which houses were built were indeed prizes to those who were lucky enough to draw them.

[5] That all of the acts charged against the defendants to the in-

dictment were connected together and concerned the same transaction, and were therefore of the same class of offenses, is clear, and that such acts and transactions may be included in the same indictment is expressly provided by statute; section 1024 of the Revised Statutes declaring:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

The judgment is affirmed.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK v. PACIFIC COAST PIPE CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2452.

1. MECHANICS' LIENS ⟸260—EXTINGUISHMENT—RIGHT CONDITIONED BY LIMITATION.

The provision of Rev. Codes Idaho, § 5118, relating to mechanics' liens, that "no lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien," makes the remedy a part of the right created. The limitation prescribed conditions the right; and, unless suit is brought within the time limited, the lien itself ceases to exist.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 456, 458–468; Dec. Dig. ⟸260.

Continuance or revival of Mechanic's Lien, see note to Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co., 71 C. C. A. 17.]

2. MECHANICS' LIENS ⟸260 — EXTINGUISHMENT — LIENHOLDERS NOT JOINED IN FORECLOSURE SUIT—STATUTORY LIMITATION.

The statute does not prescribe in terms who shall be made parties to such suit, but it necessarily means that it must be brought against all whose rights, estates, or interests are claimed to be adverse and subordinate; otherwise they are not affected by it, and as to them the lien ceases to be effective after the expiration of the six-month limitation period.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 456, 458–468; Dec. Dig. ⟸260.]

Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit in equity by the Continental & Commercial Trust & Savings Bank, trustee, against the Kings Hill Irrigation & Power Company and others. From a decree denying its right to a mechanic's lien as against complainant, the defendant Pacific Coast Pipe Company appeals. Affirmed.

March 30, 1904, under and pursuant to the provisions of certain acts of Congress authorizing the same, the Secretary of the Interior, for and on behalf of the United States, entered into an agreement with the Governor of the state of Idaho, acting in its behalf, concerning certain specified tracts of

desert land, aggregating 17,666.72 acres, situate within the state of Idaho, which that state proposed should be irrigated and reclaimed in accordance with the plan therein exhibited (including the source of the water to be used for the purpose), by which agreement the United States agreed to "donate, grant, and patent to said state or to its assigns, free from cost of survey or price, any particular tract or tracts of said lands whenever an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim the same in accordance with the provisions of said acts of Congress, and with the regulations issued thereunder, and with the terms of this contract, at any time within ten years from the date of approval of the said map of the lands."

Among the various provisions and conditions specified in the agreement are the following: "It is further understood and agreed that said state shall have full power, right, and authority to enact such laws, and from time to time make and enter into such contracts and agreements, and to create and assume such obligations in relation to and concerning said lands as may be necessary to induce and cause such irrigation and reclamation thereof as is required by this contract and the said acts of Congress; but no such law, contract, or obligation shall in any way bind or obligate the United States to do or perform any act not clearly directed and set forth in this contract and said acts of Congress, and then only after the requirements of said acts and contract have been fully complied with. * * * It is further understood and agreed that as soon as an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of said lands, the said state, or its assigns, may make proof thereof under and according to such rules and regulations as may be prescribed therefor by the Secretary of the Interior, and as soon as such proof shall have been examined and found to be satisfactory, patents shall issue to said state, or to its assigns, for the tracts included in said proof."

Subsequently the Glenns Ferry Land & Irrigation Company, the predecessor of the Kings Hill Irrigation & Power Company, undertook after application to and authority from the state of Idaho, the construction of an irrigation system to supply the said lands with water and thereby to reclaim them. In the execution of that purpose certain water right contracts were entered into between the promoters of the irrigation project and the settlers upon the lands needing water, and subsequently, to wit, on the 2d day of November, 1908, the Kings Hill Irrigation & Power Company executed to the Continental & Commercial Trust & Savings Bank, as trustee, a mortgage to secure an issue of bonds of the Irrigation & Power Company in the amount of $500,000, and on March 1, 1909, an amendment thereto covering, among other things, the said water bonds and certain shares of the capital stock of the Glenns Ferry Canal Company, Limited. The original mortgage was duly recorded December 9, 1908, and the amendment thereto was similarly recorded March 19, 1909, in the counties in which were situated the properties covered by those instruments. In the course of the construction of the irrigation system, and at the request of the Kings Hill Irrigation & Power Company, the Pipe Company, as an original contractor, sold and delivered to the Irrigation & Power Company certain materials to be used, and which were actually used, in the construction and repair of the irrigation system, of the value of $12,363.24, which material was commenced to be furnished July 13, 1909, and was continued to be furnished to July 2, 1910. Not having been paid for, the Pipe Company filed a claim of lien in Elmore county, Idaho, August 4, 1910, and on August 5, 1910, in Owyhee county of the same state, being within 60 days after the last material was furnished and the counties mentioned being the counties in which are situated the waterworks for which such material was so furnished. October 31, 1910, the Pipe Company commenced an action in one of the courts of Idaho for the enforcement of its lien, making as sole defendant thereto the Kings Hill Irrigation & Power Company, and such proceedings were had in that case that the lien was foreclosed, and the property of the Irrigation Company on which the lien was asserted was acquired by the Pacific Coast Pipe Company through a master's deed prior to the trial of the present suit in the court below, which last-mentioned suit was brought

December 28, 1912, by the Continental & Commercial Trust & Savings Bank as trustee to foreclose its mortgage lien, to which suit were made parties defendant, among others, the Kings Hill Irrigation & Power Company, the Glenns Ferry Canal Company, Limited, and the Pacific Coast Pipe Company. The bill in that suit alleged, among other things, the execution of the mortgage and of the amendment thereto, and that bonds to the face value of $358,400 were executed, certified by the trustee, and sold in accordance with the terms and conditions of the mortgage, and that the Irrigation & Power Company had failed to pay either the interest or principal thereof, and prayed judgment for such sum as should be found to be due the complainant, and that the same be declared a lien upon the mortgaged premises, and that the property be ordered sold to satisfy such amount.

To the bill the Pacific Coast Pipe Company filed a separate answer and also filed a cross-bill, in which latter it alleged, among other things, that at the times therein stated the Kings Hill Irrigation & Power Company was the owner of a certain ditch, flume, and canal known as the "Kings Hill Canal," and the right of way therefor, located in Lincoln, Twin Falls, Owyhee, and Elmore county, in the state of Idaho, together with all of its appurtenances; that between July 13, 1909, and July 2, 1910, the cross-complainant, at the request of the Kings Hill Irrigation & Power Company, and as an original contractor, sold and delivered to the Irrigation & Power Company certain materials to be used, and which were actually used, in the construction and repair of the ditch, flume, and canal therein described, which material so furnished was of the reasonable value of $12,363.24; that after crediting the payments made thereon, there remained due from the Irrigation & Power Company to the Pipe Company therefor $10,071.33, with interest; that the cross-complainant completed the furnishing of such materials on July 2, 1910, and within the time allowed by the laws of the state of Idaho filed for record in the proper counties its claim of lien duly verified, which was recorded in Elmore county August 4, and in Owyhee county August 5, 1910, a copy of which notice of lien was attached to the cross-complaint; that thereafter, to wit, October 31, 1910, and within the time allowed by the laws of Idaho, the cross-complainant commenced an action against the Kings Hill Irrigation & Power Company in the district court of Elmore county in the state, to enforce its said lien, in which action the Irrigation & Power Company appeared and procured the removal of the action to the United States Circuit Court for the District of Idaho, Southern Division, in which court judgment was duly entered in favor of the Pipe Company on the 30th of December, 1911, establishing the amount due the plaintiff in the action and adjudging it a lien "upon the ditch, flume, canal, and right of way, and all the property of the said" Irrigation & Power Company described in the complaint in that action, being a part of the same property described in the bill of complaint in the present suit.

The cross-bill also set up the sale under that judgment of the property therein described, its nonredemption, and subsequent conveyance by the special master to the Pipe Company. It further alleged that on May 1, 1908, the Irrigation & Power Company entered into a contract with the state of Idaho, whereby it agreed to construct an irrigation system for the irrigation and reclamation of the lands already referred to, under and pursuant to the provisions of the said acts of Congress, specifically describing the said works, and alleging that the materials so sold and delivered by the cross-complainant to the Irrigation & Power Company were to be used, and were actually used, in the construction and completion of such work; that the said works were constructed "over, along, across, and upon the public lands of the United States and lands of the state of Idaho, and the completion of such canals and other structures, comprising the main canal and distribution system of the works so to be constructed, was essential and necessary to the securing to said Kings Hill Irrigation & Power Company of a right, title, or interest in and to such right of way; and this cross-complainant avers that said Kings Hill Irrigation & Power Company had and acquired no right, title, or interest whatsoever in and to said right of way prior to the furnishing by this cross-complainant of the materials hereinbefore in this cross-complaint referred

to and their actual use in the construction and completion of the canals and works referred to, being the canals, structures, and irrigation works hereinbefore set out and described in this cross-complaint and in the original bill of complaint herein of the Continental & Commercial Trust & Savings Bank, as trustee." And "that its lien for the materials so furnished to be used, and which were actually used, in the said irrigation works and system, canals, pipe lines, and other structures, as hereinbefore in this cross-complaint set out, was and is prior and superior to the lien of the trust deed and mortgage set out in said original bill of complaint in this action."

To the cross-complaint the complainant in the present suit filed an answer, in which, among other things, it denied that the Irrigation & Power Company had acquired no right to the right of way referred to in the cross-complaint prior to the furnishing by the Pipe Company of the materials mentioned and their actual use in the construction of the irrigation works, and denied that any lien of the cross-complainant for any materials so furnished to and used by the Irrigation & Power Company was or is prior or superior to the lien of the complainant's mortgage, but, on the contrary, alleges that any such lien of the cross-complainant is subsequent and inferior to the complainant's mortgage lien.

It appears that the main canal of the irrigation system was completed prior to December 28, 1909, and that the Irrigation & Power Company had furnished water for irrigation during a part of the year 1909. Thereafter two branches of the system were constructed, in the construction of which the material furnished by the Pipe Company was used, one of them extending across the Snake river to Kings Hill, and the other a pumping system at what is spoken of in the record as Tuana Gulch.

N. M. Ruick, of Boise, Idaho, for appellant Pacific Coast Pipe Co.

Levy Mayer and Charles L. Powell, both of Chicago, Ill., Richards & Haga, of Boise, Idaho, and Mayer, Meyer, Austrian & Platt, of Chicago, Ill., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The appellant contends that its lien was superior to that of the appellee's mortgage and had not expired as to the latter at the time it filed its cross-bill to foreclose. The court below held against the appellant upon the last proposition, and if it was correct in that ruling, it will be unnecessary for us, as it was for that court, to determine which was the prior lien.

[1] Mechanics' and materialmen's liens do not exist under the common law, but are creatures of statute law only. Section 5110 of the Idaho Revised Codes gives to every person performing labor upon or furnishing materials to be used in the construction, alteration, or repair of any mining claim, building, wharf, bridge, ditch, dyke, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, a lien upon the same for work done or materials furnished. Section 5114 of the same statutes provides that such liens are preferred to other incumbrances attaching subsequent to the time when the structure was commenced or the work done or materials furnished. Section 5115 requires that any person claiming such a lien shall, within the period therein prescribed, file in the office of the county recorder of the county in which the property is situated his verified claim therefor, stating certain prescribed facts, and section 5118 is as follows:

"No lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien; or, if a credit be given, then six months after the expiration of such credit; but no lien shall continue in force under this chapter for a longer period than two years from the time the work is completed, or credit given, unless proceedings to enforce the same shall have been commenced."

The true construction of the first clause of the section just quoted is, we think, the controlling question in the case. As will be seen, it in effect expressly declares that no such lien given by the Idaho statute shall bind any structure to which it has attached for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien. In other words, the remedy is by the statute made a part of the right created. It was so held in respect to an analogous statute, by the Supreme Court in the case of The Harrisburg, 119 U. S. 199, 214, 7 Sup. Ct. 140, 147, 30 L. Ed. 358. That was a suit in admiralty brought by the widow and child of one Rickards to recover damages for his death, caused by the alleged negligence of a schooner of which he was first officer. As no such suit could be maintained in the courts of the United States in the absence of an act of Congress or a statute of a state, the action depended wholly upon a statute of the state of Pennsylvania, which gave to the widow and child a cause of action therefor, but in doing so expressly declared that "the action shall be brought within one year after the death and not thereafter." The Supreme Court in deciding the case expressly held:

"The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all."

The applicability of that decision of the Supreme Court to the facts of the present case is not, we think, affected by the subsequent decision of the same court in the case of Bear Lake Irrigation Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. Ed. 327. In that case there was a lien law of the state of Utah very similar to the statutory provisions of the state of Idaho, and there the question was, as it is here, between one who claimed a lien for work done and a trust company which claimed a mortgage lien upon the same property, the work there having been commenced by the contractor prior to the execution of the mortgage, and the statute in force at the time of the execution of the contract and of the commencement of the work requiring the claimant to commence an "action to enforce his lien within ninety days from the time when he filed his claim for a lien." Before the expiration of the 90 days thus provided for, and, indeed, before the completion of the contractor's work or the filing of his claim of lien, the state of Utah passed, on the 12th day of March, 1890, another lien law, making provisions for the creation and enforcement of such liens, section 21 of which provided that:

"No lien claimed by virtue of this act shall hold the property longer than one year after filing the statement firstly described in section 10, unless an

action be commenced within that time to enforce the same" (Laws 1890, c. 30)

—and containing a clause formally repealing the old act, the latter having been passed in 1888. Notwithstanding such repeal, the Supreme Court construed the new statute as a continuation of the old one, with the modifications as provided in the new act, saying (164 U. S. 11, 17 Sup. Ct. 9, 41 L. Ed. 327):

"Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act."

And the court held that the 90 days allowed by the act of 1888 after the filing of the claim of lien, for the commencement of an action to enforce it, was extended by section 21 of the act of 1890 to one year, and that as such extension became effective before the work in that case was completed and the claim of lien filed, suit for the labor lien claimed was not required to be commenced before the expiration of one year from the time of the filing of the claim, the court saying:

"The two acts in question here are of a similar nature, relating to the same general subject-matter, and making provisions for the creation and enforcement of mechanic's liens. The new act of 1890, although in terms repealing the earlier act, is yet in truth, and for the reasons already given, a continuation of that act with the modifications as provided in the new one. One of those modifications is the extension of the time in which to commence the action to foreclose the lien after the filing of the statement which claims it. Where at the time of the passage of the new act the proposed lienor has only entered upon the execution of his contract and has not yet completed the work under it, we think that at least as to him the provision enlarging the time in which to commence the action to foreclose the lien is applicable, and there is no retroactive effect thereby given to that provision of the new act.

"It may be asked what effect is given under this construction to the language of the proviso contained in section 32 of the act of 1890, already quoted. The answer is that the mere enlargement of the time in which to commence the action, at least in a case where the time had not yet arrived in which to file any statement of the plaintiff's claim for a lien, does not affect any right or remedy provided for in the old act. The right, as that term is used in the statute, consisted of the right of sale of the property in order, if necessary, to obtain payment of the money due the contractor. The remedy consisted of the taking of certain proceedings by which this sale was to be accomplished. Prior to the arrival of the time when one of these steps was to be taken, an alteration of the statute by which the time to take that step might be enlarged was not an alteration of the 'right' or of the 'remedy,' as those terms are used in the statute, nor did it in any way affect either; it was simply an alteration of the mere procedure in the course of an employment of a remedy, the remedy itself remaining untouched or unaffected by such alteration. In this case such an enlargement of time to commence an action was given before the time had arrived in which the action could have been commenced under the old statute. The new statute was prospective in its operation, even as applied to this case. Of course, if the new act had curtailed the time in which to bring the action, after the time had commenced to run under the old statute, totally different considerations would spring up, and what was a mere alteration of procedure, having really nothing to do with a remedy in the one case, might, in the other, most seriously

affect it, and hence come within the proviso in question. Under the facts of this case the right or remedy of the plaintiff was not touched, or, in the language of the proviso, was not 'affected' by the enlargement of the time in which to commence the action, and therefore the proviso did not take the plaintiff's case out of the application of the section in the new act providing such enlarged time.

"Under the construction given by us to the act of 1890, as a continuation of that of 1888, with modifications, the question as to which act the lien is claimed under is not specially material. In effect, it is one act, and those labors, etc., which were performed before the passage of the act of 1890 are added to those performed thereafter. The lien is really claimed by virtue of the fact that at the time when the contract was entered into the statute of Utah provided such a right or remedy, and although the action to foreclose the lien was commenced under the provisions of the act of 1890, yet the right itself commenced under the old act. That right is not affected by any provision of the new act, and although it is claimed that the right and the remedy must go together under the old act, as they are preserved in the same language, yet, for the reasons already given, the time in which to commence the action is no part of the 'remedy' as that word is used in the proviso, and an extension of that time may be provided for in the new act without in any way affecting the right or remedy of the lienor where the facts are the same as in this case.

"It may be assumed that where a statute creates a right not known to the common law, and provides a remedy for the enforcement of such right, and limits the time within which the remedy must be pursued, the remedy in such case forms a part of the right, and must be pursued within the time prescribed, or else the right and remedy are both lost; but it does not, therefore, follow that the plaintiff's right to a lien and to maintain this action must be based solely upon the act of 1888.

"We must bear in mind the position of the plaintiff when the act of 1890 was passed. He had not then completed his contract, and could not therefore file any statement of claim, nor could he commence any action. The particular time in which he would be allowed to commence his action (provided a sufficient time in fact were given) was, under such circumstances, mere matter of procedure as distinguished from remedy. The remedy would not thereby be altered, because the remedy consisted in filing the statement and in commencing the action. The time in which to do either would be matter of procedure only. Hence, when the act of 1890 was passed, which enlarged the time in which to commence the action already provided for, such enlargement did not affect any right or remedy of the plaintiff. It did not affect either, because the provision applied only to procedure and not to right or remedy, and therefore the plaintiff could avail himself of the time given him by the act of 1890 in which to commence his action as one of the steps in procedure by which the remedy for a violation of the contract by the enforcement of foreclosure of the lien would be accomplished.

"We conclude that the lien of the plaintiff was valid and superior to the mortgage of the Mortgage Trust Company."

There has been no modification of the Idaho statute expressly declaring that no mechanic's or materialman's lien shall bind any property for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien, or if a credit be given, then within six months after the expiration of such credit, nor for a longer period than two years from the time that the work is completed or credit given, unless proceedings to enforce the same shall have been commenced.

Under similar statutes the Supreme Courts of several of the states have held that the time specified for the commencement of action for the enforcement of such liens enters into and is a part of the right of lien. See Davis v. Bartz, 65 Wash. 395, 118 Pac. 334; Dunphy v.

Riddle, 86 Ill. 22; Crowl v. Nagle, 86 Ill. 437; McGraw v. Bayard, 96 Ill. 146; Smith v. Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661; Falconer v. Cochran, 68 Minn. 405, 71 N. W. 386; Hokanson v. Gunderson, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354; Deming-Colborn, etc., v. Union Nat., etc., 151 Ind. 463, 51 N. E. 936; Union Nat., etc., v. Helberg, 152 Ind. 139, 51 N. E. 916; Stoermer v. People's Savings Bk., 152 Ind. 104, 52 N. E. 606; Green v. Sanford, 34 Neb. 363, 51 N. W. 967; Ballard v. Thompson, 40 Neb. 529, 58 N. W. 1133; Jaicks v. Sullivan, 126 Mo. 177, 30 S. W. 890; Badger L. Co. v. Staley, 141 Mo. App. 295, 125 S. W. 779.

Decisions based upon statutes which do not make the requirements in respect to the time of the commencement of suit a part of the right to the lien claimed are inapplicable.

[2] The Idaho statute does not, in terms, prescribe who shall be made parties to the action thereby required to be brought; but we agree with the learned judge of the court below that it necessarily means that it must be brought against all of those whose rights, estates, or interests are claimed to be adverse and subordinate; otherwise they could not be concluded. In the instant case the trustee was manifestly entitled to contest the amount, the validity, and the priority of the lien claimed for labor and material, and, of course, to its day in court for that purpose. But at the time it was called upon to do so the life of the appellant's lien had ended by the very terms of the statute which created it. As said by the court below:

"The argument that the limitation does not apply to a mortgage because the validity and amount of a mechanic's lien may be established in a suit between the claimant and the owner of the property alone, and that the only issue in which the mortgagee is interested, namely, the date or relative dignity of the lien, may be tried out in a subsequent suit to redeem, in so far as it has any force at all, rests upon an erroneous assumption, which is that the mortgagee has no right to question the amount or validity of the claim of lien. These are issues which the incumbrancer, equally with the owner, may raise, and for that purpose the mortgagee is entitled to his day in court. If, for instance, a lien were asserted for the value of material which was never furnished for use in a structure covered by the mortgage, it must be clear that the mortgagee may, by showing the fact, defeat the lien, or reduce the amount thereof."

In Hassall v. Wilcox, 130 U. S. 493, 9 Sup. Ct. 590, 32 L. Ed. 1001, a statute of Texas, passed in 1879, gave a lien for wages to mechanics and laborers, on a railroad, prior to all other liens, and authorized its enforcement, in a suit, by a judgment for the sale of the railroad, and provided that it should not be necessary to make other lienholders defendants, but that they might intervene and become parties. It did not provide for any notice by publication. In 1882, a railroad in Texas was mortgaged to secure bonds. In 1884, a creditor of the railroad company holding such labor claims, in a suit against it alone, in a court of the state, obtained a judgment for his claim and lien, and for the sale of the railroad. In a suit afterwards brought by a bondholder, in the Circuit Court of the United States, to have the rights of the creditors of the company ascertained, and a receiver appointed, it was referred to a master to report on the priority of claims. The creditor by judgment presented his claim; it was objected to by the bondholder

as fraudulent and embracing amounts not covered by the statutory lien. The master reported that the claim included amounts which were not a lien, as well as amounts which were, but did not separate them; that the claim was a valid one against the company, but that it was not a lien entitled to priority. The court, on exceptions, awarded priority of lien to the claim, for the full amount of the judgment. It was held, among other things, that the bondholders were not bound by the judgment rendered in the suit to which they were not made parties. So here, the trustee is not bound by the judgment obtained by the appellant against the owner of the property, and the lien of the appellant having, by the express provision of the statute creating it, ended long prior to the time when the appellant attempted to assert it as against the trustee, we hold that it was then without any life.

The judgment is affirmed.

CITY OF WICHITA v. WICHITA WATER CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1915.)

No. 4177.

1. EQUITY ⊂=373—HEARING ON BILL AND ANSWER—ISSUES.
Where complainant sets a cause down for hearing on bill and answer, all allegations of the answer well pleaded are admitted, and only questions of law are presented for determination.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 711–713; Dec. Dig. ⊂=373.]

2. WATERS AND WATER COURSES ⊂=203—WATER COMPANIES—ORDINANCE GRANTING FRANCHISE—"CONTRACT."
The passage of an ordinance granting a franchise to a water company and its acceptance by the company create a "contract" under the law of Kansas, and so far as it fixes rates to be paid to the company for water it is a private contract.
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289–299; Dec. Dig. ⊂=203.
For other definitions, see Words and Phrases, First and Second Series, Contract.]

3. WATERS AND WATER COURSES ⊂=203—WATER COMPANIES—ORDINANCE PRESCRIBING RATES—CONSTRUCTION.
Under an ordinance granting a franchise to a water company and prescribing a schedule of maximum rates to be charged by the company, in which it was provided that water for churches should be free and that rates for motors should be "special," the company cannot be required to furnish free water to churches for motors to provide power for operating organs.
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289–299; Dec. Dig. ⊂=203.]

4. WATERS AND WATER COURSES ⊂=203—WATER COMPANIES—RIGHT TO CHARGE FOR CONNECTIONS.
In the absence of any statutory provision, or provision in the ordinance granting its franchise, on the subject, a water company may lawfully make a reasonable charge to intending consumers for extending their service pipes from the curb line and connecting them with its mains.
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289–299; Dec. Dig. ⊂=203.]

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5. WATERS AND WATER COURSES ⊂=203—WATER COMPANIES—CONTRACT MADE BY FRANCHISE ORDINANCE—PRACTICAL CONSTRUCTION BY PARTIES.
Where a water company, operating under the contract made by the ordinance granting its franchise, made certain charges to consumers from the time it commenced operations, which were paid without objection for nearly 30 years, it amounted to a practical construction of the contract by the parties acting thereunder, which should have great weight, if its terms are of doubtful meaning with respect to the right to make such charges.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289–299; Dec. Dig. ⊂=203.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by the City of Wichita against the Wichita Water Company and others. Decree for defendants, and complainant appeals. Affirmed.

This suit is by the city of Wichita, a municipal corporation of the state of Kansas, against the Wichita Water Company, a Delaware corporation, to restrain the latter from charging or collecting for water furnished by it to churches of the city, and from refusing to connect with its water mains the service pipes of its inhabitants who desire to be furnished with water without the payment of charges therefor, in alleged violation of the ordinance of the city under which the water company and its predecessors were granted the right to construct, maintain, and operate its system of waterworks within the corporate limits of said city. The hearing, which was upon bill and answer, resulted in a decree dismissing the bill at plaintiff's cost, and the city appeals.

Earl Blake, of Wichita, Kan. (Robert C. Foulston, of Wichita, Kan., on the brief), for appellant.

David Smyth, of Wichita, Kan. (J. W. Smyth and Holmes & Yankey, all of Wichita, Kan., on the brief), for appellees.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

REED, District Judge (after stating the facts as above). The material allegations of the bill are that in September, 1882, the plaintiff, a city of the first class in the state of Kansas, by its Ordinance No. 266 duly passed, granted to one J. A. Jones, his associates and assigns, for the term of 40 years, the right to construct, maintain, and operate a system of waterworks within the corporate limits of said city for the purpose of supplying to the city and its inhabitants "water for domestic and sanitary purposes and for the better protection of the city against disaster from fire," and to charge and receive therefor compensation within the limit of maximum rates fixed by said ordinance; that Jones and his associates in interest accepted said ordinance in writing, and pursuant to its terms constructed a system of waterworks in the city, which is now owned and operated by the defendant water company; that by said ordinance Jones, for himself and his assigns, agreed to furnish water for the city

and its inhabitants at rates within the limits of maximum rates fixed therein; that notwithstanding such agreement, and in violation thereof, the defendant seeks to charge the various churches of the city for water, which was to be furnished free under said ordinance, and claims that said churches are not entitled to water free for running motors by which they respectively operate their church organs, and insists upon the payment of a monthly water rental as a condition precedent to the furnishing of water to operate such motors, and threatens to shut off the water from the churches refusing to pay the monthly rental on or before the 15th of each month; that plaintiff brings the suit in its own right and for and on behalf of the various churches of the city, entitled to water service free under the terms of said ordinance, to restrain further breaches thereof, and to prevent the numerous consumers of water in the city from being compelled to sue to vindicate their rights under said ordinance or submit to a small, but annoying, injustice.

As a further cause of action it is alleged, that notwithstanding the foregoing agreement, the defendant water company has failed and refused to furnish water to water consumers unless they shall submit to an "illegal and extortionate charge of $2.50" as a condition precedent to the connection of service pipes with the water mains, and still refuses to make such connection for parties desiring water without the payment of such charge as a condition precedent to making such connections and the piping of water from the mains to the property line of the property abutting on the streets on which water is desired; that the charge of $2.50, or any sum, is illegal and unwarranted by the terms of said ordinance. The prayer is that defendant be enjoined from collecting from the churches of the city for water for running motors, and from charging $2.50, or any other sum, to consumers of water for connecting service pipes with its mains, and from shutting off the water to the churches or consumers, unless such payments are made, and that it be required upon proper application to install proper connections free of charge, between its mains and the service pipes of property owners in the city desiring water, and for other relief.

The defendant water company for its answer admits the passage by the city of Ordinance No. 266 granting to Jones and his assigns the use of its streets for the purpose of constructing, maintaining, and operating in said city a system of waterworks, its acceptance by Jones and the construction by him of such a system, and that defendant now owns and operates the same, that it and its predecessors have always charged the churches of the city a monthly rental at reasonable meter rates for water to run their motors, that they have always required the consumers of water to pay for tapping the mains, connecting the service pipes therewith, and extending them to the property line of the streets in which the mains are laid, and alleges that it is not required by the ordinance to do so free of charge, and denies the authority of the city to require it to furnish water to the churches free.

Further answering the defendant alleges that it is provided by section 13 of said ordinance that the rate to be paid for water for running motors shall be "special," and that water furnished to churches for such purposes has always been charged for at reasonable meter rates, and no objection has ever been made by any of them that the amount so charged was or is unreasonable, and not until within the last six months has it been claimed that the defendant and its predecessors did not have the legal right to charge and collect from the churches for water furnished to operate motors, and such churches have always, prior to the commencement of this suit, paid without protest for water for such purposes, and during all such time the fact that said defendant and its predecessors charged and collected for water so furnished was a matter of common notoriety among the inhabitants of said city. The defendant also admits that it has charged all consumers and proposed consumers of water, as a condition precedent to furnishing them with water, a reasonable price for putting in and maintaining connections of their service pipes with the water mains and extending such pipes to the street line of the consumer's property; that such requirements have been a part of the published rules and regulations of the defendant company and its predecessors for nearly 30 years, during all of which time the water company and its predecessors have required that all such connections be made, which are necessary to the safe operation and maintenance of the system, by its agents under the supervision of its officers, to be paid for by the consumer.

[1] Except as admitted the answer denies all allegations of the bill. The plaintiff set the cause down for hearing before the court upon bill and answer, which admits all allegations of the answer well pleaded, and only questions of law are presented for determination. 1 Street's Fed. Eq. § 812 et seq.; In re Sanford Fork & Tool Co., 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414.

So far as material, Ordinance No. 266 provides that, in consideration of benefits that will accrue to the city of Wichita by the construction of a system of waterworks, the city agrees to rent, and does rent, from the said J. A. Jones and assigns certain hydrants, describing them, at an annual rental of $4,000, to be paid quarterly, with the right to rent additional hydrants at the rate of $50 each per annum.

Section 13:

"That the following maximum rates shall be annual, and become a part of this franchise:
"Brewery, special;
"Churches, free;
"Candle factory, special;
"City offices, free;
"Distilleries, special;
"Fire protection, special to individuals;
"Hotels, special;
"Packing house, special;
"Printing office, special;
"Schools, free;
"Schools, fire protection, special;
"Sprinkling private garden, special, no license to exceed $20;
"Sprinkling public gardens, special;

"Sprinkling carts, special;
"Public drinking and watering fountains, to be erected by the city, free;
"Meter rates, 10,000 gallons and over per day, per 100 gallons, $0.02;
"Others, special;
"Motors, special;
"Factories not enumerated, special."

For other uses of water flat rates are fixed to be paid therefor by the consumer.

[2] The passage of this ordinance and its acceptance by Jones is a contract between them (Gen. Stats. of Kansas 1909, §§ 1030, 1031), and so far as it fixes the rates to be paid the water company for water it is a private contract. Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271, 282, 22 C. C. A. 171, 34 L. R. A. 518. The bill alleges no violation of the ordinance so far as it may affect the city as a municipality, or that the water company does not fully comply with the requirements of the ordinance as to the sufficiency in all respects of the system, and the only violation alleged is in the price charged to the churches of the city for water to run motors with which to operate the church organs, and the price charged to consumers and proposed consumers of water for connecting their service pipes with the water mains. The answer admits the material allegations of the bill, but denies that under the terms of the ordinance the churches are entitled to the free use of water for running motors, and the authority of the city to require it to do so, or that it is required to connect the service pipes of consumers with its mains free of charge.

In argument the defendant challenges the right of the city to maintain the suit in behalf of the churches or private consumers for its alleged overcharges for the use of water and the alleged illegal charges for the connection of service pipes with the mains, and insists that the injured consumer alone can rightly maintain the suit for such matters The trial court sustained this contention and dismissed the bill upon this ground, citing Dailey v. City of New Haven, 60 Conn. 319, 22 Atl. 945, 14 L. R. A. 69, and other cases, and declined to follow Muncie Gas Co. v. City of Muncie, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822. Whether or not the plaintiff city may maintain the suit for the benefit of private consumers may be a debatable question, which we deem it unnecessary to determine in this case, for, admitting, without deciding, that it may do so, it can only maintain the suit to the same extent and upon the same ground that the individual consumer, in whose behalf it is brought, could maintain the same. Its position in such case would be analogous to that of a state or the government when they respectively sue, or permit suits to be brought in their names, for some reason, in behalf of private individuals. Maryland v. Baldwin, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822; United States v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121. In the last-named case the Supreme Court at page 346 of 127 U. S., at page 1088 of 8 Sup. Ct. (32 L. Ed. 121), after referring to several cases said:

"Applying these principles to this case, an inspection of the record shows that the government, though in name the complainant, is not the real contestant party to the title or property in the land in controversy. It has no interest in the suit, and has nothing to gain from the relief prayed for, and

nothing to lose if the relief is denied. The bill itself was filed in the name of the United States, and signed by the Attorney General on the petition of private individuals, and the right asserted is a private right, which might have been asserted without the intervention of the United States at all."

See, also, United States v. Winona & St. P. R. Co., 67 Fed. 969, 972, 15 C. C. A. 117.

[3] The ordinance fixes a maximum meter rate to be charged by the water company to private consumers, when used upon a meter basis, and specified flat rates when not so used, and in all other cases the rates are "special"; but for city offices, public drinking and watering fountains (to be erected by the city), and to schools and churches, there is to be no charge, except that for "fire protection" to schools and private individuals the rate is also "special." There is nothing in the ordinance to indicate that the water company shall furnish water free for other purposes than as specified in its charter. On the contrary, the schedule of rates plainly indicates that water furnished to run motors is to be furnished at "special" rates. The language is: "Churches free"; "Motors special." Such rates will, of course, depend upon the quantity of water required for motor or other "special" purposes. The quantity of water that the ordinary church would use for the purposes specified would not be great; but when a church uses water as power with which to run a motor, or for any other purpose requiring power, the quantity will depend upon the power required. Plainly the ordinance does not, either expressly or by necessary implication, require the water company to furnish water to the churches free for power purposes. In fact, section 1031 of the General Statutes of Kansas of 1909, which are a compilation of prior statutes, provides that as a condition precedent to the renewal or extension of a franchise, or the granting of an original franchise by any city of the first class to any person, company, or corporation, for furnishing water to the city and its inhabitants, an ordinance shall be passed by the council which shall state the terms, conditions, and consideration of such grant, which shall provide and require that such person or company shall during the continuance of such franchise furnish free from fire hydrants all the water that will be required for flushing gutters, sewers and other reasonable *public purposes,* except for fire protection. This statute does not authorize the city to require the water company to furnish water free, as a part of the consideration for the franchise right, except for some public purpose, and defendant insists that the provision of the ordinance requiring it to furnish water to the churches free for any purpose is unauthorized and void; but we need not determine this question, for it is sufficient to say that, if the plaintiff city desired or intended to contract with the water company for free water for the benefit of the churches of the city for all purposes, it should have made its contract accordingly. It did not do so, and it cannot rightly require the water company to furnish water to the churches for power purposes without the payment of a reasonable compensation therefor. Section 1031, Gen. Stats. Kansas 1909; Allen v. Duluth Gas & Water Co., 46 Minn. 290, 48 N. W. 1128.

The plaintiff cites and relies upon Church Society v. Ashtabula Water Co., 20 Ohio Cir. Ct. R. 578, 8 O. C. D. 648, as sustaining its contention for the free use of water to run the organs in churches; but the language of the ordinance in that case as quoted in the opinion is:

"The said grantee [the water company] shall furnish free of charge, all the water needed for use in the churches, free public schools, and other village buildings belonging to the village."

This is quite different from the ordinance in question, which provides that the rates for water for "motors" shall be a special rate, or subject to the agreement of the parties.

[4] May the water company rightly charge the consumer for the reasonable cost of connecting the service pipes with its water mains and extending them to the curb line or property abutting upon the streets in which the mains are laid? The answer to this question must also be found in the terms of the ordinance contract. The ordinance does not require the water company to connect the service pipes with its mains free of charge to consumers, and the schedule of rates only fixes the maximum price that the company may charge for water actually furnished to consumers, and so long as such maximum rate is not exceeded, and the charge for connecting the service pipes with the mains is reasonable, the ordinance is not violated. Whether or not the water company shall furnish water to a consumer, or the consumer shall receive water from the water company, is purely a matter of contract between them.

The city cites and relies upon Hatch v. Consumers' Co., 17 Idaho, 204, 104 Pac. 670, 40 L. R. A. (N. S.) 263, and cases there cited, as sustaining its contention that the obligation rests upon the water company to make the connections at its own expense. The case apparently so holds, but upon the ground, as we read the opinion, that in its prior decisions the court held that the statutes of Idaho, under which the city granted the franchise to the water company, either expressly or by necessary implication imposed upon the water company the duty of making such connections at its own expense. This being true, the acceptance by the water company of its charter would obligate it to make the connections free of charge. The case went to the Supreme Court of the United States upon the alleged ground that by the decision the water company had been denied some right guaranteed to it by the federal Constitution. The Supreme Court held that the charter of the company, as construed by the highest court of the state in connection with the statutes of the state in force at the time it was granted, imposed upon the water company the duty of making such connections at its own expense, and that the water company, having accepted the charter as so construed, was not therefore denied by the state any right guaranteed to it by the federal Constitution. The ordinance before us does not so require, nor is there any statute of Kansas or decision of its courts to which our attention has been called that so requires. In the Hatch Case the Supreme Court of Idaho recognizes that the consumer may be required by ordinance to pay the expenses of service connections when the statute so authorizes, and cites a number of cases so holding.

Municipalities, in granting franchises to or making contracts with private persons or corporations to furnish water to the city and its inhabitants, may require the water company, when the statute so authorizes, to connect the service pipes with the water mains as a part of the consideration they shall pay for the privilege of furnishing the water; but, in the absence of a charter or contract that so provides, the matter is left to the agreement of the parties.

[5] The answer of the water company affirmatively alleges that the churches of the city have always been charged by it and its predecessors for water at reasonable meter rates for running their motors, and that they have paid such charges without objection on their part until a short time prior to the commencement of this suit; also that defendant and its predecessors have always required consumers of water to pay the actual cost of tapping the mains and connecting the service pipes therewith, which amount varies from $2.50 to $5, the work to be done under its supervision; that such requirements have been a part of the published rules and regulations of the defendant company and its predecessors for nearly 30 years, and have been acquiesced in and observed by all water consumers in the city until within 6 months of the time of the commencement of this suit. This, if the contract were of doubtful meaning, would be a practical interpretation thereof by the parties acting thereunder, and of great influence in its true interpretation by the court. Chicago v. Sheldon, 9 Wall. 50, 54, 19 L. Ed. 594; Insurance Co. v. Dutcher, 95 U. S. 269, 273, 24 L. Ed. 410; District of Columbia v. Gallaher, 124 U. S. 505, 510, 8 Sup. Ct. 585, 31 L. Ed. 526; Old Colony Trust Co. v. City of Omaha, 230 U. S. 100, 118, 33 Sup. Ct. 967, 57 L. Ed. 1410; Manhattan Insurance Co. v. Wright, 126 Fed. 82, 87, 61 C. C. A. 138; Uinta Tunnel Min. & Transp. Co. v. Ajax Gold Min. Co., 141 Fed. 563, 568, 73 C. C. A. 35.

We are of opinion that the churches in the city of Wichita are not entitled to the free use of water from the defendant water company for running water motors, and that the consumers of water in the city are not entitled to have their service pipes connected with the water mains and extended to the curb or property line of the streets in which the mains are laid, at the expense of the water company. The bill was therefore rightly dismissed; but it should have been upon the merits, and for the want of equity.

The decree of the district court will be modified accordingly, and, as so modified, it is affirmed.

BANKERS' SURETY CO. OF CLEVELAND, OHIO, et al. v. MAXWELL.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1915.)

No. 1298.

1. UNITED STATES ⊜67—CONTRACTORS' BONDS—EXTENT OF LIABILITY—"PERSON SUPPLYING LABOR."

One employed by a contractor to superintend the construction of a public building, whose duties require him to act as a working foreman, is a "person supplying labor," within the meaning of Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), and is protected by the contractor's bond given thereunder.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⊜67.]

2. PARTNERSHIP ⊜9—CREATION OF RELATION—SHARING PROFITS AS COMPENSATION FOR SERVICES.

An agreement by a contractor for a building to pay his superintendent of construction a salary, and in addition as a bonus a share of the profits of the contract, if any, did not create a partnership, where there was a clear understanding that it should not, and that the superintendent should not share in any loss.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 23, 24; Dec. Dig. ⊜9.]

3. ESTOPPEL ⊜58—EQUITABLE ESTOPPEL—PREJUDICE TO PERSON ASSERTING ESTOPPEL.

That a superintendent of construction on a public building, who had a power of attorney from the contractor to draw checks in payment of indebtedness incurred in the work, did not draw checks for his own salary, but permitted it to accumulate, does not estop him from recovering the same from the surety on the contractor's bond, on the latter's insolvency, where the money he checked out was applied in payment of other claims, which would have been enforceable against the surety.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 144, 145; Dec. Dig. ⊜58.]

4. PAYMENT ⊜39—APPROPRIATION BY CREDITOR—SECURED AND UNSECURED DEBTS.

A creditor, who has two claims against his debtor, one secured and one unsecured, in the absence of special direction to the contrary, may apply funds in his hands in payment of the unsecured claim.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104–114; Dec. Dig. ⊜39.]

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Suit in equity against the Bankers' Surety Company of Cleveland, Ohio, and the Maryland Casualty Company of Baltimore. From a decree in favor of E. D. Maxwell, intervener, defendants appeal. Affirmed.

D. Lawrence Groner, of Norfolk, Va., for appellants.

Leon Goodman, of Lynchburg, Va. (Harper & Goodman, of Lynchburg, Va., and David Stern, of Greensboro, N. C., on the brief), for appellee.

Before PRITCHARD and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. In July, 1909, Cecil L. Saunders entered into a contract with the United States for the construction of a post office building at Clifton Forge, Va. The Bankers' Surety Company became surety on his bond. Upon the completion of the building, some $8,000 or $10,000 of accounts for materials furnished the contractor remained unpaid, and suit was instituted in the District Court of the United States for the Western District of Virginia, against Saunders, the Bankers' Surety Company, and the Maryland Casualty Company, the latter company having taken over the Bankers' Surety Company and assumed payment of its then outstanding obligations. A number of creditors intervened in the action, the claims of all of whom were settled, except the claim of the present intervener, E. D. Maxwell. The matters involved in this appeal, therefore, relate wholly to his claim.

The intervener (appellee) superintended the work of building the post office. At the time the contract was made appellee was in the employ of Saunders at Ithaca, N. Y. Among other things, the appellee in his deposition stated that just before he came to Virginia to construct the post office he was offered a position in New York City at a salary in excess of $300 a month; that he acquainted Saunders with this fact, and told him that he had always received more money than he was getting from him; that Saunders told him that, if he would go to Virginia and build the post office which he (Saunders) had contracted to build for the government, he would pay him $200 per month, with an increase later on, or give him $150 a month and in addition thereto a bonus of one-third of all profits made on the job, but that he (Maxwell) was not to share in any of the losses; that it was not a partnership, and was not to be considered as such, but "simply as a gadfly to make me work harder, and get as much more done as I possibly could do, so that there would be a better profit for him and myself."

Appellee further testified that when Mr. Saunders gave him the power of attorney to sign his checks that it was done, not only to protect Mr. Saunders, but appellee as well, and that in order to leave no doubt about the matter he went to see a lawyer at Clifton Forge, who advised him that it would be best for him to "give Mr. Saunders a personal honesty bond, which would preclude any thought of partnership so far as the state of Virginia was concerned"; that he accordingly executed a bond to indemnify Saunders, and that it transpired that there were no profits so far as the books showed; that there would have been a profit if Mr. Saunders could have collected all of the outstanding obligations and a proper credit had been made for the other jobs, for which he borrowed money from the Clifton Forge job; that as a result of this course of dealing he paid out approximately the sum of $30,000; that he drew money on account, but did not draw money there, being under the impression that the final payment was coming and that he would get his whole salary in a lump sum.

At the hearing before the District Judge, by consent, the case was transferred from the common-law to the equity side of the court. The defendant surety companies filed their answer, the deposition of the

intervener was taken, and a decree for $1,270.27, the whole amount of the claim, with interest at the rate of 6 per cent. per annum from January 26, 1912, until paid, was duly entered by the District Court, and it is from this decree that this appeal was taken.

The first assignment of error appears to have been abandoned by counsel for the appellant, and therefore we do not think it necessary to devote any time to the discussion of the same, further than to say that we are of opinion that the court below, in this instance, followed the proper practice under the circumstances.

[1] The second assignment of error is to the effect that the court below erred in refusing to decree that the intervener was "a person supplying labor" within the meaning of the act of Congress. Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. L. 811 (Comp. St. 1913, § 6923). It was the manifest purpose of Congress in the enactment of this statute to protect the rights of parties performing labor as well as those supplying material for the construction of public buildings. Such being the case, this act should be interpreted so as to effectuate the intent of Congress by giving the same a liberal construction.

It is insisted by appellants that appellee was a superintendent partner, and that he was not, therefore, a laborer within the meaning of the statute. The Supreme Court of the United States in the case of Mining Co. v. Cullins, 104 U. S. 178, 26 L. Ed. 704, in passing upon this question, said:

"He was not a contractor. The services rendered by him were not of a professional character, such as those of a mining engineer. He was the overseer and foreman of the body of miners who performed the manual labor upon the mine. He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. He appears from the findings to have performed duties similar to those required of the foreman of a gang of track hands upon a railroad, or a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor. They require the personal attention and supervision of the foreman, and occasionally, in an emergency, or for an example, it becomes necessary for him to assist with his own hands. Such duties cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under the control of the foreman, is nevertheless as really work and labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of such duties may well be called work and labor, and that the District Court rightfully declared the person who performed them entitled to a lien, under the law of the territory."

Also the following cases are very much in point: Phœnix Furniture Co. v. Put-in-Bay Hotel Co. (C. C.) 66 Fed. 685; Stryker v. Cassidy, 76 N. Y. 52, 32 Am. Rep. 262; Field & Slocumb v. Consolidated Co., 25 R. I. 319, 55 Atl. 757, 105 Am. St. Rep. 895.

In 27 Cyc. 43, the text is as follows:

"The lien is usually allowed for services in superintending the construction of a building or other improvements."

The appellee filed a deposition which constitutes the only evidence bearing upon the question as to the nature of his employment. He

states positively that he was employed as working foreman, and that as such it was his duty "to go among the men and actually build the building." He further says:

"I suppose there wasn't a stone, nor a sash, piece of iron, piece of trim, or a part of the heating or electric light plant that I did not actually assist in placing in the building. Most of the concrete forms I actually put in myself. * * * There was never a day that I wasn't actually occupied in the construction of that building in a suit of overalls."

The work he performed was such as to bring him within the purview of the statute. Therefore, in view of this evidence, we are of opinion that the court below was correct in so finding and decreeing accordingly.

[2] The third assignment is to the effect that the court erred in refusing to find that the appellee was a partner of the general contractor, and therefore not protected by the provisions of the bond sought to be enforced. Again, we have the uncontradicted evidence of the appellee to the effect that neither he nor the general contractor had any intention of forming a partnership in connection with this work. Appellee testified in regard to this matter as follows:

"* * * Would give me $150 per month and a bonus of one-third of the profits that might be made on the job, but that I would not share in any of the losses. It was not a partnership. It was not to be considered as a partnership, but simply as a gadfly to make me work harder, and get as much done as I possibly could do, so that there would be a better profit for him and myself. * * * When I went to Clifton Forge, so that there would be no misunderstanding as to the partnership, because I did not want to go into partnership, when Mr. Saunders gave me the power of attorney to sign checks, I wanted to protect, not only himself, but myself, and went to see a lawyer in Clifton Forge, who advised that the better way to do was for me to give Mr. Saunders a personal honesty bond, which would preclude any thought of partnership, so far as the state of Virginia was concerned."

His testimony in this respect clearly established the fact that it was not the intention of either Saunders or appellee to form a partnership. However, it is insisted that the agreement to share profits is an indicia to a partnership contract. While such is true, in this instance it is not conclusive, in view of other circumstances and conditions which negative such relationship. It does not appear that there was a contribution to the common capital by the appellee, nor was there a community of interest in the amount involved. By the express terms of the contract he was to be paid for his services, and therefore it cannot be reasonably insisted that he contributed any services. In the case of Jackson v. Haynie's Adm'r, 106 Va. 365, 56 S. E. 148, the court in discussing this phase of the question said:

"The principles of the law of partnership lead to the conclusion that, if a trader makes an arrangement in regard to a commercial business with another, by reason of which that other becomes interested as owner in the resulting profits, while they are undivided and remain as profits, the two are partners, the general rule being that to constitute a partnership there must be a community of interest inter sese, and that the parties should share the profits and losses. It is, however, far from being universally true that a mere participation in the profits constitutes the party a partner. At most it is true only sub modo. * * * If a party has no interest whatsoever in the capital stock, and, as between himself and the other party, has no rights as a partner, or no mutuality of powers and duties, but is simply employed

as an agent, and is to receive a proportion of the profits as a compensation for his labor and services, he will not be deemed a partner." Meehan v. Valentine, 145 U. S. 624, 12 Sup. Ct. 972, 36 L. Ed. 835; Berthold v. Goldsmith, 65 U. S. (24 How.) 536, 16 L. Ed. 762.

A fair and reasonable interpretation of this contract, in view of the evidence, shows that it was not the intention of the parties thereto to form a partnership, nor does it follow as a matter of law. Therefore this assignment of error is without merit.

[3] By the fourth assignment of error it is insisted that appellee is now estopped from asserting his claim against appellants, in that he had sufficient funds in his hands with which to have satisfied his claim, and that it was his duty to have done so, and thus, having failed to protect his rights, his failure to do so was prejudicial to the rights of the appellants, and he should not now be permitted to assert his claim.

It does not appear that the sureties were injured by the payments made by appellee. If he had retained an amount sufficient to pay his claim, and refrained from paying such amount to the creditors, then such creditors would have had claims to that extent against the contractor for which the sureties were bound, and in such event appellants would have been in no better position than at present, and they certainly cannot, therefore, be said to have been injured by the application which appellee made of the funds in question. We fail to find anything in the record which in any wise tends to show that appellee had knowledge of the fact that appellants were surety for the contractor at the time that he paid out these several amounts. Therefore the facts are not such as to bring this case within the rule invoked by appellants.

By the fifth assignment of error it is insisted that the appellee was "estopped from asserting his claim against appellants because he permitted and allowed the diversion of funds by the general contractor to the payment of claims arising upon a different contract." It is further insisted that such diversion of funds was with "Maxwell's connivance."

Appellee stated in his deposition that the money which came into his hands each month was placed in a bank to the credit of the contractor. While the testimony shows that appellee was authorized by power of attorney to check out the funds in question, nevertheless it further appears that in every instance the funds were checked in the name of Saunders, and in addition thereto Saunders himself drew out various sums by check. The appellee in his deposition, among other things, testified as follows:

"Q. And that money was entirely under your control? A. It was under Mr. Saunders' control. Q. But it was in the bank and you had the right to draw it out? A. Yes, sir; I drew some of it out, and he drew some of it out. Q. That is to say, you had a power of attorney from him to sign checks for him for that work? A. Yes, sir; for that work only."

It appears from the testimony that the total amount received from the government and deposited amounted to $83,000, of which amount appellee checked less than $30,000. It clearly appears from the evidence that Saunders at all times maintained control of these funds, and

there is nothing in the record to show that appellee had the slightest authority to make payments by check to any one other than those who had performed labor for the contractor on the building that was then being erected. It would be unreasonable, and not at all warranted by the facts, to hold that it was the duty of appellee to guard these funds, so as to prevent Saunders from making payments out of the same on other contracts. We know of no rule by which appellee could be held responsible for the conduct of his principal, in view of the facts as shown by the evidence in this case.

[4] Under the last assignment of error it is insisted by counsel for appellants that appellee "has not disclosed when he first segregated his salary claim from that for loans made by him to Saunders, and has failed to produce the memorandum book showing the several items of his claim to which he first applied the funds in his hands."

Appellee testified that he checked some of these funds as a payment to himself on account for the loan made by him to Saunders. In other words, he had two claims against the contractor, to wit: The one for his salary which was secured by the bond which the sureties had executed, and upon which this suit was instituted; and the other for money which he had loaned to Saunders, and for which he had no security. It is well settled that, where one had funds in his hands belonging to a party who is indebted to him, a portion of which is secured and a portion unsecured, in the absence of a special direction from the debtor as to how the application should be made, he may apply such funds to the payment of his unsecured claim. This principle is so well settled that we do not deem it necessary to cite any authorities in support thereof.

Viewing this case in the light of the facts established and the law applicable thereto, we are impelled to the conclusion that the decree of the lower court was proper. For the reasons stated, the decree is affirmed.

NORFOLK SOUTHERN R. CO. v. CHATMAN.

(Circuit Court of Appeals, Fourth Circuit. February 18, 1915.)

No. 1283.

CARRIERS ⇐242, 307—"PASSENGER" FOR HIRE—SHIPPER ACCOMPANYING LIVE STOCK.

A shipper of live stock, who is transported by the carrier on his shipping contract on condition that he feeds and cares for the stock and exempts the carrier from liability for its escape from the car, is not given free transportation, but is a "passenger" for hire, the consideration paid being the service rendered in performing a duty of the carrier, and the latter cannot by a further provision exempt itself from liability for his injury through its negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 980, 1252–1259, 1491; Dec. Dig. ⇐242, 307.

For other definitions, see Words and Phrases, First and Second Series, Passenger.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Error to the District Court of the United States for the Eastern District of North Carolina, at Elizabeth City; Henry G. Connor, Judge.

Action at law by W. C. Chatman against the Norfolk Southern Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. M. Bain, of Norfolk, Va., and J. Kenyon Wilson, of Elizabeth City, N. C. (W. B. Rodman, of Norfolk, Va., on the brief), for plaintiff in error.

P. W. McMullan and Charles Whedbee, both of Hertford, N. C., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The plaintiff in error will be hereinafter referred to as defendant, and defendant in error as plaintiff; such being the respective positions the parties occupied in the court below.

In the early part of December, 1911, plaintiff delivered to the Pennsylvania Railroad Company, at Jersey City, N. J., a car load of horses, to be transported over its lines and thence to Hertford, N. C., on the Norfolk Southern Railroad. About 5 o'clock in the afternoon, after the horses were loaded, the man who had the horses loaded for the Pennsylvania Railroad Company delivered to the plaintiff a paper in the following language:

Pennsylvania Railroad Company.

Coupon to Uniform Live Stock Contract No. 872.

120 Jersey City Station, Dec. 1st, 1911.

W. C. Chatman delivered to the Pennsylvania Railroad Company (subject to all the conditions of the uniform live stock contract, executed as of even date herewith and now in the possession of the said company, of which this coupon is part) live stock of the kind and number, and consigned and destined as follows:

17 Consigned W. C. Chatman.
Destination Pt. Norfolk, Va.
For Hertford, N. C.
One chartered car.
Number and description of stock containing (shipper's load and count) nine (9) horses and (1) stud horse and one (1) colt. Released to a valuation of $100.00 each, watered & fed at 12 noon P. M.

W. C. Chatman, Man in Charge.

Weight subject to correction .....
Advances $.....
Car Nos. and Initials, Penna. Co. 581461.
Witness his hand and seal the day and year above written.
(Said shipper hereby states that the said animals tendered to the carrier for shipment are not affected with glanders.)

W. C. Chatman, Shipper. [Seal.]

Attest:
E. Butler,
Per M. Company's Agent.

After receiving the foregoing paper, the plaintiff got on the car with the horses as caretaker at the direction of the agent of the company, and came down to Cape Charles, Va., and thence across on a barge,

still remaining in the car, to Norfolk, where the car was carried up to the stockyards. The car was delivered to the defendant, the Norfolk Southern Railroad, and hauled to a point near Moyock in the state of North Carolina, when the car in which plaintiff and the horses were riding was derailed on account of the defective condition of the track, rotten ties, etc., and the plaintiff was injured and greatly damaged.

The defendant, for the purposes of this appeal, admits the derailment and the injury, and admits the plaintiff's right to recover judgment set out in the record, unless it can be shown that plaintiff was riding upon said train in violation of the law regulating interstate commerce, or that plaintiff was riding on the train without the authority of the defendant, and was a trespasser, or unless it can show that the plaintiff had assumed all risks of said transportation and released the defendant from any liability for neglect of any kind.

The defendant requested the court to submit the following issues to the jury:

(1) Was the plaintiff injured by the negligence of the defendant while lawfully riding on the defendant's train as a passenger, as alleged in the complaint?
(2) What damages, if any, is the plaintiff entitled to recover for said injury?
(3) Did the plaintiff assume the risks of injury in traveling upon defendant's train and release defendant therefrom?

The court declined to submit these issues, whereupon the plaintiff tendered the following issues, which were submitted:

(1) Was plaintiff injured by the negligence of the defendant as alleged in the complaint?
(2) What damage, if any, is plaintiff entitled to recover?

The jury answered both issues in favor of the plaintiff, and fixed the damages at $1,550, and judgment was entered accordingly, to which judgment defendant excepted, and the case comes here on writ of error.

It is insisted by counsel for defendant that it is not liable to plaintiff for damages, in that plaintiff's contract with the Pennsylvania Railroad is in violation of section 1 of what is known as the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [Comp. St. 1913, § 8563]), and therefore void, that the coupon or pass upon which plaintiff was transported was a gratuity, and that he was not in any sense a passenger for hire. It is further insisted that under these circumstances the company did not owe the plaintiff the duty to exercise the care necessary for his protection from personal injury that it would have, had he been a passenger for hire. Thus it will be seen that the principal question in this controversy is within a narrow compass.

Counsel for plaintiff insists that the transportation issued was for a valuable consideration; that it formed a material part of the contract with the Pennsylvania Railroad under which it agreed to ship the live stock in question. The memorandum in the right-hand corner of the caption, which is as follows, clearly indicates that it was the intention of the parties to the contract that the live stock should be watered and fed regularly by the plaintiff, who was designated as the "man in charge":

F. D. 2660.

Pennsylvania Railroad Company.

No. 872. Uniform Live Stock Contract.

120 Jersey City Station, Dec. 1st, 1911.

This agreement, made this the 1st day of December, 1911, by and between the Pennsylvania Railroad Company, hereinafter called carrier, and W. C. Chatman, hereinafter called shipper.

Witnesseth, that the said shipper has delivered to the said carrier live stock of the kind and number, and consigned and destined by said shipper, as follows:

Consignee, Destination, etc.	Number and Description of Stock and Count; Weight, Subject to Correction; Shipper's Load.
W. C. Chatman, Port Norfolk, for Hertford, N. C. c/o E. S. D.	One chartered car containing 9 horses, 1 stud, and one (1) colt. Released to a valuation of $100.00 each. Watered and fed by shipper at 12 noon, p. m. W. C. Chatman, man in charge.

Advance charges $.....
Car Nos. and initials Penna. No. 581461.

The contract also contained the following provision:

"That said shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from said car or cars."

This provision placed upon the shipper the duty of keeping the openings closed, so as to prevent the escape from the car of any stock shipped, and also contained an exemption from any liability that might occur as a result of failure on the part of the shipper to take the necessary steps to prevent the happening of the things enumerated herein. This, read in connection with the caption, clearly shows that it was to the interest of the carrier from a pecuniary standpoint to have a caretaker in constant attendance from the time the car was loaded and started to its destination until its arrival and the shipment was delivered to the consignee. It would be unreasonable to say that this of itself did not constitute a consideration for the transportation issued to the caretaker.

It should also be borne in mind that section 4386, U. S. Compiled Statutes 1901, p. 2995, prohibits the confinement of cattle, sheep, or other animals transported from one state to another for a longer period than 28 consecutive hours without unloading the same for rest, water, and feeding, unless prevented by storm or other accidental causes; hence the importance of having a caretaker in charge of each shipment of live stock.

The schedule filed with the Interstate Commerce Commission by the company issuing this bill of lading, among other things, contained the following as part of the rule which relates to live stock shipments:

"Free and reduced transportation shall not be issued to shipper or caretaker in charge of live stock shipments whether car loads or less, and such shippers or caretakers shall pay full fare returning."

Section 1 of the Act to Regulate Commerce, to which reference has hereinbefore been made, among other things provides that:

"No common carrier, subject to the provision of this act, shall, from January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except * * * to necessary caretakers of live stock, poultry," etc.

It is obvious, from reading the foregoing, that if the transportation issued on this occasion be a pass, as such it is specifically exempted by section 1 of the act.

When we consider this provision of the act it clearly appears that the shipper is not prohibited to issue transportation to caretakers while accompanying stock from point of shipment to destination, and while the first portion of the schedule provides that it shall be unlawful to give free passes or transportation, this proviso is limited by the concluding paragraph, to wit:

"Then such shippers or caretakers shall pay full fare returning."

In other words, this clearly shows that the transportation company recognized the fact that it was its duty to issue transportation to shippers or caretakers while accompanying the stock in consideration of the services thus rendered, while, on the other hand, the proviso indicates that the transportation company thereby sought to relieve itself from issuing free transportation to shippers or caretakers returning.

If it had been the purpose of the transportation company to refuse transportation to shippers or caretakers while accompanying shipments of livestock, it would have been unnecessary to have added a proviso as to the return trip. Therefore we are of opinion that this provision was intended to mean that the transportation granted to the shipper or caretaker while accompanying the stock should not be free and gratuitous, and that while making such trip the caretaker or shipper was to be considered as a passenger for hire, but that no free transportation was to be issued to such shipper or caretaker for the return trip. Therefore, in view of this provision, it cannot be reasonably insisted that the transportation issued to plaintiff on this occasion was free or gratuitous. The Supreme Court of the United States in the Case of New York Central Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, in passing on this point said:

"A person traveling on a pass, * * * for the purpose of taking care of his stock on a train, is a passenger for hire."

The following is contained in Cyclopedia of Law and Procedure, vol. 6, page 544:

"Persons are, however, frequently transported on so-called passes who are not in fact gratuitous passengers, because the right to ride without payment of special compensation therefor is given in part consideration of payment which is principally for other services. Thus one who travels on a drover's pass, which is issued in connection with the transportation of live stock for

hire, is not a free passenger, but a passenger for compensation. And those who are carried on freight trains to look after live stock which is being transported, and as an incident to such transportation, are entitled to protection as passengers."

This rule is also announced in the cases of Kirkendall v. Union Pacific Railroad Co., 200 Fed. 197, 118 C. C. A. 383; B. & Q. R. R. v. Williams, 200 Fed. 207, 18 C. C. A. 393.

On the reverse side of the sheet on which this contract is written appears what purports to be a provision relieving the carrier from liability for injuries resulting from the carrier's neglect or otherwise. In the case to which we have referred it was held that such provision was void. The case of Huckstep v. St. Louis & H. Railroad Co., 166 Mo. App. 330, 148 S. W. 988, is to the same effect.

The Supreme Court of Indiana in the case of Louisville & Nashville Railroad Co. v. Faylor, 126 Ind. 126, 25 N. E. 869, said:

"A stipulation that the carrier shall not be bound to the exercise of care and diligence is in effect an agreement to absolve him from one of the essential duties of his employment and it would be subversive of the very object of the law to permit the carrier to exempt himself from liability by a stipulation in his contract with the passenger, that the latter should take the risk of the negligence of the carrier or of his servants. The law would not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties which are of the very essence of his employment will be regarded as unreasonable, contrary to public policy, and therefore void."

However, it is insisted by counsel for defendant that the Supreme Court of the United States in the case of Charleston & W. C. R. Co. v. Thompson, 234 U. S. 576, 34 Sup. Ct. 964, 58 L. Ed. 1476, had decided this question in favor of defendant's contention. That case is easily distinguished from the case at bar. There a free pass was issued to a member of the family of an employé without any consideration whatsoever. The Supreme Court held that the pass issued to a member of the family of an employé is free under the provision of the statute which authorized it to be issued, and that:

"The stipulation contained in it is excepted, and the stipulations contained in it and on which it is excepted, including one exempting the company from liability in case of injury, are valid."

The Supreme Court based its opinion upon the theory that the pass was free and gratuitous, and that in no sense of the word could one riding on such a pass be deemed a passenger for hire.

In the case at bar, as we have already stated, the transportation was given in consideration of an agreement on the part of the caretaker that the carrier should not be bound to exercise such care and diligence as would otherwise have been incumbent upon it in order to secure the safe transportation of live stock. By this agreement the carrier relieved itself of the obligation which it owed the public, and it would be manifestly unjust under such circumstances to hold that the stipulation exempting the company from liability is valid, and that the defendant is relieved from liability for the injury which plaintiff sustained.

For the reasons stated, we think the stipulation in this instance, which undertakes to relieve the carrier from liability for injuries resulting from the carrier's negligence and otherwise, is void. It being shown that there was a derailment, under the laws of North Carolina the presumption is that the same was occasioned by the neglect of the railroads. In fact, this proposition does not seem to be seriously controverted by the defendant.

As we have stated, the learned judge who heard this case refused to submit the issues that were tendered by the defendant, and in lieu thereof submitted what we conceive to be the proper issues in view of the evidence.

Being of opinion that the case was fairly and impartially tried, the judgment of the lower court is affirmed.

HOLLANDER v. HEASLIP.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1915. Rehearing Denied April 27, 1915.)

No. 2650.

1. CORPORATIONS ⊜560—INSOLVENCY PROCEEDINGS—JURISDICTION TO DETERMINE CLAIMS.

A court of equity, administering the estate of an insolvent corporation through its receiver, has jurisdiction, on an ancillary bill filed by the receiver, to hear and determine a claim on behalf of the corporation against a third person, when it can obtain jurisdiction over his person, although the claim is of a purely legal nature.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253–2260, 2262; Dec. Dig. ⊜560.]

2. CORPORATIONS ⊜228—STOCKHOLDERS—LIABILITY FOR UNPAID SUBSCRIPTION.

Where subscriptions to the stock of a proposed corporation were conditioned on the obtaining of bona fide subscriptions for one-half of the stock before the corporation was organized and commenced business, which condition was also expressed in its charter, a subscriber, who made the initial payment on his stock on false representations by the directors that the condition had been fulfilled, cannot be held liable at suit of a receiver for the unpaid portion of his subscription, unless he has waived the condition or is estopped as against creditors of the corporation from insisting upon it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 874, 878; Dec. Dig. ⊜228.]

3. RECEIVERS ⊜167—RIGHTS OF ACTION OF RECEIVERS.

It is the general rule that a receiver cannot maintain an action on an obligation which the original party to whom it ran could not have maintained.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 320; Dec. Dig. ⊜167.

Actions by and against receivers in federal courts, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in equity by the Graham Paper Company against the World Publishing Company, Limited, with ancillary bill by Samuel F. Heaslip, receiver, against Moses Hollander. Decree for receiver, and defendant appeals. Reversed.

Under a bill filed on the 14th day of May, 1908, by the Graham Paper Company against the World Publishing Company, Limited, the appellee was on the same day appointed receiver of the property of the latter company, and was authorized to continue the business of that company, which was that of publishing a newspaper. Under authority conferred by an order made in that case, the appellee, on November 9, 1909, filed in the same court what was styled a dependent and auxiliary bill against the appellant and others, averring, among other things, that each of the defendants therein subscribed for a stated number of shares of the capital stock of the World Publishing Company, Limited, and paid on account of their said subscriptions stated sums of money—appellant's subscription being for five shares, upon which $50 had been paid—leaving due from them stated sums or balances, and that, in consequence of the fact that the liabilities of the World Publishing Company, Limited, largely exceed the value of its assets, it was necessary to collect said unpaid balances. That bill prayed that the plaintiff therein have judgment against each of the defendants named therein for the sums of money found to be due by each, with interest thereon from May 14, 1908. The court overruled a demurrer of the appellant to this bill, which set out, among other grounds, that the plaintiff therein has, to enforce the payment of said alleged debt, a complete and adequate remedy at law, and that the defendant has, under the Constitution of the United States, the right to have the fact of his indebtedness vel non tried before a jury; the amount in controversy exceeding the sum of $20, as appears by the bill herein. Thereafter the appellant filed a plea, which averred as follows:

"This defendant, not confessing any of the matters contained in the bill of complaint to be true, for plea to so much of said bill as seeks to hold this respondent for an alleged subscription to the capital stock of the World Publishing Company, Limited, of which complainant herein is the receiver, does plead thereto and say: Defendant admits that he signed the subscription list of the World Publishing Company, Limited, prior to said company being chartered and organized; that his said subscription was upon the following conditions, to wit: 'Whereas, the World Publishing Company, of New Orleans, La., is to be organized and incorporated under the laws of the state of Louisiana, with a capital stock of $500,000, the undersigned subscribe to the capital stock of said corporation for the number of shares set opposite their respective names, each share of the stock representing the par value of $100, and to be paid for as follows: Five (5%) per cent. of the stock subscribed by us, respectively, to be paid in cash; five (5%) per cent. to be paid within ten days from the organization of said corporation. And we obligate ourselves to pay the balance of our subscription upon the call of the board of directors of said corporation on the following conditions: First. That no call of the board of directors for the payment of the balance due on said stock shall exceed forty (40%) per cent. of the face value thereof. Second. That no call shall be made until after thirty days' notice by publication or a letter addressed to the subscriber at his last known place of residence. Third. That the directors shall make their calls not less than thirty days apart. Fourth. That no call shall be made until two hundred and fifty thousand dollars, or half of the capital stock, shall have been subscribed.'

"Defendant shows that the charter of the World Publishing Company, Limited, was passed before John Marshall Quintero, notary public, of this city, on the 6th day of June, 1907; that said charter contained, inter alia, the following provision: 'The capital stock of said corporation has been and is hereby fixed at the sum of five hundred thousand dollars, to be represented by five thousand shares, of the par value of one hundred dollars each. The said stock shall be paid for in cash, property, or labor done, and no cer-

tificate of stock shall be issued until payment is made. The said corporation shall be authorized to organize when fifty thousand dollars shall have been subscribed, and shall be a going concern when two hundred and fifty thousand dollars shall have been subscribed, to be paid for in cash, as and when called for by the board of directors.'

"This defendant avers that, in disregard of the conditions written into said subscription list, and upon the basis of which he subscribed, and in violation of the provisions of the charter of the said the World Publishing Company, Limited, the board of directors of said corporation, without having secured legitimate subscriptions to the amount of $250,000 of the capital stock, as called for by the subscription list and the charter, and which amount should have been honestly subscribed by responsible bona fide subscribers, the said directorate informed and advised your respondent, and announced to the stockholders and to the public generally, that the requisite amount of the capital stock, under the charter, to wit, the sum of $250,000, had been fully and honestly subscribed for, when as a matter of fact, to the knowledge of the said board of directors, the bona fide subscription to the capital stock of said corporation was a sum much less than $250,000, to wit, $168,000 or less, and that, though the said directors knew the facts as recited, nevertheless they concealed the same from your respondent; that, in accordance with said false declaration, that the amount of subscription required by the charter had been secured, said directors proceeded to issue calls upon respondent and all other stockholders similarly situated, for the payment of his and their stock subscriptions; that your respondent, being ignorant of the true condition of the subscriptions and the corporation's affairs, and relying upon the honesty and integrity of the directors of the said the World Publishing Company, Limited, and upon their declaration of the full subscription, as aforesaid, this respondent paid the sum of $50; that, after the final announcement by said directorate that the requisite amount of the capital stock had been subscribed for, they commenced the business of publishing a newspaper, and in violation of defendant's contract of subscription and the provisions of the charter of the said the World Publishing Company, Limited, they proceeded to collect subscriptions from this respondent and from other subscribers to said stock; that within a brief period after the commencement of business, through the negligence and mismanagement of the officers and directors of the said the World Publishing Company, Limited, the said company was forced into the hands of a receiver, and your respondent learned thereafter that one of the causes of the failure of the said company was the fact that the said directors had violated the conditions and obligations embodied in the contract of subscription, as well as the charter provisions of the corporation as above set forth; that, under the law, it was the duty of the said the World Publishing Company, Limited, to obtain bona fide subscriptions to the full amount of $250,000, before commencing business; that your respondent's said contract of subscription and his obligations thereunder were conditioned upon said directors obtaining bona fide subscriptions for the full amount of $250,000; that said contract of subscription became binding upon your respondent only after the full amount, as aforesaid, had been subscribed; that the obtention of the full amount of said subscription, as hereinbefore recited, was a condition precedent to any liability on the part of your respondent, arising out of his subscription; that the failure of the said the World Publishing Company, Limited, to obtain honest and bona fide subscriptions to the amount of $250,000 released your respondent from any liability to the said the World Publishing Company, Limited, or to its receiver.

"All of which matters and things this defendant avers to be true, and he pleads non indebitatus to said plaintiff's bill, and prays the judgment of this honorable court whether he should be compelled to make any other or further answer to said bill, or to so much of said bill as hereinbefore pleaded to, and prays to be hence dismissed, with his costs and charges in that behalf most wrongfully sustained."

Following the overruling of this plea, a decree pro confesso, and afterwards a final decree, were entered against the appellant.

Henry L. Lazarus and David Sessler, both of New Orleans, La. (Herman Michel and Eldon S. Lazarus, both of New Orleans, La., on the brief), for appellant.

George Denegre, Victor Leovy, and Henry H. Chaffe, all of New Orleans, La., for appellee.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge (after stating the facts as above). [1] We are not of opinion that the court was in error in overruling the above-mentioned demurrer. The bill to which it was interposed was auxiliary to the original suit in which, by means of a receivership, the court had acquired possession of the assets of the World Publishing Company, Limited, for the purpose of applying them to the payment of its debts. This enabled it to cause a debtor to that corporation who was within reach of its process to be brought into the original cause, to the end that his debt might be ascertained and payment coerced. It was for the court, in its discretion, to decide whether it would determine for itself all claims of the corporation whose estate it was administering, or would allow them to be litigated elsewhere. It was within its power to hear and determine all controversies regarding such claims, at least in so far as it could acquire jurisdiction of the persons of those who were parties to such controversies, though the questions thus collaterally involved were of a purely legal nature. White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; Bottom v. National Ry. Building & Loan Ass'n (C. C.) 123 Fed. 744; Peck v. Elliott, 79 Fed. 10, 24 C. C. A. 425, 38 L. R. A. 616; Ross-Meehan Brake Shoe F. Co. v. Southern Malleable Iron Co. (C. C.) 72 Fed. 957. It could not have so dealt with a purely legal demand, if the bill which asserted it had not been an ancillary or auxiliary one, but was an original suit brought by a receiver who derived his authority from a court of another jurisdiction. Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; Fidelity Trust & Safe Deposit Co. v. Archer, 179 Fed. 32, 103 C. C. A. 16.

[2] The plea which was adjudged to be insufficient disclosed that the stock subscription liability which the auxiliary bill asserted was evidenced by a written contract by the terms of which nothing was payable or demandable until half of the authorized capital stock of the corporation, to wit, $250,000 thereof, shall have been subscribed. It further disclosed that the charter of the corporation contained the provision that "the said corporation shall be authorized to organize when fifty thousand dollars shall have been subscribed, and shall be a going concern when two hundred and fifty thousand dollars shall have been subscribed, to be paid for in cash, as and when called for by the board of directors," and that the only payments on his subscription by the appellant were made after the directors of the corporation had informed and advised him, and announced to the stockholders and to the public generally, that the requisite amount of stock, to wit, $250,000, had been fully and honestly subscribed for, when as a matter of fact,

to the knowledge of the directors, only $168,000 or less was subscribed for, and that the appellant's payments were made in reliance upon the truth of said statements by the directors and in ignorance of the fact that the amount of stock required by its charter to be subscribed before the corporation was entitled to be a going concern was not subscribed. It is to be noted that neither in the plea nor elsewhere in the record are there any averments as to the circumstances of the accrual of any of the claims against the corporation for the satisfaction of which the asserted stock subscription liability is sought to be enforced. Nothing is disclosed to negative the conclusion that all the claimants had the dealings upon which their claims are based with full knowledge of the real facts, including the falsity of the statement made by the directors as to the amount of stock subscribed for, and the making of his payments by the appellant in reliance upon those statements and in ignorance of their falsity.

The liability to which the appellant subjected himself by signing the stock subscription agreement was a contract liability. That liability was expressly made a conditional one. When it is sought to recover of the appellant the amount he thereby conditionally obligated himself to pay, he is entitled to stand on the terms of his contract, to set up the condition it expressed, and to avail himself of the fact that that condition has not been complied with, unless he has waived such compliance or estopped himself from claiming the benefit of the condition.

There would be some support for a claim that the appellant had waived compliance with the condition, if, with knowledge that it had not been complied with, he had manifested his consent to the corporation becoming a going concern by making a payment or payments on his subscription in response to calls therefor, or had acquiesced or participated in the conduct of the undertaking by accepting a dividend or other benefit accruing therefrom. Such a state of facts is not disclosed. It is not made to appear that the appellant did anything as a stockholder or as a subscriber for stock, except to make payments on his subscription in reliance in good faith on a false representation made to him that there had been a full compliance with the condition upon which his liability to pay was to accrue. A payment made in such circumstances is not at all inconsistent with a continued and unchanged intention on the part of the subscriber to insist upon the condition expressed in the subscription contract. "A waiver exists only where one with full knowledge of a material fact does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon that right." 40 Cyc. 259. The appellant cannot be held to have waived a compliance with the condition expressed in the contract sought to be enforced by his making a payment or payments which, without fault on his part, were induced by a false representation that the condition had been complied with. A payment made in such circumstances does not indicate an intentional relinquishment of the right to require a compliance with the condition which was made a prerequisite to the accrual of any obligation to pay anything.

[3] The rule generally applicable is that a receiver cannot maintain an action upon an obligation running to the original party which the

latter could not have maintained. High on Receivers (4th Ed.) §§ 204, 205. It may be assumed, without being decided, that when the demand is sought to be enforced by the receiver for the benefit of creditors of the original obligee the receiver may avail himself of an estoppel upon the defendant of which such creditors were the beneficiaries, though the defendant had not estopped himself in favor of the party with whom he contracted. However this may be, neither the creditors nor the receiver as their representative can sustain a claim that the defendant is estopped to deny the liability asserted against him without showing that the creditors extended credit or otherwise altered their position for the worse in reliance upon something the defendant did or omitted to do. An estoppel in their favor could not arise as a result of conduct of another upon which they in no way relied or acted to their prejudice. In the absence of any showing that the creditors relied upon and were misled by the appellant's conduct, it is not to be assumed that there was a state of facts giving rise to an estoppel in their favor. The pleadings in the case contain no allegations of facts requisite to support such a claim of estoppel. As above indicated, for aught that appears, the creditors may have had their dealings either in ignorance of what the appellant had done or with knowledge of the real facts, being fully aware that the payments by the appellant on his stock subscription were made in such circumstances as not to indicate a consent by him for the corporation to become a going concern before the stipulated amount of capital stock had been subscribed.

The conclusion is that the plea disclosed the existence of a valid defense to the demand sued on, and that its averments do not show that the appellant had waived that defense or had estopped himself to set it up. Livesey v. Omaha Hotel, 5 Neb. 50; Newport Cotton Mill Co. v. Mims, 103 Tenn. 465, 53 S. W. 736; Katama Land Co. v. Jernegan, 126 Mass. 155; Marion Trust Co. v. Blish, 170 Ind. 686, 84 N. E. 814, 85 N. E. 344, 18 L. R. A. (N. S.) 347; Exposition Railroad Co. v. Canal Street Railroad Co., 42 La. Ann. 370, 7 South. 627; Bray v. Farwell, 81 N. Y. 601. The court was in error in adjudging that the plea was insufficient.

It follows that the decree appealed from must be reversed. The cause will be remanded, with leave to the appellant to file an answer to the bill of the appellee, the subsequent proceedings to be in conformity with the equity rules now in force, the appellee or any creditor whose demand is sought to be enforced in the main suit to be afforded the opportunity of controverting any matter of defense set up in the answer, or to show the existence of any facts entitled to be given the effect of a waiver by the appellant of any such matter of defense or of an estoppel upon him to set it up.

LARKIN-GREEN LOGGING CO. v. SABIN.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2534.

BANKRUPTCY ⊜100—ADJUDICATION—COLLATERAL ATTACK.

Involuntary bankruptcy proceedings, though based on the petition which alleged as the only act of bankruptcy the inaction of the alleged bankrupt for four months after attachment had been levied on its property, which petition was erroneously held to be sufficient, are not void, so as to be subject to collateral attack in a suit to enjoin the attachment creditor from proceeding with his attachment suit, since the decision sustaining that petition was made in the exercise of the court's jurisdiction, and was therefore conclusive, though erroneous.

[Ed. Note.—For other cases, see Bankruptcy; Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. ⊜100.]

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Suit by R. L. Sabin, as trustee in bankruptcy of the estate of the Consumers' Lumber & Supply Company, a corporation, to restrain the prosecution of attachment proceedings brought against the bankrupt by the Larkin-Green Logging Company, a corporation. Decree for the complainant (218 Fed. 984), and defendant appeals. Affirmed.

Kollock, Zollinger & McDowall, of Portland, Or., for appellant.

Beach, Simon & Nelson and Sidney Teiser, all of Portland, Or., for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The real, and indeed only, question in this case is whether the involuntary bankruptcy proceedings of the estate of which the appellee is trustee are absolutely void. If so, the judgment must be reversed; otherwise, affirmed—the attack upon them being collateral, and not direct.

The bill is one in equity to restrain the appellant from prosecuting an action it had commenced prior to the commencement of the bankruptcy proceedings against the alleged bankrupt, and from proceeding under a writ of attachment procured in that action, and to establish the alleged right of the trustee to the property in question freed of all such claims on the part of the appellant. After alleging the due appointment of the appellee as trustee in bankruptcy of the estate of the Consumers' Lumber & Supply Company, and the corporate capacity of the appellant, the bill alleges that on April 17, 1913, a petition in involuntary bankruptcy was filed in the court below against the said Consumers' Lumber & Supply Company, which petition is in the bill set out at large, in which it is, among other things, alleged that certain named companies were creditors of the Consumers' Lumber & Supply Company (the time, place, and character of whose business is also stated), having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500, and setting out the nature and amount of their respective claims;

that the said Supply Company was insolvent, and that within four months next preceding the day of the petition it "committed an act of bankruptcy, in that it allowed Larkin-Green Logging Company to levy an attachment on all of the assets and property of said Consumers' Lumber & Supply Company, which attachment has never been released or discharged or vacated, and which attachment was levied on December 18, 1912, and will become a prior lien and cannot be removed or set aside or dissolved through bankruptcy proceedings, after April 18, 1913; that said Consumers' Lumber & Supply Company has done nothing to vacate or set aside said attachment, and has not gone into bankruptcy voluntarily, and its failure to do so will thereby create a preference in favor of said Larkin-Green Logging Company, by reason of the attachment levied by said Larkin-Green Logging Company on said December 18, 1912, and said attachment is still a lien on all the assets of said debtors; that unless said Consumers' Lumber & Supply Company is adjudicated a bankrupt, and unless this petition is filed forthwith, a preference will be gained and obtained by said Larkin-Green Logging Company, as well as by Linnton Savings Bank, which levied a writ of attachment and attached all of the assets of said Consumers' Lumber & Supply Company on December 26, 1912, and therefore on April 26, 1913, said Linnton Savings Bank will also obtain a preference, as said Consumers' Lumber & Supply Company has done nothing to set aside said attachment, nor has it filed a voluntary petition in bankruptcy; that the said obligations owing to said Larkin Green Logging Company and Linnton Savings Bank are for prior indebtedness which was owing to the said attaching creditors prior to said December 18, 1912; that by reason of the foregoing facts said Consumers' Lumber & Supply Company has permitted and suffered a preference in favor of said Larkin-Green Logging Company and Linnton Savings Bank, which can only be set aside through an adjudication in bankruptcy of said Consumers' Lumber and Supply Company; that at the time of the levy of said attachment, and for some time prior thereto, and ever since that date, said Consumers' Lumber & Supply Company has been insolvent, and now is insolvent, within the purview and meaning of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, and its assets do not now equal, and did not at the time of the levy of said attachments, and have not since, equaled, its liabilities at a fair market value of said assets.

"Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon said Consumers' Lumber & Supply Company, as provided in the acts of Congress relating to bankruptcy, and that it may be adjudged by the court to be a bankrupt within the purview of said act."

The bill further alleges that thereafter to wit, on the 23d day of April, 1913, the said Larkin-Green Logging Company appeared in the bankruptcy court and filed a demurrer to the said involuntary petition, which demurrer is also set out at large, and states as its grounds:

"That the facts alleged and recited in said petition as acts of bankruptcy do not constitute acts of bankruptcy under the statute or under the provisions of the law of the United States referring to bankruptcy, and that the said petition does not set forth sufficient facts to constitute acts of bankruptcy under

said statute, or under the provisions of the law of the United States referring to bankruptcy, or sufficient to entitle the petitioners to an order adjudging the Consumers' Lumber & Supply Company a bankrupt, or to confer jurisdiction upon this court to act upon said petition or to adjudge said Consumers' Lumber & Supply Company a bankrupt."

Such demurrer, the bill alleges, was, after argument on behalf of the respective parties, duly overruled by the court in an order which is also set out at large in the bill. The bill further alleges that thereafter the said Consumers' Lumber & Supply Company filed an answer to the said involuntary petition in bankruptcy, admitting all the allegations thereof, and praying that it be adjudged a bankrupt, which answer is also set out in full in the bill; that thereafter the court, "having jurisdiction of the parties to the said involuntary bankruptcy proceedings and of the subject-matter thereof," made and entered a decree adjudging the said Consumers' Lumber & Supply Company a bankrupt, which decree is also set out at large in the bill, with the allegation that the said order of adjudication has not been vacated, set aside, or modified, and is now and has been ever since it was entered in full force and effect; that an order of reference was duly made by the court, referring the said cause to the referee in bankruptcy, to whom the said Larkin-Green Logging Company, on the 10th day of June, 1913, "duly presented and filed with said referee a proof of claim in bankruptcy, which said proof of claim was duly approved and allowed by said referee," which claim is also set out in full in the bill, and is based upon two certain promissory notes; that the notes upon which the said claim was based "are the same notes and debts" upon which the suit was commenced by the Larkin-Green Logging Company in which its writ of attachment was issued and levied, and that the defendant Consumers' Lumber & Supply Company participated as an unsecured creditor in the election of the appellee trustee, and that the said trustee is duly authorized, empowered, and directed to sell the property of the bankrupt coming into his hands, among which is the property in controversy.

The contention on the part of the appellant is that, since the only act alleged in the petition as constituting an act of bankruptcy on the part of the Consumers' Lumber & Supply Company was its inaction for the period of four months after levy of the writ upon its real property, which was held by the Supreme Court in the recent case of Citizens' Banking Company v. Ravenna National Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352, not to subject the insolvent debtor to involuntary adjudication as a bankrupt, the whole bankruptcy proceeding must be treated as absolutely void. We are unable to so hold. Certain it is that the court below, in overruling the demurrer to that petition, was in error; but in doing so it was manifestly exercising the jurisdiction which pertained to it as a court of bankruptcy, in a matter of which it had full jurisdiction, as well as of the parties, and its error in the particular indicated was precisely similar to like errors committed by other federal courts, as was expressly shown by the Supreme Court in the concluding clause of its opinion in the case cited, at page 369 of 234 U. S., at page 806 of 34 Sup. Ct. (58 L. Ed. 1352). Jurisdiction to decide does not mean

only the power to decide right. As said by the Circuit Court of Appeals for the Eighth Circuit in Re First Nat. Bank of Belle Fourche et al., 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355:

"The jurisdiction of a court is not limited to the power to render correct decisions. It is the power to decide the issues according to its view of the law and the evidence, and its wrong decisions are as conclusive as its right ones. It empowers the court to determine every issue within the scope of its authority, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties, unless reversed by writ of error or appeal, or vacated by some direct proceeding."

See, also, In re Marion Contracting & Construction Co. (D. C.) 166 Fed. 618; Edelstein v. United States, 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236; In re Columbia Real Estate Co. (D. C.) 101 Fed. 965.

Whether the appellant is also concluded by its action in proving its claim as an unsecured creditor and participating in the subsequent bankruptcy proceedings in question it is not necessary to decide.

The judgment is affirmed.

GULF TRANSIT CO. v. GRANDE.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1915.)

No. 2744.

1. SEAMEN ⟸29—LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

A gangwayman, employed by a stevedoring company to direct the movements of the winchman in loading bales of cotton into the hold of a steamship, and libelant, who was employed in stowing the cotton, *held* fellow servants, and the employer not liable for an injury to libelant, caused by a premature order to the winchman.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188–194; Dec. Dig. ⟸29.]

2. MASTER AND SERVANT ⟸107—MASTER'S LIABILITY FOR INJURY TO SERVANT—PLACE TO WORK.

While it is the primary duty of the master to use reasonable care to provide the servant with a safe place in which to work, when that has been done, he is not liable for an unsafe condition resulting from the manner in which the workmen carry on their work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199–202, 212, 254, 255; Dec. Dig. ⟸107.]

Appeal from the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

Suit in admiralty by Odin P. Grande against the Gulf Transit Company. Decree for libelant, and respondent appeals. Reversed.

A libel was filed by Odin P. Grande against the appellant, incorporated as stevedores, to recover damages for personal injuries. The cause of action was stated by the libelant as follows:

"1. That on March 30, A. D. 1912, the British steamship Penlee was lying alongside Commendencia Street wharf in the bay of Pensacola, in the Northern district of Florida, receiving a cargo into the hold of said steamship by means

of a certain derrick, winch, and other tackle; that said winch and derrick were upon the deck of said vessel and used in connection with the cable, one end of which was attached to a bale of cotton upon said wharf, and by means of said winch and derrick hoisted from said wharf over the side of said steamship and then lowered into the hold of said steamship and there stowed.

"2. That on the date aforesaid respondent, the Gulf Transit Company, a corporation, through and by its agents and servants, was engaged in loading said cargo of cotton bales from its said wharf into the hold of said steamship as hereinbefore alleged.

"3. That on the date aforesaid libelant, Odin P. Grande, was employed by respondent as its agent and servant in the hold of said steamship, whose duty it was to stow said cotton after same had been lowered into said hold in the manner aforesaid.

"4. That while in the hold of said steamship, in the discharge of his duty to respondent as aforesaid, libelant, and respondent's other employés working with libelant, could not see out upon the deck of the said steamship, or observe bales of cotton as they were lowered from said wharf over the side of said steamship, and lowered into the hold of said steamship, until after same had been hoisted to a point directly over the hold of said steamship, because libelant and his coemployés working in the hold of said steamship as aforesaid were many feet below the deck of said steamship, and were covered by the deck of said steamship, except as to the hatchway; that the work at which the libelant and his coemployés were employed by respondent was arduous and exacting, and that libelant, as well as his coemployés, were required to concentrate their attention upon the work directly in hand; that defendant's winchman, engaged in operation of the winch aforesaid, used for hoisting and lowering bales of cotton as aforesaid, was required to be upon the deck of said steamship near the winch, and while there in the discharge of his duties the respondent's said winchman could not see into the hold of said steamship, and could not see libelant and his coemployés, as they were engaged in the discharge of their duties as aforesaid; that said bales of cotton were large, bulky, and weighed between 400 and 500 pounds each; that because libelant and his coemployés could not see said bales of cotton until they were hoisted to a point directly over the hatchway, and because they had their attention concentrated upon the work directly in hand, and because the winchman aforesaid could not see libelant and his coemployés working in the hold of said steamship, the manner of loading said bales of cotton in said steamship as aforesaid was highly dangerous to libelant and his coemployés, and their lives and safety were constantly in jeopardy.

"5. That it became and was the duty of respondent to libelant to observe due care and diligence to provide libelant with a reasonably safe place in which to work, and in which to discharge his duties to respondent, as aforesaid; that in the discharge of this duty to libelant it became and was respondent's duty to provide a man, whose duty it was to stand upon the deck of said steamship, near the hatchway aforesaid, there to be and remain, and to observe the movement of said cotton in bales, as same was hoisted aboard said steamship from said wharf and lowered into the hold of said steamship, and to give proper and timely warning and signals to the winchman, so that said bales of cotton could be hoisted and lowered into the hold of said steamship with safety to libelant and his coemployés; that this was the positive duty of respondent, and that in discharging said duty respondent's said employé was engaged in discharging a duty which respondent owed directly to libelant and his coemployés, and that said duty was nondelegable.

"6. That on the date aforesaid, while the libelant was working in the hold of said steamship, stowing cotton, as he was employed by respondent to do as aforesaid, the man whom respondent provided and placed on the deck of said steamship for the purpose of giving due and timely signals to the winchman for hoisting and lowering said bales of cotton as aforesaid suddenly, and without warning to libelant, carelessly and negligently signaled the winchman aforesaid to lower away on the bales of cotton, with which signal the said winchman then and there complied, and as a result thereof the said bales of cotton, large and bulky and weighing between 400 and 500 pounds each, forcibly

and violently fell upon libelant, thereby giving to and inflicting upon libelant divers and sundry wounds," etc.

Upon the hearing the court rendered a decree in favor of the libelant for $200, from which the respondent has appealed to this court.

W. A. Blount, A. C. Blount, Jr., and F. B. Carter, all of Pensacola, Fla., for appellant.

John P. Stokes and R. P. Reese, both of Pensacola, Fla., for appelleee.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge (after stating the facts as above). [1] It is conceded by counsel that the injuries of the appellee resulted from the negligence of the gangwayman in prematurely giving a signal to the winchman to lower the cotton. And the only question to be determined is whether the appellee and gangwayman were fellow servants, within the rule which exempts the master from liability for the negligence of one servant resulting in injury to another of the same class. They were both employed by appellant, which was, quoad the ship, an independent contractor. They were engaged in a common employment in the same department of service, and both received orders from the same employer. The gangwayman had no control over the appellee; his duty being simply to signal the winchman when to hoist the cotton and lower it in the hold of the ship. The winch and other appliances were in good condition, and there is no claim that the gangwayman was an incompetent servant. Counsel for the appellee insist that it was the duty of the appellant to exercise reasonable care in providing him with a safe place to work, and that the negligence of the gangwayman in giving the signal prematurely to the winchman rendered the place unsafe, and hence for the resulting injuries to him the appellant is liable in damages.

This position of counsel is opposed by the decided weight of authority, and to it we are unable to give our assent. That the appellee and the gangwayman were fellow servants, and that the appellant was not responsible for the negligent acts of the gangwayman in carrying on the work, clearly appears from the two cases of New England R. R. Co. v. Conroy, 175 U. S. 327, 20 Sup. Ct. 85, 44 L. Ed. 181, and Kreigh v. Westinghouse, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984. The former case, in which the court declined to follow Railway Company v. Ross, cited below, announces a rule to guide us in determining who are fellow servants. At page 328 of 175 U. S., at page 86 of 20 Sup. Ct. (44 L. Ed. 181), the court said:

"Unless we are constrained to accept and follow the decision of this court in the case of Chicago, Milwaukee & St. Paul Railway Co. v. Ross, 112 U. S. 377 [5 Sup. Ct. 184, 28 L. Ed. 787], we have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employé, occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to

perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end."

[2] Referring to the duty of the master to provide his employés with a safe place to work and to his responsibility for injuries resulting from the place becoming unsafe through the negligence of laborers in the manner of conducting the work, it was said by the court in Kreigh v. Westinghouse, 214 U. S. at pages 255, 256, 29 Sup. Ct. at page 621 (53 L. Ed. 984):

"The duty of the master to use reasonable diligence in providing a safe place for the men in his employ to work in and to carry on the business of the master for which they are engaged has been so frequently applied in this court, and is now so thoroughly settled, as to require but little reference to the cases in which the doctrine has been declared. Baltimore & Potomac R. R. Co. v. Mackey, 157 U. S. 72, 87 [15 Sup. Ct. 491, 39 L. Ed. 624]; Union Pacific R. R. Co. v. O'Brien, 161 U. S. 451 [16 Sup. Ct. 618, 40 L. Ed. 766]; Choctaw, Oklahoma, etc., R. R. Co. v. McDade, 191 U. S. 64 [24 Sup. Ct. 24, 48 L. Ed. 96]. The employé is not obliged to examine into the employer's methods of transacting his business, and he may assume, in the absence of notice to the contrary, that reasonable care will be used in furnishing appliances necessary to carrying on the business. Choctaw, Oklahoma, etc., R. R. Co. v. McDade, 191 U. S. 64, 68 [24 Sup. Ct. 24, 48 L. Ed. 96]. But while this duty is imposed upon the master, and he cannot delegate it to another and escape liability on his part, nevertheless the master is not held responsible for injuries resulting from the place becoming unsafe through the negligence of the workmen in the manner of carrying on the work, where he, the master, has discharged his primary duty of providing a reasonably safe appliance and place for his employés to carry on the work, nor is he obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant and his fellow workmen. Armour v. Hahn, 111 U. S. 313 [4 Sup. Ct. 433, 28 L. Ed. 440]; Perry v. Rogers, 157 N. Y. 251 [51 N. E. 1021]."

The case of Ocean Steamship Co. v. Cheeney, 86 Ga. 278, 284, 12 S. E. 351, appears to be peculiarly applicable to the case at bar. Referring to the hatch tender whose negligence resulted in injuries to one of his colaborers, it was said by the court at page 283 of 86 Ga., at page 351 of 12 S. E.:

"The hatch tender was usually the engine driver, or one of the hands employed to assist in loading the vessel. It appears that no special person was designated for this service, but that the hatch tender 'was taken indifferently from the laborers.' He was engaged by the company in the same business that all the other hands of the gang were engaged in, to wit, the loading of the vessel with freight. He was therefore a coemployé with the other persons engaged in this business; and if, when stationed at the hatchway for the purpose of giving notice to the hands below, he failed to give that notice, or if he absented himself from the hatchway, and, while absent, some other person engaged in the business threw the bale down into the hold without notice to those below, and the plaintiff was thereby injured, it was in consequence of the negligence of a coemployé, and under the law he cannot recover for such negligence. We do not think it makes any difference whether the bale was thrown down when the hatch tender was present and failed to give notice, or whether in his absence some other coemployé threw the bale down. In either case it would be the negligence of a coemployé. It would be the negligence of the hatch tender in not giving notice, or in absenting himself from the hatchway, or, in case it was done in the hatch tender's absence, the negligence of some other coemployé in throwing the bale down without notice."

It seems useless to multiply authorities touching a question which has been definitely decided by the Supreme Court. The case of Standard Oil Company v. Brown, 218 U. S. 78, 30 Sup. Ct. 669, 54 L. Ed. 939, relied upon by the appellee, is thought not to be in point. The facts of the Brown Case clearly distinguish it from the case before the court, and it would be a useless consumption of time to point out their differing features. Our conclusion is that the gangwayman was a fellow servant of the appellee, and hence for his negligence no recovery can be had against the appellant.

The decree should be reversed, and the cause remanded, with directions to the trial court to enter a decree dismissing the libel. So ordered.

KEANE WONDER MINING CO. v. CUNNINGHAM.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2495.

1. MASTER AND SERVANT ⟸278—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—SAFE PLACE TO WORK.

In an action for personal injuries received by a miner, evidence *held* sufficient to warrant the jury in finding that the owner was negligent in not making the place of work safe by knocking down loose ore hanging on the roof of a stope before the miner was put to work thereunder.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977; Dec. Dig. ⟸278.]

2. COURTS ⟸7—JURISDICTION—INJURIES TO PERSON—TRANSITORY ACTION.

An action for personal injuries is transitory, and may be maintained in the state in which service can be obtained on the defendant, though the injuries were caused in another state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 14, 16, 22–31; Dec. Dig. ⟸7.]

3. COURTS ⟸8—TRANSITORY ACTION—"PUBLIC POLICY."

Where the statutes of the state in which a transitory cause of action arose are not in substance inconsistent with the statutes or the public policy of the state in which the action is brought, they will be recognized and applied, and to be contrary to the "public policy" of the state the foreign statute must be against good morals or natural justice, or such that the enforcement of it would be prejudicial to the general interests of the citizens, it not being sufficient that, it differs from the law of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19; Dec. Dig. ⟸8.

For other definitions, see Words and Phrases, First and Second Series, Public Policy.]

4. MASTER AND SERVANT ⟸203, 227—INJURIES TO SERVANT—ACTION—LAW GOVERNING.

In an action brought in Nevada for personal injuries to an employé received in California, the provisions of the California statute abolishing the defenses of assumption of risk and contributory negligence can be applied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538–543, 668, 669; Dec. Dig. ⟸203, 227.

What law governs master's liability for injuries to servant, see note to Mexican Cent. Ry. Co. v. Jones, 48 C. C. A. 232.]

In Error to the District Court of the United States for the District of Nevada; E. S. Farrington, Judge.

Action by James Cunningham against the Keane Wonder Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Gavin McNab, B. M. Aikins, and A. H. Jarman, all of San Francisco, Cal., and Sweeney & Morehouse, of Reno, Nev., for plaintiff in error.

Dixon & Miller, J. B. Dixon, and A. Grant Miller, all of Reno, Nev., for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and VAN FLEET, District Judge.

GILBERT, Circuit Judge. The defendant in error, who will herein be designated the plaintiff, in his complaint alleged that he was injured while working as a mucker in the mine of the defendant, that the defendant carelessly drove a stope upwards from a tunnel situated in its mine, and failed and neglected to use ordinary and reasonable care in inspecting the roof or top of said stope, and failed and neglected to pick or bar down from said roof loose rock and ore therein, and caused the plaintiff to work in said tunnel at the bottom of said stope while the stope was in a dangerous condition, owing to the negligence of the defendant in not properly timbering the same, and in not properly inspecting and examining the same, and in not properly picking or barring down the loose rock at the roof of said stope, by reason whereof an amount of ore and rock fell, causing serious injury to the plaintiff.

It is contended that the court below erred in denying the defendant's motion, at the close of the testimony for an instructed verdict in its favor, and it is said that the evidence conclusively shows that it was the duty of the plaintiff, before working in the place where he was injured, to examine the roof of the stope and to bar down any loose material that might remain thereon, and that there was no evidence to show that the defendant was negligent. The view of the court below on this branch of the case is shown where, in denying the motion for a nonsuit, it said:

"Now, here is a large chamber at the point where the accident occurred. The hanging wall was 25 feet above the foot wall, and an enormous body, 60 tons of ore, were left on the hanging wall. It seems to me that in itself was negligence; at least it is a fact tending to show negligence. On the existence of that fact, I hold there is testimony here showing negligence."

The evidence indicated that the ore body varied in thickness, and was from 8 to 15 feet or more, and that it contained a flat seam carrying galena running through and causing a cleavage at about six or seven feet above the foot wall. The ore below the seam was broken out by the use of piston drills working against the breast. The ore above the seam was mined by means of Waugh drills, which were used to blast down the ore from the hanging wall. At the place where the accident occurred, the hanging wall was graphitic schist. After shooting the holes drilled by the Waugh drills, there would,

at times, remain ore bodies, more or less shattered, but still unbroken from the hanging wall. Such an ore body remained above the place where the plaintiff was working. The ore body was white quartz, and between the ore body and the hanging wall there was a gouge, varying in thickness from 1 to 18 inches, a soft black graphitic schist, the presence of which rendered any body hanging below it likely to become detached from the hanging wall. The tendency of the blasting which followed the use of the Waugh drills was to loosen the ore which might still remain thereafter on the hanging wall. To prevent the falling of such ore, and to make safe the working place underneath the same, it was the custom to bar down such rock as might be loose and removable. The defendant contends that this duty of inspection and barring down rested upon the muckers, and argues that it has discharged its full duty in placing that burden upon the muckers, and that therefore it was not negligent. But the plaintiff testified otherwise. He said that it was the duty, not of the muckers, but of the miners, to bar down the loose rock. He testified: "The miner goes in first and bars down the loose rock, and he tells the mucker when it is safe for him to come in"—and he said that on the day on which he was injured, the foreman, Mr. Roper, took him in there to work, "and I though it was all right. Mr. Roper said nothing to me at all." He testified also that:

"Sometimes the foreman himself would bar down the loose rock and see that the place was safe before we would go in there to work."

So the witness Dropulich testified that it was not the muckers' business to use the pinch bars to pick the rock from the roof—"that is a miner's business. I never was work with that. I didn't see it either." Perez, another mucker, who was working in the mine, testified to the same effect, and Porter, who was a miner, testified that it was his duty "to bar down or pick down or sound the rock after a blast to see whether it was safe, or to make it safe." The defendant offered testimony to the contrary. We have nothing to do, however, with the weight of the testimony. We are not convinced that the court below erred in holding that the evidence offered by the plaintiff, if true, was sufficient to show negligence on the part of the defendant. This is not a case in which the only evidence of negligence is the fact of the accident. The jury may have found negligence in the fact alone that ore was allowed to remain on the hanging wall, or that there was want of proper care in inspecting the ore hanging from the roof underneath which the plaintiff was put to work; there being evidence tending to show that a proper inspection and testing of the rock would have disclosed the fact that it was likely to fall. The defendant owed the plaintiff the duty of furnishing him a reasonably safe place in which to work, and from the whole evidence it is not an unreasonable inference that the place could have been made safe by the use of proper precautions.

[2] The action was brought in a state court of Nevada, upon a cause of action which arose in the state of California, and the cause was removed by the defendant to the District Court of the United States for the District of Nevada. Error is assigned to the instruction

whereby the court charged the jury that the case was to be governed by the statute of California, which provided that assumption of risk was no defense to an action of that nature, and that contributory negligence should not bar recovery where the plaintiff's contributory negligence was slight and that of the employer was gross in comparison, in which case the damages might be diminished by the jury in proportion to the amount of negligence attributable to the employé. It is said that this instruction was error for the reason that, under the law of the state in which the action was brought and was pending, assumption of risk and contributory negligence were available as valid defenses to such an action. There can be no doubt of the right of the plaintiff to bring his action in the state of Nevada, provided that he could obtain service upon the defendant therein. Said the court in Atchison, Topeka & Santa Fé Ry. Co. v. Sowers, 213 U. S. 55, 67, 29 Sup. Ct. 397, 401 (53 L. Ed. 695):

"An action for personal injuries is universally held to be transitory, and maintainable wherever a court may be found that has jurisdiction of the parties and the subject-matter."

[3] In Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439, Mr. Justice Miller said:

"Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

In Texas & Pacific Ry. Co. v. Cox, 145 U. S. 593, 605, 12 Sup. Ct. 905, 908 (36 L. Ed. 829), the court said that this rule is generally recognized and applied where the statute of the state in which the cause of action arose—

"is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced."

What was meant by the term "public policy" of the state is shown in Northern Pacific Ry. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958, in which the court quoted with approval from Herrick v. Minneapolis & St. Paul Railroad, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771, the following:

"But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the lex loci contractus and the lex fori are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens."

In Cuba R. R. Co. v. Crosby, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40, the court said:

"With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it."

The cases so cited and the principles therein announced seem to be conclusive of the question which is here presented.

[4] As to the defenses which may be interposed to actions of this class, the Legislature of Nevada has not as yet seen fit to take the advanced position which has been reached by the Legislature of California. In Nevada the old defenses are still pleadable in bar. But the courts of Nevada are open to those whose right of recovery depends upon the law of the state where the injuries were received. To permit in the court of the forum defenses which were not pleadable in the state where the cause of action arose would be to deprive the plaintiff of a portion, if not the whole, of his right of action, granted by the laws of that state. In what respect would it contravene the public policy of Nevada to accord the plaintiff the rights which are given him by the state of California? It certainly cannot be said that it would be against "good morals" or "natural justice," or that it would be "prejudicial to the general interests" of the citizens of Nevada. There is no statute of Nevada which prohibits the enforcement of this cause of action in accordance with the laws of the state in which it arose. Some of the state courts have adopted a restricted rule of interstate comity, which, if applied in this case, would fully sustain the defendant's contention. But in the federal courts, following the lead of the Dennick Case, in which Mr. Justice Miller declared a liberal rule of comity, the tendency has been to establish a broader rule, a rule which accords, we think, with enlightened procedure, justice and common sense.

A decision directly in point is Missouri Pac. Ry. Co. v. Larussi, 161 Fed. 66, 88 C. C. A. 230, in which the Circuit Court of Appeals for the Seventh Circuit, in an action brought in Illinois upon a cause of action which arose in Kansas, held that the law of Kansas relieving railroad employés from the common-law rule of assumed risk from negligence of fellow servants was applicable, and would be enforced in the court of the forum. See, also, Theroux v. Northern Pac. R. Co., 64 Fed. 84, 12 C. C. A. 52, in which the Circuit Court of Appeals for the Eighth Circuit held that an action for death by wrongful act occasioned in a state, which gives three years for suing therefor, may be maintained at any time within the three years in another state which gives only two years in which to bring such an action.

We find no error. The judgment is affirmed.

GIBBONS v. GOLDSMITH.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2481.

1. BANKRUPTCY ⊂=455—REVIEW—APPEAL—"CONTROVERSY IN A BANKRUPTCY PROCEEDING."

Wherever a third person claims the property held by the trustee in bankruptcy, whether he intervenes by original petition or is brought in on the application of the trustee, he institutes a "controversy in a bankruptcy proceeding" in which the judgment is appealable under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 916; Dec. Dig. ⊂=455.

For other definitions, see Words and Phrases, Second Series, Controversy Arising in Bankruptcy Proceeding.

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY ⊂=440—REVIEW—PETITION TO REVISE—"BANKRUPTCY PROCEEDING."

A question raised by the claimant of property adverse to a trustee in bankruptcy, whether the bankruptcy court had jurisdiction to determine that claim, is a question of a "bankruptcy proceeding," reviewable by petition to revise, under Bankr. Act, § 24b.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⊂=440.

For other definitions, see Words and Phrases, First and Second Series, Bankruptcy Proceeding.]

3. BANKRUPTCY ⊂=140—JURISDICTION OF COURT—ADVERSE CLAIM—COMMUNITY PROPERTY.

Under the provisions of the Bankruptcy Act, vesting the trustee with the title of the bankrupt to all property which, prior to the filing of the petition against him, could have been sold under judicial proceedings against him, and Rem. & Bal. Code Wash. § 5918, giving to the husband the control of the community property, and providing that such property may be sold on execution for community debts, and the decisions of the state courts that debts contracted by the husband during the existence of the marriage are prima facie community debts, the bankruptcy court has jurisdiction to determine the disposition of funds in the hands of the trustee in bankruptcy arising from the sale of community property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⊂=140.

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

4. BANKRUPTCY ⊂=140—ADVERSE CLAIMS—DETERMINATION—PROCEEDINGS.

Such jurisdiction was properly exercised, where the wife was given full opportunity to present her claim to the property, to frame issues, and to adduce evidence to the same extent as she might have done in any other suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⊂=140.]

Petition for Revision of Proceeding of the District Court of the United States for the Northern Division of the Western District of Washington, in Bankruptcy; Jeremiah Neterer, Judge.

Petition by Mary L. Gibbons against J. S. Goldsmith, as trustee in bankruptcy of the estate of Pat Gibbons, bankrupt, to revise an order of the District Court entered in the bankruptcy proceedings. Petition dismissed.

Pat Gibbons, upon the petition of creditors, was adjudged a bankrupt. The bankrupt's estate consisted of 640 acres of land on which was a coal mine then under a lease for a period of years. This property was acquired by the bankrupt and his wife, the petitioner herein, through their joint efforts, and, under the laws of the state of Washington, it was community property. The petitioner was not a party to the bankruptcy proceedings, nor did she in any way assent thereto. The trustee took possession of the property, caused the land to be appraised, and sold, subject to the lease, for the sum of $48,050. In the meantime, pending the bankruptcy proceedings, the lessee had paid $8,174.51, as royalties under the lease, to the Seattle National Bank, for the benefit of the trustee. It was paid to the bank, for the reason that the trustee contemplated contesting the validity of the lease, and declined to receive the same. The estate being in a condition to be closed, the trustee decided to withdraw the $8,174.51 from the Seattle National Bank. The bank declined to pay the same, on the ground that the petitioner had asserted some adverse claim to the fund. The trustee thereupon filed his petition in the District Court, praying for an order directing the bank to show cause why it should not pay the money, and directing the petitioner to appear at the same time and propound any claim which she might have, not only to the money in the bank, but also to the money realized on the sale of the land. The petitioner appeared and objected to the jurisdiction, and moved to quash the citation to show cause. These motions being overruled, she answered, alleging that all of the said land belonged to the community; that the entire indebtedness of Pat Gibbons was separate, and not the indebtedness of the community; that before the sale of said land was made, or attempted to be made, she duly filed in the office of the auditor of the county in which the same is situated a claim asserting her community title and interest in and to said property, and the trustee in bankruptcy had notice of her rights and claim. In the answer she insisted upon her objection to the jurisdiction, and refused to consent to the matter being heard and determined by the bankruptcy court, and prayed that the proceedings be quashed. The allegations of the answer were put in issue by the trustee. The petitioner offered no proof on the hearing. The referee entered an order adjudging all the assets to be property of the community, and held that some, if not all, of the claims proved were actually community debts, that under the law the debts were presumptively community debts, and that the trustee was entitled to the control of the community property and to the funds derived therefrom. The petitioner brought the matter before the District Court for review, and the order of the referee was affirmed. The petitioner on a petition to revise now presents the foregoing facts to this court, and prays that the order of the District Court and the referee be vacated, set aside, and held for naught, and that it be adjudged that the District Court had no jurisdiction over the funds in the possession of the Seattle National Bank, and no jurisdiction over the money realized from the sale of the lands, and no jurisdiction to sell or dispose of said lands, and no jurisdiction to adjudge in this summary proceeding the rights of the petitioner.

Israel & Kohlhase and Joseph W. Robinson, all of Seattle, Wash., for petitioner.

Clise & Poe, of Seattle, Wash., for Dexter Horton Trust & Savings Bank.

McClure & McClure, of Seattle, Wash., for J. S. Goldsmith, as trustee, etc.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). This case presents the beclouded question which arises in nearly every case in which review of decisions in bankruptcy is sought in an appellate court. Is the remedy by appeal or by petition to revise? Is the judgment to be reviewed a step in a bankruptcy proceeding, or is it a controversy arising in a bankruptcy proceeding? The answer to the question in a case of this kind depends upon the nature of the proceeding in the bankruptcy court, and the questions which are to be presented for review to the appellate court. It is to be observed that the petitioner in this case does not attempt to bring before this court the merits of a controversy which was decided in the court below. She presents only the question of the jurisdiction of that court to deal with the subject-matter of the proceeding. The prayer of her petition is that it be adjudged that the District Court had no jurisdiction over any of the funds realized from the community property or the sale thereof, and had no jurisdiction to sell or dispose of said property, and no jurisdiction to determine in a summary proceeding the rights of the petitioner in or to said funds or said lands.

[1] If the petitioner were here seeking a reversal of the judgment on the merits, and asserting the adverse right to receive all or a portion of the funds in the hands of the court in the proceeding which was instituted therein, her remedy would clearly be by appeal. For whereever, in a proceeding such as this, a third person intervenes in the bankruptcy court and asserts an independent and superior title to the property held by the trustee, claiming the right to recover and remove the same from the jurisdiction of the bankruptcy court as part of the estate to be administered, he institutes a controversy in a bankruptcy proceeding, whether he intervenes by an original petition, or is brought into court upon the application of the trustee, and to review the judgment of that court his remedy is by an appeal under the provisions of section 24b. Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Knapp v. Milwaukee Trust Co., 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. 610; Houghton v. Burden, 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. 780; Loeser v. Savings Deposit Bank & Trust Co., 163 Fed. 212, 89 C. C. A. 642; In re Hartzell, 209 Fed. 775, 126 C. C. A. 499; In re McMahon, 147 Fed. 685, 77 C. C. A. 668; In re Moody (D. C.) 131 Fed. 525; In re Rochford, 124 Fed. 182, 59 C. C. A. 388; Galbraith v. Robson-Hilliard Grocery Co., 216 Fed. 842, 133 C. C. A. 46.

[2] But where it is sought, as in this case, to present to the Circuit Court of Appeals the question whether the District Court erroneously exercised jurisdiction to determine the merits of an adverse claim to property, the question of law so raised is a question of a bankruptcy proceeding, and it is reviewable by a petition to revise under section 24b of the Bankruptcy Act. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; Schweer v. Brown, 195 U. S. 171, 25 Sup. Ct. 15, 49 L. Ed. 144; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; In re Gill, 190 Fed.

726, 111 C. C. A. 454; In re McMahon, 147 Fed. 684–687, 77 C. C. A. 668; In re Blum, 202 Fed. 883, 121 C. C. A. 241; Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537; In re Goldstein, 216 Fed. 887, 133 C. C. A. 91.

In Schweer v. Brown the court said:

"If the court erred in retaining jurisdiction on the merits, the remedy was by petition to the Circuit Court of Appeals under section 24b."

In Re McMahon Judge Lurton said:

"In respect to the judgment of the District Court overruling the objections made to the * * * jurisdiction, we have reached the conclusion that the action of that court was subject to review under the supervisory powers conferred upon this court by section 24b."

[3] The only question which remains to be considered is whether the District Court had the jurisdiction and power to entertain the proceeding and render the judgment which is complained of. The real estate out of which the fund in controversy was realized was admittedly community property. The petitioner and the bankrupt had been married more than 29 years. The debts were incurred within that period. The status of the community property in the bankruptcy court, and the rights of the members of the community in respect to the same, are to be determined by the statutes and the decisions of the state of Washington. Section 5918, Remington & Ballinger's Code, gives the husband the management and control of the community real property, and provides that all such community real estate shall be subject to liens of judgments recovered for community debts, and to sale on execution issued thereon. By the decisions of the Supreme Court of that state it is well settled that, while all property acquired by the husband is prima facie community property, all debts created by him during the existence of the marriage are prima facie community debts. Calhoun v. Leary, 6 Wash. 21, 32 Pac. 1070; Bird v. Steele, 74 Wash. 68, 132 Pac. 724. Numerous other decisions may be cited to the same effect. It is also well settled that an execution issued against the husband for a community debt may be levied on community real property. Curry v. Catlin, 9 Wash. 495, 37 Pac. 678, 39 Pac. 101; Horton v. Donohoe-Kelly Banking Co., 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; Allen v. Chambers, 18 Wash. 341, 51 Pac. 478. In Thygesen v. Neufelder, 9 Wash. 455, 37 Pac. 672, it is held that a conveyance by a husband to an assignee for the benefit of community creditors is a rightful application of community property for the discharge of community obligations; and in Bimrose v. Matthews, 78 Wash. 38, 138 Pac. 319, it was held that a discharge of the husband in bankruptcy from the obligation of a community debt of necessity discharged also the wife, although she was not a party to the bankruptcy proceeding. Prima facie, as we have seen, the debts were all community obligations. The trustee, by operation of the Bankruptcy Act, became vested with the title of the bankrupt to all property which, prior to the filing of the petition against him, could have been sold under judicial process against him.

The fund which was the subject of the proceeding in the bank-

ruptcy court was in the actual possession of that court. It follows from that fact that the court had the power to deal with the question of its disposition and its distribution. In Murphy v. John Hofman Co., 211 U. S. 562, 569, 29 Sup. Ct. 154, 158 (53 L. Ed. 327), it was said:

"Where a court of competent jurisdiction has taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property has an ancillary jurisdiction to hear and determine all questions respecting the title * * * or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them."

So in Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, it was held that, where property was in the possession of the bankrupt at the time of the appointment of a receiver, the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant. The District Court had therefore jurisdiction to hear and determine all adverse claims to the fund which was in its possession, and that jurisdiction was properly exercised in the manner in which the proceeding under consideration here was had. That proceeding was not strictly summary, but it was plenary in its nature. It afforded the petitioner herein as full opportunity to present her claim, to frame issues, and to adduce evidence as she could have had in any other form of suit. As Judge Lurton said in Loeser v. Savings Deposit Bank & Trust Co., 163 Fed. 212, 89 C. C. A. 642:

"Having the actual possession, it mattered nothing whether the trustee instituted a proceeding to bring the bank in for the determination of the controversy, or whether the bank had intervened by petition to assert its rights."

It follows that the petition must be dismissed, with costs in favor of respondent and against petitioner.

CRIBBEN & SEXTON CO. et al. v. NORTH END HOUSE FURNISHING CO.†

(Circuit Court of Appeals, Eighth Circuit. March 25, 1915.)

No. 4251.

BANKRUPTCY ⊂=91—ACTS OF BANKRUPTCY—FRAUDULENT TRANSFER OF PROPERTY.

Evidence considered, and *held* to sustain the allegations in a petition in involuntary bankruptcy of acts of bankruptcy by transferring property with intent to hinder, delay, and defraud creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137–139; Dec. Dig. ⊂=91.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

In the matter of the North End House Furnishing Company, alleged bankrupt. From an order dismissing their petition, the Cribben & Sexton Company and others, petitioning creditors, appeal. Reversed.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied June 16, 1915.

Lee W. Grant, of St. Louis, Mo. (Wilbur H. Close, of St. Louis, Mo., on the brief), for appellants.

William Zachritz and Hugh D. McCorkle, both of St. Louis, Mo. (Edgar F. Zachritz, of St. Louis, Mo., on the brief), for appellee.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. This is an appeal from a judgment dismissing an involuntary petition in bankruptcy. Appellants filed the petition against appellees March 8, 1913, and alleged among other acts of bankruptcy the following:

"Your petitioners further state that the said North End House Furnishing Company committed an act or acts of bankruptcy, in that, beginning with January 29, 1913, until the date of the filing of the petition herein, the said North End House Furnishing Company from time to time transferred and conveyed a part of its property with intent to hinder, delay, or defraud its creditors, or some of them, in that during all of said period it turned over to one Samuel Gibstine, as fast as the same was collected, all cash received by it, being both cash collected from accounts and bills receivable and cash derived from cash sales, and that said sums so transferred from day to day were turned over to the said Gibstine with intent to hinder, delay, or defraud its creditors; that the exact amount so transferred is unknown to your petitioners, for the reason that the said North End House Furnishing Company did not keep correct books of account and has destroyed the cash book kept by it during said period; that your petitioners state that the amount so transferred with intent to hinder, delay, or defraud its creditors exceeds the sum of five hundred dollars ($500.00). Your petitioners further state that the said North End House Furnishing Company committed a further act of bankruptcy, in that it did convey and transfer part of its property with intent to hinder, delay, or defraud its creditors, on or about the 5th day of February, 1913, in that it did on or about said date transfer and convey to the Diamond Investment Company certain bills receivable, secured by mortgage, owned by it, said bills receivable being executed by the following persons and in the following amounts, to wit:

Joseph Murphy	$241.60
Joseph Bequerst	115.50
J. P. Smith	30.00
Jos. Vittitoe	44.50
Oscar Strasmer	47.50
Fred Schneeman	30.80
L. Nagel	78.00
William Dietrichs	50.00
Paul Nordgens	22.00
J. Frail	28.00
Geo. Schmitz	40.50
Harry L. Kellar	20.00
J. Moore	98.00
J. M. Wolff	28.00
H. Seib	36.00
John Mehl	50.12
Howard T. Smith	20.00
L. Berman	12.75
Minsterman	9.50
C. Smith	7.00
Frank Block	13.90
Anton Spitz	7.05
Gus Schlueter	7.57
Geo. Harig	4.60
Geo. Rodemeyer	9.20

Peter Heitman	$ 17.00
Wm. Pohlman	12.00
Augustus Martin	19.00
Theodore Callis	4.00
L. Breuer	19.00
E. Berns	3.00
Elizabeth Meyer	43.25
Mary Gevers	54.10
H. F. Kruse	20.00
J. B. Viekery	40.00

"That said transfer was made by it with intent to hinder, delay, or defraud its creditors, and was without consideration."

A receiver was appointed, and the stock of merchandise belonging to appellee was sold for $798.57. Appellee answered the petition, and the issues thus raised were referred to a master, who made a report recommending the dismissal of the petition. The report was confirmed, and petition dismissed. The master reported with reference to the above alleged acts of bankruptcy as follows:

"In the opinion of the special master, the evidence does not justify him in finding that the respondent transferred any of its money to Gibstine with the intent on its part to hinder, delay, or defraud its creditors. The argument made on behalf of the petitioning creditors in support of this act of bankruptcy consists of a series of assumptions and conjectures, and although the evidence is perhaps sufficient to raise a suspicion that Gibstine did not account for all the money of the company received by him, the special master thinks that the petitioners have failed to sustain this act of bankruptcy by a preponderance of the evidence. The charge that the transfer of the company's notes to the Diamond Investment Company was without consideration, and was made with intent to hinder, delay, or defraud its creditors, is not sustained by the evidence. The evidence shows that the notes in question were pledged to the Diamond Investment Company as security for a loan made to the respondent company. There is no evidence warranting the conclusion that the transaction was without consideration, or that it was made with the intent alleged in the petition."

We think the master and the court erred in so finding. The evidence in the record with reference to these alleged acts of bankruptcy is substantially as follows: Appellee was a corporation doing business in St. Louis, Mo., on the time payment plan. At the time the petition was filed Samuel Gibstine owned a majority of the stock of the corporation, and H. F. Hartnagel owned the balance. Gibstine alone contests the involuntary petition. He became interested in the corporation about January 27, 1913, by purchasing a majority of the stock. Early in January, 1913, the corporation employed a Mr. Umbreit to make an audit of its affairs. The audit showed merchandise on hand of about $2,900 or $3,000; stock, cash, and outstanding accounts, $4,900. The liabilities for merchandise amounted to $3,000. Gibstine testifies to a somewhat smaller value of merchandise when he took possession, but his valuation was simply an estimate. Prior to the time that Gibstine assumed control of the corporation a ledger was kept, in which were entered all sales made on credit. There were also kept order slips, or sales slips, on which was entered each sale, and which constituted the original record entry of each sale, and the number of these order slips was also entered in the ledger opposite each charge item. There was also kept a cashbook, in which was entered all cash

items including collections and cash sales. There was also kept a bank account at the Bremen Bank, where all moneys belonging to the corporation were deposited. The corporation paid its debts fairly well. After Gibstine secured control of the corporation it failed to enter all credit sales in the ledger; it ceased to enter in the ledger opposite the charge items the number of the order slips; it ceased to deposit its money in bank, but all moneys received, either from collections or from cash sales, were turned over to Gibstine. Gibstine kept no account of the moneys turned over to himself, and the books of the corporation show no record of these moneys. A few days after Gibstine took charged he pledged with the Diamond Investment Company, owned by his wife, mortgages of the corporation amounting to $1,300 to secure an alleged loan of $500. The check for this $500 was handed by Gibstine to Tiekmeier, who seems to have been the treasurer of the corporation. Tiekmeier indorsed it in the name of the corporation and handed it back to Gibstine, and Gibstine collected the money on it. Gibstine testifies that the $500 borrowed from the Diamond Investment Company was used to run the business and pay current expenses, but just what expenses it paid does not clearly appear. After January 27, 1913, the corporation paid none of its indebtedness. Between February 4th, and February 24th, about nine suits for sums aggregating $735.60 were filed against it. Up to the time the receiver took possession on March 10 or 12, 1913, the business of the corporation went on as usual, so far as sales of merchandise were concerned.

Hilkerbaumer testifies that, in a conversation had with McCorkle, Gibstine, and Hieger (the latter secretary of the company), they told him (Hilkerbaumer) that during the month of February alone they had made sales aggregating $1,200. Tiekmeier testifies that the profits on sales were not less than 100 per cent. The books of the corporation, however, show credit sales for January, February, and 11 days of March of only $587.23, and cash sales of only $43.60, which would be $569.17 less than they admitted had been sold in February alone. At the time of the bankruptcy the corporation owed a total of $3,500. When the receiver took charge, Gibstine turned over to him cash amounting to $14.75 and a few notes as all the property belonging to the corporation. Subsequently, after an examination had before the referee, other mortgages were turned over upon a second demand by the receiver.

It is impossible, of course, to ascertain the exact amount of money received from the business by Gibstine; but the evidence conclusively shows that he received a sufficient sum of money from the business under such circumstances to sustain the allegation in the petition that the corporation transferred a portion of its property between January 29, 1913, and the day of filing the petition, with intent to hinder, delay, and defraud its creditors. We also think the act of bankruptcy charged to have been committed on the 5th day of February, wherein $1,300 worth of bills receivable secured by mortgage were transferred to the Diamond Investment Company, is fully proven, and that said transfer was made with intent to hinder, delay, and defraud the creditors of the corporation.

The judgment of the court below should be reversed, and the case remanded, with instructions to enter judgment adjudging the corporation a bankrupt, and to thereafter proceed therein according to law.

PITTSBURGH S. S. CO. v. DULUTH S. S. CO.

DULUTH S. S. CO. v. PITTSBURGH S. S. CO.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1915.)

Nos. 2576, 2577.

1. COLLISION ⟸102—STEAMERS MEETING IN FOG—FAULTS OF BOTH VESSELS.
A collision near the lower end of Lake Huron in a dense fog between the steamer Sonoma, passing up, and the steamer Empire City, passing down, *held* due to faults on the part of both vessels. Each vessel was one of a procession supposed to be on courses some distance apart. The Sonoma heard the fog signals of the Empire City, and gave a passing signal which was not answered, and, although she heard two more fog signals, she failed to sound alarm signals and slow down, as required by rule 26 of the Rules for the Great Lakes (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649 [Comp. St. 1913, § 7936]). The Empire City was also chargeable with contributory fault because, being off her course and seeking a place to anchor during the fog, she was inattentive and failed to hear either the passing signal or the alarm signals of the Sonoma.

[Ed. Note.—For other cases, see Collision, Dec. Dig. ⟸102.

Collision, signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

2. COLLISION ⟸104—VIOLATION OF RULES—BURDEN OF PROOF.
A vessel which at the time of collision is in actual violation of a statutory rule designed to prevent collisions has the burden to show that such violation could not have contributed to the collision.

[Ed. Note.—For other cases, see Collision, Dec. Dig. ⟸104.]

Appeals from the District Court of the United States for the Northern District of Ohio; William L. Day, Judge.

Suit in admiralty for collision by the Pittsburgh Steamship Company, owner of the steamer Empire City, against the Duluth Steamship Company, owner of the steamer Sonoma, with cross-libel. Decree holding both vessels in fault, and both parties appeal. Affirmed.

H. A. Kelley, of Cleveland, Ohio, for libelant.

H. D. Goulder and R. G. McCreary, both of Cleveland, Ohio, for cross-libelant.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. This is an admiralty case, involving collision between the steamer Empire City, owned by the Pittsburgh Steamship Company, and the steamer Sonoma, owned by the Duluth Steamship Company. The collision occurred at the foot of Lake Huron, during a heavy fog, and between the intersection of the Ft. Gratiot and Point Edward ranges (near the entrance of the St. Clair river) and the lightship stationed 1½ miles north of this range intersection.

The Sonoma was up-bound, light; the Empire City was down-bound, laden with iron ore—each vessel being over 400 feet in length. All the testimony was taken in open court. The District Court found both vessels at fault, and accordingly condemned each to pay one-half the damages and costs. Both parties have appealed.

[1] The following facts are conceded or undisputed: Up-bound vessels, soon after leaving the St. Clair river on the Ft. Gratiot range, make a turn to port of about two points onto the course indicated by the Point Edward range, which course runs practically due north past the lightship and is known as the "ship channel course," there being at least 1,000 feet of good water on each side of the range line. For some hours before the collision the weather had been intermittently foggy, and a large number of down-bound vessels had waited in the vicinity of the lightship for the weather to clear; and at about 8 o'clock in the morning this large number of boats proceeded down substantially in procession, steering on what was taken to be the ideal range line. The Algonquin and the Goulder were immediately in advance of the Empire City, which was followed by the Rogers. At about the same time a number of up-bound vessels left the mouth of the St. Clair river; the Ionia, a small and heavily laden steamer, preceding the Sonoma, which soon after turning on the Point Edward range dropped about half a mile astern of the Ionia. Perhaps halfway between the range intersection and the lightship the fog closed in thick, and during this fog the Ionia met and passed the Algonquin, the Goulder, and the Empire City in the order named, and the Sonoma met and passed the Algonquin and the Goulder; the passing being in each case port to port and under appropriate passing signals. The collision between the Sonoma and the Empire City occurred shortly after the latter had passed the Ionia.

We have no difficulty in finding that the Sonoma's fault contributed to the collision. The Empire City, in common with the other vessels involved, blew at proper intervals the prescribed fog signals. The Empire City's signal of three blasts was heard by the Sonoma, which responded with a one-blast passing signal. This latter signal was not replied to by the Empire City, who afterwards gave two further fog signals, presumably at intervals of about one minute. Meanwhile the Sonoma kept on her course, and without giving alarm signals, in spite of the Empire City's failure to respond to the passing signal. In failing to slow down to a standstill and blow an alarm the Sonoma violated navigation rule 26 applicable to the Great Lakes. The New York, 175 U. S. 187, 201, 20 Sup. Ct. 67, 44 L. Ed. 126; The North Star (C. C. A. 6) 62 Fed. 71, 10 C. C. A. 262; The George W. Roby (C. C. A. 6) 111 Fed. 601, 49 C. C. A. 481; Hawgood Transit Co. v. Mesaba S. S. Co. (C. C. A. 6) 166 Fed. 697, 701, 92 C. C. A. 369.

[2] While the Sonoma was perhaps not imperatively bound to stop the instant she heard the Empire City's first fog signal (The Umbria, 166 U. S. 413, 17 Sup. Ct. 610, 41 L. Ed. 1053), she was plainly in fault for disregarding three successive signals. The Sonoma thus having been at the time of collision in actual violation of a statutory rule designed to prevent collisions, the burden was upon her to show

that such violation could not have contributed to the collision. The Pennsylvania, 19 Wall. 125, 126, 22 L. Ed. 148; The Martello, 153 U. S. 64, 74, 14 Sup. Ct. 723, 38 L. Ed. 637; The Ellis (C. C. A. 5) 152 Fed. 981, 82 C. C. A. 112; Hawgood Transit Co. v. Mesaba S. S. Co., supra, 166 Fed. at page 702, 92 C. C. A. 369. It certainly cannot be said that, had the Sonoma observed the statutory obligations, the collision would have occurred. That vessel's fault must therefore be held to have contributed thereto. We thus find it unnecessary to determine whether the Sonoma complied with rule 15, by reducing her speed to bare steerageway on hearing the Empire City's fog signals.

To determine whether the Empire City was also at fault, further statement of facts is needed. When the fog shut in the Empire City's engines were stopped, according to her master's testimony, and the boat at the last drifted with the current, which was about two miles an hour, and thus lost helm control, except that "she would sheer a little" and a "kick ahead" had to be given to "steady her." The master, according to his testimony, had decided to anchor, and just before the collision soundings were being taken, which showed an entire loss of headway, and the wheel had been put hard aport, for the purpose of turning to anchor. The trial judge reached the conclusion that the collision occurred several hundred feet east of the ideal range line; that the Empire City's lookout, although complete in numbers, failed to hear either the passing signal or the fog signals blown by the Sonoma; and that the Empire City was thus at fault in failing to give due attention to the presence of other vessels and their signals, being absorbed with the anchoring of the vessel while on a course pursued by upward-bound vessels in procession, and at a position greatly to the eastward of the course generally followed at that time by down-bound boats. That the Empire City was "following in a procession of boats" is admitted by her wheelsman.

We see no reason to question the correctness of the court's conclusions of fact, which, indeed, we should not disturb, in the absence of a decided preponderance of evidence to the contrary. City of Cleveland v. Chisholm (C. C. A. 6) 90 Fed. 431, 434, 33 C. C. A. 157; Monongahela, etc., Co. v. Schinnerer (C. C. A. 6) 196 Fed. 375, 379, 117 C. C. A. 193. That the collision occurred several hundred feet east of the ideal range line satisfactorily appears by the testimony of the Ionia's master, who says that his vessel passed the Empire City at a distance of 600 to 700 feet to port and while his vessel was 800 to 900 feet east of the ranges, and by the testimony of the Algonquin's master, that he passed the Ionia at an estimated distance of 800 to 900 feet and the Sonoma at a distance of about 400 feet. The testimony of the navigators of the Goulder also indicates that the procession of up-bound boats passed at a safe distance from the general course of the down-bound procession, although the Goulder's master did not identify either the Ionia or the Sonoma.

The Empire City's navigators, it is true, say they turned onto the ideal range line soon after leaving the lightship and that that course was kept; but the testimony to that effect does not impress us as sufficiently definite and satisfactory to overcome the disinterested and

fairly convincing testimony indicating that the Sonoma must have been several hundred feet east of the ideal range line when the collision occurred—in spite of the danger of placing too much dependence upon estimates of distances in a fog, where sounds must be largely relied on. If, then, the collision happened at the place found by the trial judge, it is not easy to escape the conclusion that the Empire City was also at fault. We say this because, although she had the right under ordinary conditions to pursue her course easterly of the ideal range line, and (on using due precautions to prevent collision with the line of the up-bound and down-bound processions and in the presence of appropriate notice or warnings that the vessel was at rest) had the absolute right to anchor when the fog became so thick as to make navigation dangerous, it obviously would be negligent for her navigators, in this juncture, which called for the exercise of great care, to become, for any reason, so inattentive to surrounding conditions, including the up-bound and down-bound processions and the Sonoma's passing and fog signals, as to permit the boat to be carried out of what was asserted to be its carefully chosen course, and to pass directly into what should have been known was the path of the up-bound vessels generally, if not of the Sonoma in particular—even if we assume there was no negligence, under the existing circumstances, in failing to add a low engine speed to the current speed, for the purpose of helm control.

It is to be noted that the Empire City's wheelsman testifies that her course was shifted a half point to the westward for the purpose of meeting the Ionia, that the latter was thus passed at an estimated distance of about 150 feet, that after this passing was made the Empire City had been brought back to the eastward substantially to her course previous to meeting the Ionia, and that the latter was only about a boat length clear of the Empire City's stern when the Sonoma appeared about 400 to 450 feet away, coming head on, which seems to have been the first knowledge any one on the Empire City had of the Sonoma's proximity or presence. This testimony, while more or less inconsistent with a total absence of helm control for any considerable period preceding the collision, suggests a lack of attention on the part of those responsible for the Empire City's navigation to what was going on in the immediate vicinity, by way of fog and passing signals, and may not unnaturally help to account in some degree for a variation of a few hundred feet to the eastward from the Empire City's course, believed to have been taken after leaving the lightship. No satisfactory reason is given for the failure of the Empire City to hear the Sonoma's signals as readily as the Algonquin and the Goulder apparently did, nor why the Empire City should have heard the signals of the Ionia and not those of the Sonoma.

After a careful consideration of the record, we are satisfied of the correctness of the trial court's finding of contributory negligence on the part of the Empire City; and the decree of the District Court is accordingly affirmed. As each party has appealed, the costs of this court will be divided.

THE DOLBADARN CASTLE.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2430.

1. SHIPPING ⟸132—DAMAGE TO CARGO—LIABILITY OF VESSEL—BURDEN OF PROOF.

Under a bill of lading exempting the ship from liability for "leakage, breakage, loss or damage by heat, sweat, rust or decay, unless occasioned by improper stowage," where it is shown that the goods were damaged by sweat or rust, the burden rests upon libelant to prove that such sweat or rust was the result of improper stowage; otherwise the ship is exonerated.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. ⟸132.]

2. ADMIRALTY ⟸118—REVIEW ON APPEAL—FINDINGS OF FACT.

In admiralty, findings of fact made by the trial court will not be disturbed by an appellate court, unless it clearly appears that there was error.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758–775, 794; Dec. Dig. ⟸118.]

3. SHIPPING ⟸132—DAMAGE TO CARGO—LIABILITY OF VESSEL.

Evidence considered in a suit for damage to cargo, and *held* to sustain the findings of the trial court that the damage was not due to improper stowage, but was caused by sea water which entered because of the straining of the ship and the opening of the deck seams during unusually violent storms, which constituted a peril of the sea, or to other causes within the exemptions in the bills of lading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. ⟸132.]

Appeal from the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

Suit in admiralty by Parrott & Co., a corporation, against the bark Dolbadarn Castle, the Dolbadarn Castle Shipping Company, Limited, claimant. Decree for respondent (212 Fed. 565), and libelant appeals. Affirmed.

Louis T. Hengstler and Andros & Hengstler, all of San Francisco, Cal., for libelant and appellant.

Ira S. Lillick, of San Francisco, Cal., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The appellant brought a libel against the Dolbadarn Castle, to recover for damages to certain freight shipped at Rotterdam to be transported to San Francisco. The libel alleged that in February, 1910, the appellant shipped on said bark in good order and condition, 2,023 sheets or steel plates, and 2,775 barrels of cement, and that the said goods were not delivered in like good order and condition, but were damaged while they were on board and in the custody of the bark. The claimant, the appellee herein,

alleged as an affirmative defense that the loss and damage referred to in the libel was caused solely and entirely by the force of the wind and waves and perils of the sea, which, notwithstanding that the bark was seaworthy and the goods were properly stowed, so injured and strained the vessel that the sea water was forced through her decks and into the cargo referred to, wetting and damaging the same, that the master and crew took every precaution for the protection of the cargo, and that the damage was caused by the act of God and without fault on their part, or insufficiency on the part of the vessel. From a decree dismissing the libel, the libelant appeals.

[1] It is contended, first, that the court below erred in ruling that on the issues raised by the pleadings, the burden of showing improper stowage, was upon the libelant. What the court held was that upon the evidence, the cargo was damaged either by sea water or by moisture resulting from sweat, that as one of the provisions of the bills of lading was that the ship should not be liable for damage resulting from the act of God or perils of the sea, the vessel was not liable for damage occasioned by sea water, because the evidence was that the presence of sea water in the hold had been the result of unusual storms and extraordinarily heavy weather, and that as one of the exceptions in the bills of lading was that the ship "is not liable for leakage, breakage, loss or damage by heat, sweat, rust or decay, unless occasioned by improper stowage," the vessel was not liable for the damage from sweat or rust, unless the libelant proved that such sweat or rust was the result of improper stowage. As to the testimony tending to show that the moisture which caused the caking of the cement and the rusting and pitting of the plates was the result of sweat arising from a cargo of coke, the court said:

"If it be conceded that this fact is established, the burden of proving that the damage from such sweat was occasioned by improper stowage is upon the libelant. For once the damage is brought within the exceptions of the bill of lading, the ship is exonerated, unless the libelant show that notwithstanding such exception the ship is liable because of some negligence; in this case, the negligence of improper stowage."

The case of The Folmina, 212 U. S. 354, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748, cited by the appellant, does not support its contention. In that case it was held that when goods, received in good order on board a vessel under a contract to deliver them at the termination of the voyage in like good order and condition, are damaged on the voyage, the burden of proof is on the carrier to show that the damage was occasioned by a peril for which it is not responsible, and that merely proving that the damage was done by sea water does not establish that the damage was caused by peril of the sea, within the exception of the bill of lading, and that it is the duty of the carrier to sustain the burden of proof by showing a connection between damage by the sea water and the exception against sea perils. In the case at bar that requirement of proof was met by evidence that sea water reached the cargo, and evidence upon which the court found that whatever sea water entered did so by reason of the fact that the ship became strained by the unusual storms and the heavy seas encountered by her. In the Folmina Case the court cited, among other

cases, the decision of this court in the Henry B. Hyde, 90 Fed. 114, 32 C. C. A. 534, in which it was held that where a libel for injury to goods in shipment alleges that the injury consisted of breakage, the case is prima facie within an exception in the bill of lading against liability for loss or injury from breakage, and that the burden rests on the libelant to prove that the breakage occurred through the negligence of the carrier. That rule, sustained by abundant authority, was the rule which the court below applied in holding that the burden of proof that the damage from sweat was occasioned by improper stowage was upon the libelant. See The Koranna (D. C.) 214 Fed. 172; The Königin Luise, 185 Fed. 478, 107 C. C. A. 578; The Good Hope, 197 Fed. 149, 116 C. C. A. 573; The Patria, 132 Fed. 971, 68 C. C. A. 397; The St. Quentin, 162 Fed. 883, 89 C. C. A. 573; The Baralong, 172 Fed. 220, 97 C. C. A. 24.

[2, 3] It is contended that the evidence failed to show that the damage was caused by perils of the sea. In considering this contention it is to be observed that all the testimony of the appellant's witnesses was heard in open court, and that the only testimony offered on deposition was that of the officers of the bark. The well-settled rule is applicable that the findings of fact of the trial court will not be disturbed in this court unless it clearly appears that there was error. Whitney v. Olsen, 108 Fed. 292, 47 C. C. A. 331; Perriam v. Pacific Coast Co., 133 Fed. 140, 66 C. C. A. 206; The Bailey Gatzert, 179 Fed. 44, 102 C. C. A. 612. But the appellant relies upon the fact that Stewart, who appeared as an expert witness for the appellee, testified that the pitting of the steel plates was, "in a large measure, due to salt water," and from that it argues that the witness admitted that a portion of the damage was from causes other than the perils of the sea. We do not think the language quoted from Stewart's testimony should be given the effect which the appellant attributes to it. He was a surveyor for Lloyds Register, and upon the appellee's ascertaining that a claim would be made for damages, he was employed as an expert to examine the cargo. He made tests with nitrate of silver on the steel plates, and he testified:

"My examination of the steel plates convinced me that the pitting and deterioration was in a large measure due to salt water."

On his cross-examination he was not asked whether any of the deterioration was the result of other causes, and his testimony seems to have been accepted as a complete explanation of the damage to the plates by pitting. On his redirect examination he stated that there was no question in his mind as to the cause of the pitting on the steel at the time when he made his test, that it was salt, and it is shown that he reported to the owner at that time that in his opinion the damage was due to salt water. In addition to his testimony, there was positive and direct evidence that sea water actually reached the steel plates. Capt. Baxter testified to the extremely heavy weather experienced on the voyage. He said that a monstrous sea came over the bow that swept everything, filled the decks fore and aft; that the decks were strained and leaking in places; that he could see traces of salt water running down the tanks, and on the edges of the plates that were piled up next

to the tanks, and that it had made its way over the plates; and that the water entered through the decks during the storm. He testified that the damage to the steel plates and to the cement came from stress of weather, the ship laboring and straining and leaking through the deck, and down the main ventilator. Owen, the mate, gave similar testimony.

It is claimed also that there was no evidence sufficient to show that the damage to the cement was caused by peril of the sea, and that the testimony of Wallace, who was called as a witness for the appellee, furnished no evidence as to the cause of the caking of the cement. Wallace was a marine surveyor and the port warden of the port of San Francisco. He examined the cement before any of the cargo was discharged. He testified that a lot of the top tier of barrels of cement was caked, that when he tested the barrels he found that they showed salt water very plainly, and that there was very visible evidence of the seepage of salt water through the decks, especially alongside the mast and the mast partners. It is true that there is no evidence that the witness made an examination of the contents of the barrels further than what he might ascertain from their external appearance, and by tapping the barrels with a hammer to see if the cement was caked. But the fact that he discovered evidence of salt water, and that the upper tier of barrels, which was more exposed to the sea water than the lower tiers, was much more seriously damaged than the latter, tends to show that the whole damage was occasioned by sea water.

The appellant refers to the finding of the court below that the damage both to the cement and to the steel plates was caused by some form of moisture; that if the moisture was sea water it was caused by the perils of the sea, and therefore excusable, and if it was caused by sweat the ship was liable only if the libelant could show negligence, and it contends that since the appellee in its answer to the libel alleged that all the loss and damage was caused by perils of the sea, it must be held to that allegation, and it has therefore no defense as to damage which may have been caused by sweat. We do not think the answer has the effect so to narrow the issues. It is alleged therein that under the contracts of affreightment it was agreed that the ship should not be liable for "leakage, breakage, loss or damage by heat, sweat, rust or decay unless occasioned by improper stowage." If the appellee was in error in believing that all the damage was caused by perils of the sea, and in so alleging in the answer, it should not be held that it is thereby precluded from availing itself of any other defense which the answer contains, such as the provision just quoted from the bills of lading.

But the appellant contends that it has sustained the burden of proof of improper stowage, and that by the preponderance of the evidence it is shown that the appellee negligently failed to segregate by sufficient bulkheads the steel and cement from the coke which was the greater portion of the cargo, and that the coke, by reason of its capacity to absorb moisture and to throw it off in the form of vapor, was the effective cause of the greater portion of the damage which was done. No fault is to be imputed to the appellee for bringing coke as a portion of

its cargo, for the vessel was under charter to the appellant, and the charterer designated the cargo which was to be carried. There was evidence, moreover, that the bulkheads were constructed in a manner approved by prudent persons versed in such matters, and that it conformed to existing knowledge and experience. The coke which was the principal portion of the cargo, was stowed in the fore and aft parts of the bark, and the steel and cement were carried amidships. The bulkheads were made of upright stanchions upon which boards were nailed athwartship. The boards were not dovetailed, but they were placed closely together, and on the side next the coke they were lined with dunnage mats. According to some of the witnesses, daylight could not be seen through the bulkheads. There was other testimony that there were cracks between the boards. Upon this conflicting testimony the court below found that the bulkheads were better for the purpose intended than those generally in use at that time, and concluded that the appellant had not sustained the burden of showing improper stowage. We find no ground for disturbing the findings of the court below.

The decree is affirmed.

LOVE, United States Marshal, v. PAVLOVICH.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2422.

1. ATTACHMENT ⟸271—DISCHARGE OF LIEN—FAILURE OF JUDGMENT TO ORDER SALE.

Under Act June 6, 1900, c. 786, § 147, 31 Stat. 356, enacting a Code for Alaska, Carter's Ann. Code Civ. Proc. § 147, which provides that, on rendering a judgment for plaintiff in an action in which property is held under attachment, the court shall order and adjudge the property to be sold to satisfy the judgment, where no such order is made, but a personal judgment only is rendered against the defendant, the attachment is discharged.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 959; Dec. Dig. ⟸271.]

2. STATUTES ⟸226—CONSTRUCTION—STATUTES ADOPTED FROM ANOTHER JURISDICTION.

Where a statute of a state is adopted by another state or by Congress, the construction previously given to such statute by the highest court of the state presumably becomes a part of the law as so adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. ⟸226.]

In error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Frederic E. Fuller, Judge.

Action at law by Vaso Pavlovich against H. K. Love, United States Marshal for the Fourth Division of the Territory of Alaska. Judgment for plaintiff, and defendant brings error. Affirmed.

McGowan & Clark, of Fairbanks, Alaska, for plaintiff in error.

H. A. Day and Morton E. Stevens, both of Fairbanks, Alaska, for defendant in error.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

MORROW, Circuit Judge. On May 17, 1912, two actions were commenced in the commissioner's court in and for Fairbanks precinct, Fourth judicial division, territory of Alaska, one by Paul Ringseth against Sam Vlik & Co. and the other by Jack McLean against Sam Vlik & Co. Sam Vlik & Co. was a copartnership composed of Sam Vlik, Dan Vlik, and Mike Onak, engaged in mining. In each of the actions the plaintiff therein sought to recover from the defendants therein the sum of $1,000, alleged to be due and owing on an express contract for the payment of money. A summons and a writ of attachment were issued in each of the actions, and placed in the hands of a deputy United States marshal for service, and the same were served upon Dan Vlik, one of the partners, during the night of May 17, 18, 1912. It appears from the returns made by the deputy marshal to the writs of attachment that the same were executed by attaching all of the right, title, and interest of the defendants in the actions in and to one lot of wood and provisions situated on Discovery claim, Chatanika river, Fairbanks recording district, territory of Alaska. It appears from the testimony that there were two piles or lots of wood on the claim of the defendants in the actions, one of which, a small pile containing 3 or 3½ cords, was located near the cookhouse, and the other, a large pile containing about 200 cords, was located at some distance from the cookhouse and on another part of the claim. There is considerable conflict in the testimony as to whether the deputy marshal attached the large pile, or the small pile, or all of the wood upon the claim; but in the view which we take of the case the question becomes immaterial.

On May 18, 1912, the day following the service of the attachments in the suits of McLean and Ringseth against Sam Vlik & Co., the latter, by Sam Vlik, a member of the firm, made, executed, and delivered to the plaintiff herein, Vaso Pavlovich, a bill of sale for 210 cords of four-foot birch wood situated on Discovery claim, on the Chatanika river, Fairbanks precinct, Alaska. The consideration named in the bill of sale was $2,000. It appears from the testimony, and the fact is not disputed, that on the date of the execution of the bill of sale, notices of ownership were posted by the plaintiff on the wood in controversy. On May 24, 1912, judgments by default were entered in the actions of McLean and Ringseth against Sam Vlik & Co. By each of the judgments it was ordered that the plaintiff therein have and recover of and from Sam Vlik & Co. the sum of $1,000, with interest thereon at the rate of 8 per cent. per annum until paid, and costs of suit, amounting to $18.70. Execution was issued in the case of Ringseth v. Sam Vlik & Co. on May 24, 1912, and placed in the hands of H. K. Love, United States marshal, the defendant herein. On May 25, 1912, the marshal purporting to act under and by virtue of such execution, levied upon 123 cords of the wood theretofore attached; and on June 6, 1912, the wood was sold by the marshal to Ringseth, the plaintiff in that action, for the sum of $1,075. On June 12, 1912,

execution was issued in the case of McLean v. Sam Vlik & Co., and the marshal, purporting to act under and by virtue of the execution, levied upon 40 cords of wood, being the balance of the wood theretofore attached; and on June 25, 1912, a sale of the last-mentioned wood was made by the marshal to Ringseth for the sum of $275.

The present action has been instituted by the plaintiff Vaso Pavlovich, to recover from the defendant, H. K. Love, as United States marshal, damages for the alleged wrongful conversion and sale by such marshal of the wood in controversy, alleged to have been on the dates of the sales thereof the property of the plaintiff herein under and by virtue of the bill of sale from Sam Vlik & Co. of May 18, 1912. The case was tried before the court and a jury, and resulted in a verdict and judgment in favor of the plaintiff for the sum of $1,325 and costs.

The position taken by the plaintiff is that the seizures of the wood by the United States marshal under the executions issued in the case of Ringseth v. Sam Vlik & Co. and in the case of McLean v. Sam Vlik & Co., and the subsequent sales thereof by the marshal, were void for the reason that the justice of the peace in entering the judgments failed to foreclose the attachment liens and failed to incorporate in the judgments an order providing for the sale of the attached wood, as required by the law of Alaska. The instructions given by the court on this question were as follows:

"You are instructed that property may be sold or mortgaged subject to the lien of an attachment, and the sale or mortgage becomes absolute when the lien of the attachment is removed or lost. You are instructed that the judgments given in the commissioner's court at Chatanika on May 24, 1912, that have been introduced in evidence in this case, did not contain any order that the property attached theretofore in the actions in which said judgments were given should be sold to satisfy the demands of the plaintiffs in said actions, and that therefore as a matter of law said plaintiffs waived and lost any lien theretofore secured upon the property in question by reason of the attachments theretofore issued in said actions, and that the defendant was not therefore longer entitled to the possession of said property under said writs of attachment, if you should find that they had been theretofore duly levied. And you are further instructed that if you find that the plaintiff had become the owner of said wood and entitled to the immediate possession thereof prior to the date of the levy thereon by the defendant under the writs of execution (evidence of which has been given before you), by reason of the bill of sale to the plaintiff from Sam Vlik & Co., then the defendant was without right to hold such property under such levies, or to sell or dispose of the same."

If these instructions stated the law correctly, it is an end to the controversy, and we need not inquire further whether the attachments were served prior to the execution of the bill of sale of the wood to the plaintiff, or whether the wood sold by the marshal was the identical wood attached by the marshal upon the bringing of the actions against the copartnership. These questions will then become no longer material.

[1] Section 147 of the act of June 6, 1900, chapter 786, making further provision for a civil government for Alaska (31 Stat. 321, 356; Carter's Annotated Codes of Alaska, § 147), provides as follows:

"If judgment be recovered by the plaintiff, and it shall appear that the property has been attached in the action and has not been sold as perishable property or discharged from the attachment as provided by law, the court

shall order and adjudge the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the marshal shall apply the property attached by him, or the proceeds thereof, upon the execution, and if there be any such property or proceeds remaining after satisfying such execution, he shall, upon demand, deliver the same to the defendant."

[2] This section was taken from the laws of Oregon (Lord's Oregon Laws, § 308). When this statute was adopted by Congress the Supreme Court of that state had given the statute a construction. Presumably the construction so given the statute by the highest court of the state became part of the law as adopted by Congress. Warner v. Railway Co., 164 U. S. 418, 423, 17 Sup. Ct. 147, 41 L. Ed. 495; Willis v. Banking Co., 169 U. S. 295, 307, 18 Sup. Ct. 347, 42 L. Ed. 752; Henrietta M. & M. Co. v. Gardner, 173 U. S. 123, 130, 19 Sup. Ct. 327, 43 L. Ed. 637; James v. Appel, 192 U. S. 129, 135, 24 Sup. Ct. 222, 48 L. Ed. 377; Welsh v. Barber Asphalt Co., 167 Fed. 465, 472, 93 C. C. A. 101; Jennings v. Alaska Treadwell Gold Min. Co., 170 Fed. 146, 149, 95 C. C. A. 388.

In the case of Bremer & Co. v. Fleckenstein & Mayer, 9 Or. 266, 271, the Supreme Court of Oregon, construing this statute, said:

"Under the law, as it stood before the amendment of October 25, 1878, no order of sale of attached property was required. The statute itself directed the application of such property upon the execution when it should be issued. The amendment, * * * however, provides that if property has been attached in the action, and has not been sold as perishable, or otherwise discharged from the attachment as provided by law, the court shall, when it renders judgment, order and adjudge that the property be sold to satisfy the plaintiffs' demands, and that if execution issues thereon, the sheriff shall apply the property attached by him, or the proceeds thereof, upon such execution. We recognize the fact that this amendment has effected a change here as to the property under attachment, when judgment in the action is rendered. The order of sale must be made as to such property when judgment is given, or it will be discharged from the attachment, and liberated from the attachment lien."

In the case of Moore-Shafter Shoe Mfg. Co. v. Billings, 46 Or. 401, 80 Pac. 422, the principle was again announced by the Supreme Court of Oregon. Mr. Chief Justice Wolverton, delivering the opinion of the court, said:

"The question for our determination is whether, under the complaint, the plaintiff is in a position to maintain a suit against the defendants. Preliminarily it must be observed that the plaintiff has no lien on the goods by virtue of the alleged levy of the writ of attachment issued in the action instituted against Billings and recovered on its demand. There was no order entered adjudging the property to be sold at the time of the rendition of the judgment in the action. This was tantamount to a waiver of the attachment lien if one was legally and regularly obtained, and a liberation of the goods from the effect of such levy."

See, also, Lowry v. McGee, 75 Ind. 508; Smith v. Scott, 86 Ind. 346; Sannes v. Ross, 105 Ind. 558, 5 N. E. 699; U. S. Mortgage Co. v. Henderson, 111 Ind. 24, 12 N. E. 88; Wright v. Manns, 111 Ind. 422, 12 N. E. 160; Wasson v. Cone, 86 Ill. 46; Staunton v. Harris, 9 Heisk. (Tenn.) 579; Hillman v. Werner, 9 Heisk. (Tenn.) 586.

It follows that whatever lien was acquired by the plaintiffs in the cases of McLean v. Sam Vlik & Co. and Ringseth v. Sam Vlik & Co.

was lost when the court before whom the cases were tried entered a personal judgment against the defendants therein, without an order or judgment that the attached property be sold to satisfy the plaintiffs' demands, and that the seizure and sale of the property by the marshal was without authority, and therefore void.

The only remaining question which we deem it necessary to consider relates to the bill of sale made by Sam Vlik & Co., by Sam Vlik, a member of the firm, to the plaintiff herein. The marshal contends that the bill of sale was void and of no effect for the reasons: First, that it was executed by but one of the partners; and, second, that it was made with intent to defraud the creditors of Sam Vlik & Co. We think each of the objections is without merit. With respect to the objection that the bill of sale was executed by but one of the members of the copartnership, it appears from the record that Sam Vlik, prior to the execution of the bill of sale, told Mike Onak, a member of the firm, that he was going to execute a bill of sale for the wood to the plaintiff herein, and Onak presumably made no objection; and Dan Vlik, the third member of the firm, testified that Sam Vlik was the manager of the partnership and ran the business and had authority to give the bill of sale. With respect to the objection that the bill of sale was given with intent to defraud the creditors of Sam Vlik & Co. it is only necessary to state that that question was fully submitted to the jury under full and appropriate instructions, in which we find no error.

The judgment of the court below is affirmed.

RABINOWITZ et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 170.

1. CONSPIRACY ⇐33—TO COMMIT OFFENSE AGAINST UNITED STATES—SUFFICIENCY OF EVIDENCE.

Evidence considered, and *held* to sustain a conviction of defendants for conspiracy to commit an offense against the United States by concealing assets of an estate in bankruptcy from the trustee.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. ⇐33.]

2. CRIMINAL LAW ⇐147—CONSPIRACY TO COMMIT OFFENSE AGAINST UNITED STATES—LIMITATION.

The provision of Bankr. Act July 1, 1898, c. 541, § 29d, 30 Stat. 554 (Comp. St. 1913, § 9613), limiting the time for prosecutions for offenses arising under the act to one year, does not apply to a prosecution for conspiracy under Cr. Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), although the conspiracy charged is to commit an offense under the bankruptcy act, such prosecution being governed by the general limitation of three years contained in Rev. St. 1044 (Comp. St. 1913, § 1708).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 271, 272; Dec. Dig. ⇐147.]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of conviction of the crime of conspiring to commit an offense against the United States, namely, that the defendants should conceal certain assets belonging to their estate in bankruptcy from the trustee of such estate.

Carl E. Whitney, of New York City (Walter C. Noyes, of New York City, of counsel), for plaintiffs in error.

H. Snowden Marshall, U. S. Atty., of New York City, R. B. Wood and Raymond H. Sarfaty, Asst. U. S. Attys., both of New York City.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] As in most prosecutions for conspiracy, the testimony was largely circumstantial. As defendant stated the government's case it was based on four propositions: (1) Rabinowitz Bros. had had substantial assets a short time before their failure, which had largely disappeared at the time of failure. (2) The circumstances showed an intention to conceal such assets. (3) International Flouncing Company was a concern of the bankrupts. (4) Goods which belonged to the bankrupts were traced into the possession of the Flouncing Company.

It will not be necessary to state the testimony at any length; reference may be had to the opinion of Judge Hand, denying motion to set aside the verdict. (See page 849.) The brief of plaintiff in error is confined entirely to the fourth proposition, supra, and deals with the testimony as to 14 cases of goods, on which the government mainly relies. In different lots between August 30th and September 9th these cases were deposited in the Linde warehouse in the name of defendant Bokal. Later in the same month the same 14 cases were withdrawn from the Linde warehouse and deposited in the Schenck warehouse, the receipt being given to Epstein, another defendant. Subsequently they were withdrawn from the Schenck warehouse and delivered to the Flouncing Company. The theory of the government was that the 14 cases, which were deposited in the Linde warehouse in Bokal's name, belonged to Rabinowitz Bros. Bokal was not a partner in that firm, but was a relation by marriage of the partners. In order to sustain its theory the government made proof of certain deposits of goods by Rabinowitz Bros. in the Mercantile warehouse and of certain withdrawals of the same. Evidently the jury accepted the government's theory. The contention here is that they were misled by a coincidence of numbers between some of the cases drawn from the Mercantile and some of those deposited in the Linde warehouse.

Rabinowitz Bros. deposited in the Mercantile warehouse between December 7, 1909, and March 19, 1910, a very large number of cases, with a great variety of numbers, some with letters and some without, some numbers running in sequence, but many more not thus numbered. Among these there were deposited on January 21, 1910, two cases numbered 601 and 602. These cases were withdrawn on September 1,

1910. The entries in the books of the Linde warehouse showed deposits as follows:

Harry Bokal, 167 Wooster Street.

1910						Rate 30/30
Aug.	30	4	cs.	8		603
						604
					Ins. $11.90 paid	606
						607
Sept.	1	3	"	"		600
						602
						605
"	2	2	"	"		601
						608
"	6	4	"	"		610
						611
						612
						613
"	9	1	"	"		609
					Sept. 22, 10	Sept. 21.

The government, of course, relied on the coincidence of numbers on the two cases 601 and 602 appearing on the records of both warehouses as showing that those were Rabinowitz goods which passed from the Mercantile warehouse through the Linde and Schenck warehouses to the Flouncing Company. The trial judge referred to this coincidence twice in his charge, and undoubtedly it influenced the jury. Defendant's counsel, while admitting that the coincidence referred to is, upon first glance, entitled to much weight, contends that when the two records are more carefully examined, the presence of the Nos. 601 and 602 in the Linde entry "demonstrates that they could not have come from the Mercantile warehouse." The argument is this: The 14 cases are all numbered in sequence 600 to 613; the only reasonable explanation of the sequence is that some person owned a single lot of 14 cases of goods marked in sequence and deposited them in parcels in the Linde warehouse. To this proposition we assent; also to the proposition that the cases were all numbered before they were deposited. From this it is contended that Nos. 601 and 602 in the Linde warehouse must have been some other cases (though bearing the same numbers) than those deposited in the Mercantile. It is argued:

"The first deposit was made August 30 and the two Mercantile cases were not withdrawn until September 1st. So about the only way we can think of that the cases could have been marked in sequence and include the two Mercantile cases is to suppose that the Rabinowitzes obtained the numbers of those cases before August 30th, and then marked the other cases to correspond with them for the purpose of perpetuating the Mercantile numbers. But any such marking would have been objectless."

We agree in thinking such marking would have been objectless, and that the suggested theory is unreasonable. Defendant suggests, as the only other theory consistent with ownership by Rabinowitz Bros., that these 14 Linde cases had been one lot numbered in sequence before the two cases had been deposited in the Mercantile warehouse on January 21, 1910. With this suggestion we also agree, but are not persuaded by the argument based thereon, viz.:

"But no other cases in the sequence were in the Mercantile, and it is about as inconceivable as the first possibility that these 2 cases, which had been in storage for 10 months, should have been taken out and should then have *happened* to be reassembled with the 12 other cases at this particular time and place."

It seems to us that a natural and reasonable explanation, which would account for the facts disclosed by the warehouse records is this. Prior to January 21, 1910, Rabinowitz Bros. owned 14 cases, marked in sequence 600 to 613, the contents of which they had no occasion immediately to make up. Twelve of these cases they placed in their own loft; they had a large one, and two witnesses testified that until about a month or so before bankruptcy it was so filled with merchandise, some of it in cases, that it was difficult to move about in it. Two of these 14 sequence cases they deposited in the Mercantile warehouse, possibly in order to get cash advances on them—the books of the warehouse indicate that loans were made on Nos. 601 and 602. About the end of August or the beginning of September, apprehending bankruptcy (petition was filed September 15th) they undertook to save these goods, and wished, for some purpose, to keep the entire lot of 14 cases intact. Therefore they sent the 12 cases from their loft to the Linde warehouse, repaid the advances on the other two, and transferred them from the Mercantile to Linde and deposited them with the other 12 in Bokal's name. The elevator men from the building where their loft was located speak of some 8 or 10 cases coming down about that time.

We are satisfied that the jury were not misled to defendant's prejudice by the coincidence of numbers; indeed the government's case was a very strong one even without such coincidence.

[2] It is further contended that the indictment should have been dismissed because it was not found within one year of the commission of the offense. Section 29d of the Bankruptcy Act provides:

"A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense."

Defendants were indicted under section 37 of the Criminal Code for conspiracy to commit an offense against the United States. Prosecutions for conspiracy are regulated by the general limitation statute (section 1044, U. S. Rev. Stat.), which prescribes a period of three years. Section 29d does not modify or repeal that section. The offense "conspiracy" is not one "arising under the Bankruptcy Act." If Congress had intended to change the existing statutes it would have used more definite language, or language inconsistent with such statutes. United States v. Comstock (C. C.) 162 Fed. 416; United States v. Hirsch, 100 U. S. 33, 25 L. Ed. 539.

The judgment is affirmed.

NOTE.—The following is the opinion of Learned Hand, District Judge, on denying the motion for a new trial:

LEARNED HAND, District Judge. I do not think it is necessary to rehearse the evidence at length. The chief question is whether there was any evidence justifying the inference that the 14 cases which Epstein entered at

Linde's Warehouse in Bokal's name were goods which came from the Rabinowitzes. As the goods were traced directly back to the Rabinowitzes, there is no need of further implication of Bokal and Epstein than arises from their assistance in concealing them, once their identity is established.

The inference that the Rabinowitzes concealed goods was amply supported by the receiver's testimony that their place had been gutted, by the testimony of the creditors as to the stock on hand in August, by the bankrupts' admissions up to the eve of bankruptcy, and by the testimony of the elevator boy to one removal of 8 or 10 cases. It is further corroborated by the withdrawal of 26 cases from the warehouse between August 1st and the failure. Bokal was their brother-in-law, had helped them before the failure, and lent them his credit afterwards. Levenson was in business with Bokal, and Levenson was a mere dummy for the Rabinowitzes to use in their new business. Thus we have at the outset facts pointing to secreting of goods, and Bokal as a friendly disposed person, the backer of their new enterprise.

The coincidence in the dates of removal and storage is as follows:

Rabinowitzes Removed from Their Warehouse		Epstein Stored in Bokal's Name at Linde's	
August 26	3	August 30	4
August 30	2	September 1	3
September 1	8	September 2	2
		September 6	4
Between August 26 and September 1	13	Between August 30 and September 6	13

These dates permit of the inference that 13 of the cases were the same. The identity of two case numbers may, perhaps, also be mentioned as not wholly negligible. The contents of the cases withdrawn was described as laces and "white goods"; that of those stored was described as "laces," they might therefore from this description be the same goods.

Epstein entered the goods at Linde's for Bokal, to whom the documents were sent personally by mail. At the very time when he began entering them at Linde's, about September 1st, he was already arranging for their transfer to Schenck's in his own name. Bernard swears that Epstein made two entries at Schenck's, 2 cases on September 10, and 14 on the 21st and 22d. Ten days before the first shipment he consulted Bernard, in the only talk they had that month, about storing goods with him, and asked him to take out insurance of $5,000 or $15,000. The size of the insurance precludes the idea that he then had in mind only the two cases entered on the 10th. Hence we have Bokal through Epstein entering these goods in Linde's under the name of Bokal at the moment when he purposed to store them in Epstein's own name at Schenck's. On the 22d he did withdraw them at Schenck's, and there they stayed till Epstein withdrew them some months later, erased the marks, and delivered them to the Rabinowitzes, who used them in the new business.

Why should Bokal at the same time have arranged to store goods first in his own name and later in Epstein's? This forbids the possibility of a sale by Bokal to Epstein after the goods had been stored at Linde's. It shows that the shifting about of the goods was prearranged from the outset, and is inconsistent with the innocence of the parties concerned. Men do not lay a plan to enter goods into one warehouse in one name, to withdraw them in the same name, and to re-enter them in another in another name, unless they have something to cover. It is absurd to attribute such maneuvering to innocent conduct. It is especially absurd when it is followed by orders to the truckman to erase even the second markings upon the goods after they have been withdrawn. Bernard's testimony, especially the date of Epstein's talk, clinches the matter in a way I did not observe upon the trial. There was ample evidence to show that Epstein was Bokal's agent throughout. They were connected by marriage, and the receipts were all sent to Bokal, as well as letters regarding the goods. Moreover, Bokal's motive is shown throughout the case, while Epstein appears to have none.

To sum up, we have the following situation as an entirety: Three bankrupts fail under circumstances strongly indicating a secretion of goods; they have

a relative who appears as a financial backer after the bankruptcy, when they at once go into the same line of business through the aid of a dummy; the backer at the same time when the bankrupts remove goods from their warehouse is found planning through his factotum to put substantially the same number of cases of the same kind of goods first in one warehouse in his own name, later in another in a different name, all of which is carried out to the letter; finally, after an appropriate interval, the goods come out of the second warehouse, the marks are erased by order of the backer's factotum, and they are delivered to the bankrupts and used by them. If a jury is not justified in making an inference from such a string of circumstances that the goods which the backer so smuggled around were the same as those the bankrupts withdrew, it is a little hard for me to see how we can ever proceed on circumstantial evidence.

The motion is denied. The defendants may have bail until they may apply to the Circuit Court of Appeals either to hear the cause on typed minutes, or for bail during the summer.

ELLET-KENDALL SHOE CO. v. MARTIN.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1915.)

No. 4135.

1. SALES ⟸8—CONTRACT—INTENTION OF PARTIES—CONSIGNMENT FOR SALE.
Whether a contract under which a stock of shoes was shipped was a sale, or merely a consignment for sale, must be determined from the terms of the contract, the test being whether the specific goods were to be returned if not sold, or another thing of value might be returned instead.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 18, 19; Dec. Dig. ⟸8.]

2. SALES ⟸46—FRAUD—MISREPRESENTATION OF FACTS.
Where the buyer of a stock of shoes gave the seller a financial statement from which an indebtedness of $5,500 was omitted, the seller could rescind the sale.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 95; Dec. Dig. ⟸46.]

3. SALES ⟸89—CONTRACTS—RIGHTS OF PARTIES—MODIFICATION.
The parties to a contract for the sale of goods on credit may, before the acceptance of the goods, change their contract so as to make it a consignment for sale, and the creditors of the consignee acquire no interest in the goods so shipped.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252, 259; Dec. Dig. ⟸89.]

4. BANKRUPTCY ⟸159—PREFERENCES—CONSIGNMENT FOR SALE.
A contract for the consignment of goods for sale is not a preference to the consignor, which is avoided by the bankruptcy of the consignee less than four months thereafter, since there can be no preference under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) where there is neither debtor nor creditor.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248, 262, 268-281; Dec. Dig. ⟸159.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Intervention by the Ellet-Kendall Shoe Company in bankruptcy proceedings, wherein W. S. Martin was trustee in bankruptcy, to require the trustee to deliver to the intervener certain goods in the bank-

rupt's possession. Decree for the trustee, and the intervener appeals. Reversed, with directions to allow the claim of intervener to the goods.

E. S. Ellis, of Kansas City, Mo. (C. F. Hutchings and Frank W. Yale, both of Kansas City, Mo., on the brief), for appellant.

W. S. McClintock, of Topeka, Kan. (A. L. Quant, of Topeka, Kan., on the brief), for appellee.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

REED, District Judge. Brown and Norris, a copartnership doing a general merchandise business at Osage City, Kan., and the individual members thereof, were adjudicated involuntary bankrupts August 16, 1913, upon petition filed July 21st preceding, and W. S. Martin, the appellee, was thereafter duly appointed trustee in bankruptcy of their estates and qualified as such. The Ellet-Kendall Shoe Company, a corporation, which will be called the petitioner, in due time filed with the referee its petition claiming that certain shoes in the possession of the trustee, and claimed by him as a part of the bankrupt stock of merchandise, was the property of the petitioner, which it had consigned to the bankrupts in June, 1913, for sale on commission and which remained unsold at the time of the bankruptcy, and asked an order that the trustee be required to deliver to the petitioner such goods as its property. The trustee denied the claim of the petitioner and alleged that the shoes were bought outright by the bankrupts from the petitioner on credit and were a part of the bankrupts' estate at the time of the bankruptcy; or, if not so bought, the transaction between the petitioner and the bankrupts whereby said goods were consigned to the bankrupts amounted to a preference under the Bankruptcy Act. Upon a hearing the referee denied the claim of the petitioner, and adjudged the shoes to be a part of the bankrupt estate. On petition for review this order of the referee was approved by the District Court, and the petitioner appeals.

The proofs show without substantial dispute that on June 5, 1913, a traveling salesman of the Ellet-Kendall Shoe Company, a manufacturer and jobber of boots, shoes, and rubber goods at Kansas City, Mo., took from the bankrupts at Osage City, Kan., a verbal order for 73 dozen pairs of shoes of different sizes described by stock numbers and of the invoice value of $1,713 to be shipped at once by the petitioners from Kansas City to the bankrupts by rail, terms of payment one-half by November 1st, and the balance by December 1st following. On the same day the bankrupts gave to the salesman a statement in writing of their financial condition as a basis for obtaining credit, which statement showed their assets, including a homestead, to be $18,700, subject to a mortgage upon the homestead of $2,000, and liabilities for merchandise, $4,975, $200 of which was due at bank in 30 days; other liabilities, none. The next day, June 6th, the bankrupts wrote the petitioner as follows:

"Osage City, Kansas, June 6, 1913.

"Ellitt Kendall Shoe Co., Kansas City, Mo.—Gentlemen: After taking into consideration the purchase of Shoes we made of you yesterday. We have de-

cided that at this time And us being new here, And fixed Financially the way we are, That we bought two many Shoes. And we would ask you to Cancil this Order.

"We hope in the near future we may be able to Buy your line of Shoes. But at the present time we feel like that it will be impossible for us to handle them.

"Resp. Yours, Brown & Norris."

On the morning of June 7th, the salesman of the petitioner at Kansas City wrote the bankrupts a letter, the material parts of which are:

"June 7, 1913.

"Brown & Norris, Osage City, Kans.—Gentlemen: On my arrival in the house this morning I found your letter in regard to not shipping your bill of goods that I sold you Thursday. I am somewhat surprised to receive it.

"However, your order left the house here Friday afternoon. I sent the order in Thursday night and it was packed and shipped out Friday, and no doubt you will receive it sometime today. * * *

"Your order was shipped complete with the exception of the Children's High Cuts 5's to 8's also four dozen of Child's shoes, 2's to 5's and 5's to 8's in fancy patent leather, also one Doz. of Child's G. M. Btn. sizes from 8½ to 12's in Goodyear Welt. All of the balance of the order was filled. These few items will go forward to you just as soon as we receive them from the factory. Do not let your financial condition worry you any with this shoe bill, as the proposition in the way I made it to you will be the easiest bill of goods you will ever pay in the shoe business if you stay in the business 50 years. Wishing you all kinds of success, and whenever you are in need of anything in our line let me know in regard to it and I will send it to you so as to keep your line in good shape for your fall shoe business.

"Yours truly, Ellet-Kendall Shoe Co.,
"W. E. McNaughton."

A few days later there were delivered to the bankrupts at Osage City several boxes of shoes from the petitioner via the Atchison, Topeka & Santa Fé Railway Company; and by mail they received an invoice from the petitioner dated June 7th, which corresponds with the shoes ordered, except that the invoice was short some 10 dozen pairs of shoes, which the petitioner did not have in stock, to be forwarded later, and there was substituted for 1 dozen pairs of the shoes ordered a different lot, but of the same value. The bankrupts did not open the boxes when received, and on June 12th went to Kansas City for a conference with the petitioner. At this conference after considerable discussion it was finally agreed between the bankrupts and the petitioner that the order of June 5th should be rescinded by the bankrupts because the goods shipped did not conform to the goods ordered, and because they had countermanded the order on June 6th; and by the petitioner because the financial statement made by the bankrupts as a basis for the credit was not correct (the bankrupts then informing the petitioner that they had omitted therefrom $5,500 of their indebtedness at the time it was made), and that the order would not have been accepted or the goods shipped had it known that the statement was not correct. Upon that date the bankrupts signed a letter to the Ellet-Kendall Shoe Company in the office of that company as follows:

"Kansas City, Mo., June 12, 1913.

"Ellet-Kendall Shoe Company, Kansas City, Mo.—Gentlemen: Referring to your invoice of June 7th, total amount $1,713.40, we will return these invoices to you to be exchanged for consigned invoices, as we cannot accept the goods

on any other terms than as a consignment. We carry insurance on our general stock and we will see that our insurance policy reads to cover consigned goods.

"Yours truly, Brown & Norris."

It was thereupon agreed that the goods should be kept by the bankrupts for sale on commission to be paid for as sold. This agreement was reduced to writing, dated June 7th, and reads in this way:

"Whereas, Ellet-Kendall Shoe Company are consigning boots and shoes to Brown & Norris, located at Osage City, Kansas, said Brown & Norris hereby agree to guarantee the sale of all such consignments made at the net marked prices named in the bills, without expense to Ellet-Kendall Shoe Company. That said Brown & Norris also agree to keep said stock insured and that any unsold merchandise which may in the future be necessary to take back, or which Brown & Norris may return to Ellet-Kendall Shoe Company, said Brown & Norris agree to make a loss on said goods in the return of same of (30%) thirty per cent. of the original cost. Said Brown & Norris further agree to make weekly reports to Ellet-Kendall Shoe Company showing the articles and lot numbers that have been sold, and accompany said reports with check covering payment of goods that have been sold. Brown & Norris further agree to energetically and diligently push the sale of these consigned goods. It is further agreed that this consigned account shall be fully settled and accounted for in six months from this date, or a final settlement shall be made in less time than six months if it can conveniently be done.

"Ellet-Kendall Shoe Co.,
"By T. C. Ellet, Pres.
"Brown & Norris,
"By I. F. Brown.

"Kansas City, Mo., June 7th, 1913."

This contract was never recorded or filed for record.

Pursuant to this agreement the bankrupts returned to Osage City, unboxed the goods previously received, and placed them in their store in the cartons or cases in which each pair of shoes was contained, and labeled with the petitioner's name and made sales therefrom from time to time for which they remitted to the petitioner on June 14th, 30th and July 22d statements of sales to those dates, respectively, and checks or drafts for the amount thereof which were duly paid, amounting to some $75. On July 19th the bankrupts made a general assignment for the benefit of their creditors, but did not include therein the remaining shoes received from the petitioner, and they remained in the store when the bankruptcy proceeding was commenced. It is admitted that the shoes were later identified as shoes received from the petitioner under the order of June 5th, and finally accepted by the bankrupts pursuant to the agreement of June 12th. Upon these facts the referee and court held that the contract of June 12th, was in effect, but a confirmation of the purchase of goods by the bankrupts under the order of June 5th, and that the petitioner was not entitled to the shoes unsold at the time the bankruptcy proceeding was commenced.

[1] Prior to the amendment of the Bankruptcy Act of June 25, 1910, the trustee in bankruptcy would have succeeded only to the rights of the bankrupts under the local law to these shoes. See Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767; Big Four Implement Co. v. Wright, 207 Fed. 535, 125 C. C. A. 577, 47 L. R.

A. (N. S.) 1223. Counsel have not discussed, either at the bar or in the briefs, the effect, if any, of that amendment to section 47a (2) of the Bankruptcy Act, which vests in the trustee, "all the rights of a creditor holding a lien by legal or equitable proceedings upon the property in the custody of the court of bankruptcy," but counsel for appellee apparently concede that if the transaction of June 12th was in effect a consignment of the shoes by the petitioner to the bankrupts for sale on commission, the petitioner would be entitled to recover the shoes not sold at the time of the bankruptcy, or their proceeds if sold by the trustee (see In re Lane Lumber Co., 217 Fed. 550, 133 C. C. A. 402, and Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767, above), and it is contended in behalf of the trustee that the contract of June 12th is a confirmation of the transaction of June 5th, and in effect but a completed sale of the shoes on credit to the bankrupts. This must be determined from the terms of that contract. Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Metropolitan Nat. Bank v. Benedict, 74 Fed. 182, 185, 20 C. C. A. 377. In Sturm v. Boker, above, the Supreme Court, at page 329 of 150 U. S., at page 104 of 14 Sup. Ct. (37 L. Ed. 1093), says:

"The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale. * * * The agency to sell and return the proceeds, or the specific goods if not sold, stands upon precisely the same footing, and does not involve a change of title. An essential incident to trust property is that the trustee or bailee can never make use of it for his own benefit. Nor can it be subjected by his creditors to the payment of his debts."

This rule is followed by this court in Metropolitan National Bank v. Benedict, above. See, also, In re Franklin Co., 199 Fed. 1, 117 C. C. A. 577, reversing (D. C.) 187 Fed. 281.

[2] The financial statement of the bankrupts upon which they were to and did first obtain the goods from the petitioner upon credit was false in material particulars and gave to the petitioner the right to rescind the transaction of June 5th. Ellet-Kendall Shoe Co. v. Ward, 187 Fed. 982, 110 C. C. A. 320. It did so rescind that transaction immediately upon learning of the falsity of the statement, and at once made the contract of June 12th.

[3] But whether the petitioner had the right to rescind the transaction of June 5th or not, the goods had not been accepted by the bankrupts, and they remained in their store in the boxes in which they were received unopened. No adverse right to the property had then attached, and the situation of the parties with reference thereto remained unchanged. The parties then had the undoubted right by their mutual agreement to change the transaction of June 5th, and make another agreement satisfactory to themselves. They made such an agreement, which is essentially a contract for the consignment of the goods to the bankrupts for sale on commission, and both parties acted upon it prior and up to the bankruptcy as being such a consignment upon

the terms specified in that agreement. It should not now be held a contract of sale and purchase of the goods for the benefit of the general creditors of the bankrupts, unless its terms imperatively require that it be so held. In Metropolitan Nat. Bank v. Benedict Co., above, Judge Caldwell speaking for this court of a similar contract said, at page 185 of 74 Fed., at page 379 of 20 C. C. A.:

"Moreover, parties have the undoubted right to make their own contracts and to put their own construction upon them, and to regulate their rights and liabilities thereunder. If the court 'leaves the parties to be governed by their understanding of their own language, it, in effect, enforces the contract as actually made. That they should be so permitted to construe, their own agreement accords with every principle of reason and justice.' * * * And when both parties to a contract, acting in good faith, are agreed as to its meaning and their rights under it, a stranger having no interest in the subject-matter of the contract cannot insist that a different interpretation shall be put upon it, or compel the parties to put that interpretation upon it, which will benefit him. * * * This is not a case where the parties to the contract themselves differ as to its meaning and purpose. Here the parties are agreed that the contract they made was one of bailment. It is a third party who is demanding that the contract shall not have effect according to the agreement and intention of the parties. On this state of facts, the bill of sale invested the bank with the rights of the commission company only; and, as the commission company had no right to the property, the bank has none."

These decisions are controlling upon this court in the absence of some statute of the state of Kansas. That there is no such statute is clear, we think, from the following decisions of the Supreme Court of that state bearing upon the question: Powell v. Wallace, 44 Kan. 659, 25 Pac. 42; McKinney v. Grant, 76 Kan. 779, 93 Pac. 180; Van Arsdale v. Baldwin Piano Co., 90 Kan. 347, 133 Pac. 703.

Powell v. Wallace, 44 Kan. 659, 25 Pac. 42, above, is much like the case before us upon its facts. In that case Wallace & Co. were engaged in the wholesale boot and shoe trade in Kansas City, Mo. They brought suit against Powell to recover possession of a bill of boots and shoes, which they claimed had been consigned by them to one Myers, who was engaged in the boot and shoe business at Eureka, Kan., to be sold by him at retail, Wallace & Co. to hold title to the same, except those sold in the usual course of retail trade, until February 15th, when they would be paid for or the specific goods returned to Wallace & Co. as consignors. Upon receipt of the goods Myers placed them in his store with other goods owned by him, where they remained, except such as were sold in the usual course at retail, until January 27th, when the entire stock was sold to Powell, who took possession thereof. Wallace & Co. recovered judgment for the unsold shoes upon the ground that they had consigned them to Myers for sale upon commission, and that the title to the shoes, except those sold in the usual course of retail trade by Myers, remained in them. In affirming the judgment of the district court, the Supreme Court said:

"The evidence of the plaintiffs below [Wallace & Co.] was to the effect that the goods were consigned to Myers. The invoice of the bill of goods reads: 'Consigned by Wallace & Co. to Myers.' It is true that it also contained a memorandum, 'Sold by Berry,' but this only indicated the salesman who took the order. The letters of October 29th and 31st also indicated that the goods

had been consigned to Myers. * * * The word 'consigned' has a well-defined legal meaning. 'To consign, in the mercantile law, is ordinarily, to send or transmit the goods to a merchant or factor for sale; and a consignee is consequently the person to whom they are consigned, shipped, or otherwise transmitted.' * * * Consigned implies agency. Rolker v. Insurance Co., 42 N. Y. 17."

To the same effect is Sturm v. Boker, 150 U. S. above, 326, 327, 14 Sup. Ct. 99, 37 L. Ed. 1093. The other Kansas cases are to the same effect, and hold under the law of Kansas, as it is generally held elsewhere, that a consignee of property for sale on commission acquires no title to the unsold property received under such contract that a purchaser from, or creditor of, the consignee, can hold as against the consignor; also that such a consignment contract need not be filed for record or recorded in the proper registry office to save the rights of the consignor in and to the consigned property. See Big Four Implement Co. v. Wright, 207 Fed. 535, 539, 125 C. C. A. 577, 47 L. R. A. (N. S.) 1223.

[4] The contention of the appellee that the transaction of June 12th, amounts to a preference in favor of the petitioner is without merit. There was no debt owing by the bankrupts to the petitioner for the unsold shoes; and there can be no preference under the Bankruptcy Act where there is neither debtor nor creditor. Big Four Implement Co. v. Wright, 207 Fed. 539, 540, 125 C. C. A. 577, 47 L. R. A. (N. S.) 1223.

The contention of the appellee cannot, we think, rightly be upheld. The referee and court erred, therefore, in denying the claim of the petitioner to the shoes in controversy. The decree of the District Court is reversed, and the case remanded to that court, with directions to allow the claim of the petitioner to the shoes; or, if they shall have been sold by the trustee, to award to the petitioner the value thereof. It is ordered accordingly.

Reversed.

CLOQUET LUMBER CO. v. BURNS.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1915.)

No. 4333.

1. APPEAL AND ERROR ⊂⊃859—SCOPE OF REVIEW.

Only rulings upon questions of law made by the trial court during the trial are reviewable on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3441–3445; Dec. Dig. ⊂⊃859.]

2. APPEAL AND ERROR ⊂⊃87—DECISIONS APPEALABLE—ORDER DENYING NEW TRIAL.

A motion for a new trial is a separate and independent proceeding, addressed to the discretion of the trial court, and no appeal lies from its decision thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 559–569, 577–596; Dec. Dig. ⊂⊃87.]

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. APPEAL AND ERROR ⟸1064—HARMLESS ERROR—INSTRUCTIONS.

In an action for the value of timber cut from land lying between lots on which defendant owned the timber and a lake, the court, in charging upon the question of good faith, stated that everybody knew that defendant's lots, with their area and length of lines, could not possibly extend to the water, as a matter of physical fact. Defendant's assistant manager in charge testified that before the timber was cut he knew that the land on which plaintiff was living, and which he claimed, was between the lake and a meander line of an erroneous survey, and that it was never a part of the lake; that at one time they stopped at the meander line, but that later they went on and cut all of the timber from plaintiff's land; that what their rights were had not been determined by a court, and that they took their chances. *Held*, that the instruction, if erroneous, was not prejudicial, as there was little question but that such assistant manager knew that the lots upon which he had a right to cut timber did not extend to the lake, so far as could be determined by an observation of the surrounding country and the plat.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. ⟸1064.]

4. TRIAL ⟸295—INSTRUCTIONS—CONSTRUED AS A WHOLE.

Prejudicial error cannot be predicated on portions of the charge, where no prejudicial error appears when such portions are construed with the whole charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. ⟸295.]

5. TRIAL ⟸191—INSTRUCTIONS—STATEMENTS OF FACT.

In an action for cutting timber from land of which plaintiff had such possession as authorized him to maintain the action, a statement in the charge that plaintiff was in possession was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420–431, 435; Dec. Dig. ⟸191.]

6. COSTS ⟸277—REMEDIES FOR NONPAYMENT—STAYING TRIAL—DISCRETION.

Whether a trial after the reversal of a judgment for plaintiff should proceed notwithstanding plaintiff's failure to pay the costs of the first trial was a matter entirely within the discretion of the trial court.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1048–1060; Dec. Dig. ⟸277.]

7. ABATEMENT AND REVIVAL ⟸41—TRANSFER OF INTEREST—MOTIONS TO DISMISS.

On the trial of an action after the reversal of a judgment for plaintiff, defendant brought it to the court's attention that the judgment on the first trial had been assigned by plaintiff to a corporation composed of plaintiff, his wife, and his son, and moved to dismiss because plaintiff was not the real party in interest. It appeared that the assignment had been filed nearly two years before, and that defendant's counsel at that time had been furnished with a copy of the assignment. The corporation asked leave to continue the action in plaintiff's name, and such leave was granted. *Held* that, under Gen. St. Minn. 1913, § 7685, providing that no action shall abate by reason of the death or disability of a party or the transfer of his interest, if the cause of action continues or survives, the motion to dismiss was properly overruled, as the correct procedure was for plaintiff to move for a substitution of parties, and if he fails to do so for defendant to make such motion, especially as defendant's counsel had a copy of the assignment for two years before the motion was made.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 212–220; Dec. Dig. ⟸41.]

8. APPEAL AND ERROR ⊜230—SCOPE OF REVIEW.

Matters only brought to the attention of the court by a motion for a new trial are not before the Circuit Court of Appeals for consideration on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⊜230; Trial, Cent. Dig. §§ 183–190, 680–682, 751, 819, 876.]

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by Granville A. Burns against the Cloquet Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William B. Phelps, of Duluth, Minn., for plaintiff in error.

Burt F. Lum, of Minneapolis, Minn. (John R. Van Derlip, of Minneapolis, Minn., R. R. Briggs, of Duluth, Minn., and George P. Wilson, of Minneapolis, Minn., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. [1, 2] This is an action to recover the possession of pine and spruce logs, or the value thereof in the event possession cannot be had. On writ of error the judgment for the plaintiff on the first trial was reversed and a new trial ordered. 207 Fed. 40, 124 C. C. A. 600. The only questions left open by this court by the former decision were the value of the logs and whether they were cut by the lumber company in good faith or as a willful trespasser. In view of the alleged errors argued by counsel for the lumber company, it will serve to explain our position with reference to the record by saying again, what has been so many times said before, that our power to review on writ of error extends only to rulings upon questions of law made by the trial court during the trial, and in a great majority of these rulings an exception must be taken and allowed in order to obtain a review thereof. The proceeding by motion in the trial court to obtain a new trial is a separate and independent proceeding, addressed to the discretion of that court, and no appeal lies from its decision thereon.

[3] The following portion of the charge given to the jury by the trial court was excepted to:

"But I think we will all agree that, under the testimony in this case, long before the cutting of this timber—nine years before the cutting of this timber—everybody knew, or ought to have known, that those lots there, with that area and that length of line, could not possibly come to that water.

"What I mean by that, I don't think everybody should know the principles of law governing the case. I am talking about the facts now. If you understood me to say that everybody should know the principles of law governing the case—Great Heavens! how could they? You understand the facts? There was the plat, and any man looking at that plat knew that those lines were not as long as they would be if they went to the actual lake. Everybody knew—after they found out about that lake being there as it was—that if they gave the man that bought the land on the plat all the land to the lake, he would get a great deal more land than the plat showed there was in the subdivision."

The charge above delivered was upon the question of good faith on the part of the lumber company. Counsel objected to the declaration by the court that before the cutting of the timber everybody knew, or ought to have known, that the lots upon which the lumber company owned the timber did not extend to the lake. The word "everybody" would include the officers and agents of the lumber company. The court, however, explained the matter objected to by stating to the jury that his statement as to the knowledge of everybody referred to the physical facts existing at the place where the timber was cut, and not to a knowledge of what the courts would hold as to the law. We think that, if there was error in the statement of the court objected to, it was without prejudice, in view of the fact that Henry C. Hornby, assistant manager of the lumber company at the time the timber was cut, and who had charge of the operation of the company's mill and operations in the woods, when on the stand as a witness, testified as follows:

"Q. Before the timber was cut you did know that all this land on which Burns was living, and which he claimed, was between the Howe meander line and the lake? A. Yes, sir. Q. And you knew then that it never was a part of the lake, didn't you? A. It was all high ground. Q. Could not have been a part of the lake? A. Could not have been, no sir—impossible. * * * Q. Do you know when the first cutting was done of timber under that deed? A. Not exactly. Q. Well, approximately? A. About 1893. Q. And you didn't cut down to the meander line at that time, or anywhere near it? A. No, sir. Q. Then your men went back about 1897? A. Yes, sir. Q. And cut more timber? A. Yes, sir. Q. At that time you stopped, as near as you could figure it, at the Howe meander line? A. Yes, sir. Q. Then you went on there in 1900 and 1901? A. Yes, sir. Q. And cut all of the timber from Mr. Burns' land? A. Yes, sir. * * * Q. It comes right down to this, doesn't it, Mr. Hornby—that when you cut that timber, it hadn't been finally decided by any court what your rights were? A. Had not been any final courts. Q. That is what I mean—court of last resort? A. No. Q. You know that? A. Yes, sir. Q. You simply went on there, and cut that timber, and took your chances on what the final decision would be? A. We went on and cut the timber. Q. You took— A. We cut the timber, and it had not been finally decided. Q. And you took your chances when you cut it? A. We certainly did."

The court's remarks were based upon the testimony in the case, and while the testimony did not show that everybody knew, the word "everybody" is only material as including the lumber company, and so far as Hornby was concerned there is not much, if any, question under the testimony but that Hornby knew the lots upon which he had a right to cut timber did not extend to the lake, so far as could be determined by an observation of the surrounding country and the plat. After using the language above quoted from the charge, counsel for the lumber company asked the court the following question:

"Would it be proper for the court to say to the jury, which has been held by these courts, that the area is indicated there, not as a limitation of the amount, but simply to notify the government officials what amount the party should pay for the land?"

In answer to this question of counsel the court used the following language, which was also excepted to:

"What the Supreme Court of the United States said—I will read again—was that in truth no such survey as was called for by the contract between

the government and the surveyor was made. I think under this evidence—however, you are to be the judges—that before 1900 and 1901 everybody knew that there was in truth no such survey as was called for by the contract between the government and the surveyor of the exterior lines, with the exception of the south line of the township, run; but no survey of the interior of the township was ever made, and no section lines thereof were ever run, with one possible exception, and in truth the survey as a whole was a fraud. No such body of water at the place indicated on the plat of survey then existed or now exists. I don't think these people could be said to know that the courts would hold that that survey was a fraud. I don't think so, but they knew the facts about that survey. I don't mean to say that Mr. Hornby, the representative of this company, would know that that survey was a fraud in law, or that the courts would hold it a fraud in law; but he knew the facts in regard to that survey, as I remember it—what it showed."

[4, 5] The court subsequently stated to the jury that they were the sole judges of the facts proved by the evidence, and that, if the court had made any statement which indicated to them what he thought about the facts of the case, they not only had the right to disregard his opinion, but that they ought to disregard any opinion of his which differed from their own. It is easy for counsel to select portions of a charge, and, considering them as standing alone, make out a case of prejudicial error; but this method, in fairness to the trial court, may not be adopted. The portions which are alleged to be erroneous must be construed with the whole charge, and, so construing the extracts above quoted, we find no prejudicial error therein. An exception was also taken by counsel for the lumber company to the statement by the court that Burns was in possession of the land from which the timber was cut. In view of the fact that this court had held on the previous appeal that Burns had such a possession of the land as would authorize him to maintain this action, the statement of the court was in entire harmony with the record, and no error was committed in so stating.

[6, 7] Counsel for the lumber company presented three requests to charge to the trial court, which were refused, except as they were given in the general charge. An exception was taken to this refusal. We have examined the requests and the charge, and find that the matter requested is fully stated at different times in the general charge. At the opening of the trial counsel for the lumber company objected to the trial of the case, for the reason that Burns had not paid the costs of the previous trial. Burns testified that he was unable to do so, and the court ruled that the trial should proceed, and an exception was taken to this ruling of the court. This matter was entirely within the discretion of the trial court, and no abuse of that discretion is shown. After the trial had proceeded for some time, it was brought to the attention of the court by counsel for the lumber company that the judgment entered upon the verdict in the former trial of the case had been assigned by Burns to the Granville Company, a corporation, and counsel thereupon demanded that the action be dismissed, because the plaintiff was not the real party in interest. It appeared that the assignment had been filed March 22, 1912, nearly two years before, and that defendant's counsel had at that time been furnished with a copy of such assignment; that the Granville Company was composed of the plaintiff, Burns, his wife, and son.

To remove any question of the right of the plaintiff to proceed with the trial, an appearance was entered by the Granville Company, and that company asked leave of the court to continue the action in the name of Burns. The leave was granted, and the trial proceeded. Under the laws of Minnesota the transfer of the interest of a party does not abate the action. General Statutes of Minnesota 1913, § 7685. Considering that the assignment had been in the hands of counsel for two years, a motion made to dismiss at the trial had little to commend it to the equitable considerations of the court. The correct procedure would seem to have been for the plaintiff to move for a substitution of parties, and, failing so to do, the lumber company should have made such motion. The motion to dismiss was improper. Willoughby v. St. Paul, etc., 80 Minn. 432, 83 N. W. 377; American Engine Co. v. Crowley, 105 Minn. 233, 117 N. W. 428.

The refusal of the trial court to receive in evidence the agreement between Mr. Burns and wife and Mr. Van Derlip, of date January 24, 1905, and deed from Mr. Burns and wife to Mr. Van Derlip of date January 24, 1906, was not error, as this court decided on the former appeal that those transactions did not defeat the right of Burns as a homesteader, so far as recovering the value of the timber in controversy was concerned.

[8] We have considered all exceptions taken to the charge, and all exceptions taken to any other ruling of the court which was open for consideration on the second trial. Those matters which were only brought to the attention of the court by motion for a new trial are not before us for consideration.

Finding no error in the record, the judgment below must be affirmed; and it is so ordered.

GREAT LAKES S. S. CO. v. PITTSBURGH S. S. CO.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1915.)

No. 2573.

COLLISION ⟸91—STEAM VESSELS MEETING ON CONVERGING COURSES—FAULT.

A collision between the steamer Ellwood, down-bound, when turning eastward into Lake Erie at the south end of the Detroit river channel in the night, and the steamer Brower, up-bound from Toledo, *held* due solely to the fault of the Brower in keeping too far to the eastward, instead of turning northward in the channel in the usual and proper course and as required by the passing agreement of two whistles, made when the vessels were a mile or more apart.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187–192; Dec. Dig. ⟸91.

Collision, signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Suit in admiralty for collision by the Pittsburgh Steamship Company, owner of the steamer Ellwood, against the steamer Brower, the

Great Lakes Steamship Company, claimant, with cross-libel against the Ellwood. Decree for libelant, and the claimant of the Brower appeals. Affirmed.

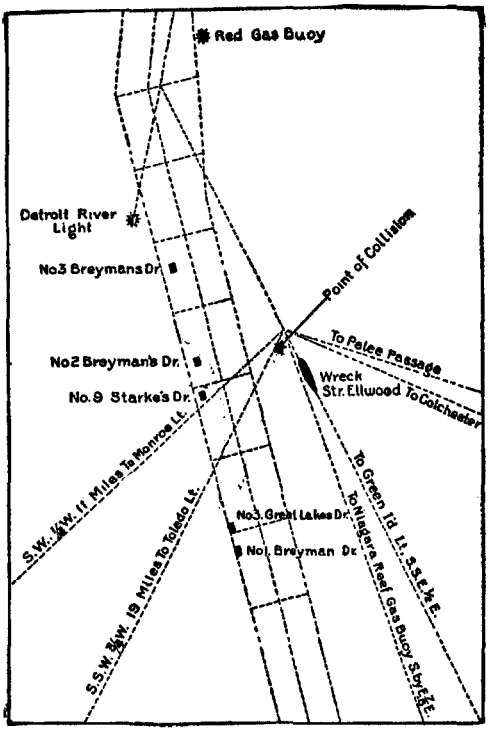
For opinion below, see 201 Fed. 588.

On the night of August 27, 1907, the steamer Ellwood, a 6,000-ton boat, 478 feet long, the property of the Pittsburgh Steamship Company, and the steamer Brower, owned by the Great Lakes Steamship Company, 346 feet long and of 3,500 tons, were in collision at a point in Lake Erie a little outside the mouth of the Detroit river. The Ellwood was bound down the lake, for Lorain, via Colchester Light; the Brower was up-bound, from Toledo. Both were loaded so that they were drawing about 19 feet. The Ellwood libeled the Brower to recover her damages of about $34,000, and the Brower cross-libeled for $22,000 damages. The District Court held the Brower solely at fault; and the Brower appeals.

The situation can be understood by reference to the sketch on the following page. The so-called Detroit river light was a considerable distance out in the lake from the river's mouth, and the water on all sides was about 20 or 21 feet deep, with an occasional shoal spot; but in order to get the best water it was customary for down-bound vessels to pass the red gas buoy on the port, the Detroit river light on the starboard, and then to continue in a general southeasterly direction for a distance before diverging on their desired courses, which might vary from southwest around to nearly east. The official lake survey charts had adopted, as an aid to navigation, an arbitrary point of divergence 2,500 feet S. E. by E. from the light, and from this point, indicated the various courses by dotted lines. These dotted lines do not, however, imply either obligation or custom to make the turn at the point indicated; they only generally indicate the proper use of bearing points and compass. Up-bound boats followed the approximately reverse courses. A boat from Toledo, with the draft of the Brower on this occasion, could have gone entirely to westward of the light, or close to it on the southeasterly side; but it was usual for such a boat to swing into the channel of the best water at some distance southeasterly from the light—it did not make much difference where—and then go up, with the light on the port and with the red gas buoy on the starboard.

At this time, the government was engaged in dredging a deeper channel southeasterly from the light. The work was plotted into sections, 800 by 1,000 feet, as shown by the dotted line double rectangles on the sketch; and along the westerly edge of the work five dredges were anchored, practically in line. In order to get into the customary up-bound course, it was necessary for the Brower to go past some of these dredges, and then turn to port to head up for the light; and while she might have swung into the channel closer to the light, it was entirely normal and proper for her to enter, as she did, between dredge No. 9, Starke, and No. 3, Great Lakes. We refer to this area of contemplated deepening, and indicated by the rectangular dotted lines, as the channel, but without intending to imply that it was a channel in any sense, except as being the course in which heavily laden boats could get the best water, and so being a course which they very commonly followed at least 2,500 feet southerly from the light.

All the witnesses agree that when the Ellwood was a little distance above the red gas buoy she observed the lights of the Brower approaching from the direction of Toledo, and a mile or so away from the line of dredges; that the Ellwood gave a two-blast signal, to which the Brower responded with the same signal; that the Ellwood made a turn around the red gas buoy, left the light on her starboard at a distance of 1,000 feet, more or less, and continued a southeasterly course, swinging somewhat—the extent is disputed—to port; that the Brower entered the channel somewhere between the two dredges named, and began heading up for the light, but that the starboarding of one or the other, or both, was insufficient, and they came together; and that the Brower struck the Ellwood a more or less angling blow, causing the Ellwood to sink. As to their exact courses and the various details involved, there is the usual conflict.



H. D. Goulder and Frank S. Masten, both of Cleveland, Ohio, for appellant.

H. A. Kelley, of Cleveland, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). When we fix the point where the collision occurred, it goes far to determine the other matters in conflict. This primary fact is ascertainable with less difficulty than usual. The location of the Ellwood, as she lay upon the bottom after the collision, was fixed by survey, and is practically undisputed. Disinterested observers from one of the dredges agree with the Ellwood's crew that she did not go more than a length, and perhaps not more than half a length, after the collision before the sinking of only one or two feet which was necessary to make her rest on the bottom. It is also fairly sure that, at the moment of the collision, her stern was swinging to port, answering an endeavor to make the inevitable blow more glancing, and that the blow itself, received on the starboard quarter, would have accelerated this swing. It is therefore not a matter of serious doubt that her heading had been considerably more to the easterly than it was as she lay sunk, and that the point of collision was just about where it is

indicated on the sketch, and so that there was a distance of not less than 1,000 feet between that point and the line of dredges. Accepting and based upon this theory of the place of collision, we proceed to consider the conduct of the respective boats.

We agree with the court below that the Brower was in fault. When her captain exercised his right of choice and determined to swing into the channel around one of the dredges as far down as the point he selected, he assumed the burden of doing so with all the care required by the fact that another steamer was coming down, and for all he knew, might be bound south or southwest, and might be desiring to go just where the Ellwood did go. That the collision was unnecessary, if the Brower had been careful in this maneuver, is highly probable, if not clear. Her captain says that he began starboarding 2,000 feet before passing the dredges, so as to enter the channel at an angle as small as possible, and constantly continued starboarding and swinging to port until the collision. This is exactly what he should have done, if he was careful, but the place of the collision demonstrates it is what he did not do. If he had thus managed his boat, passing close to dredge No. 9, and perhaps checking, it is difficult to see how there was any occasion for him to pass east of the center of the channel, say 300 feet from the dredge; but the place of the collision was 700 feet further east. The same consideration demonstrates that he could not have materially changed his heading from Toledo until after he entered into the channel between the dredges; if he had, he would necessarily have gone well astern of the Ellwood, if he had crossed her course at all. He knew that he must make a considerable turn, and that his own boat would, and the other boat might, respond to the helm much more slowly than if in deep water. The reasonably clear conclusion is that he was not navigating with close attention to the danger that might be imminent, but was taking it for granted that the Ellwood was much further away than her real position, or would yield much more than any obligation required.

How the conduct of the Ellwood should be characterized is a question of more difficulty. It is forcefully argued that, as the Ellwood knew that the Brower would come up somewhere through these waters, and as the Ellwood's final course was to be easterly, and as she might have turned off in that direction anywhere below the red gas buoy, and as, if she had kept only a little further away from the dredges, the collision would not have occurred, the result is, at least in part, chargeable to her. Particular reliance is placed on the decision of this court in Lake Erie Co. v. Gilchrist Co., 142 Fed. 89, 73 C. C. A. 313, where it was said that the customary course at this point for vessels bound down the lake, was to turn to the east between the gas buoy and the light; and hence it is urged that the Ellwood was away south of her proper place. If the record in this case justified the same conclusion of fact reached in the Lake Erie-Gilchrist Case as to the customary course of down-bound vessels, there would be much strength in this position; but that case involved the sailing course customary at a period several years before the time here involved,

and upon this record, it cannot be doubted that the Ellwood was following a common and natural course for vessels of her draft bound down the lake. Her captain so testified in terms, it can hardly be said that he is contradicted, and his general conclusion is supported by the specific fact that while the Ellwood was on the bottom, more of such vessels passed her on the south than on the north. We must assume, therefore, that she was following a rightful course. It does not follow that she was entitled to navigate without regard to the approach of the Brower; she was bound to know that the Brower might enter this channel and make the turn, and she was bound to leave, not merely sufficient room, but ample room, for that purpose. This we think she did. If the space left for the Brower, in which to make the turn, had been, for example, only 500 feet, it might well be said that, while this was apparently space enough, yet it might not prove so, and that the Ellwood, being able to yield further, could not have been wholly exonerated; but a lack of due care on the part of the Ellwood must rest upon her reasonable anticipations of what the Brower might do, and it cannot be said that there was any duty to anticipate that the Brower would require 1,000 feet of channel in which to make a swing of four points, two points of which ought to have been made before entering the channel at all.

In the Lake Erie-Gilchrist Case, each of the meeting boats had to make the turn between the Detroit river course and the course down the lake, and it was held that the boat which took the customary way and kept her own side of the joint course had a right to assume that the other boat would make the proper turn at the proper point, and would not continue on across the joint course and enter the waters which were, in a sense, appropriated to the first boat. The opinion and the authorities there cited fully and sufficiently cover the questions that here arise, and apply to the fault of the Brower in not turning up into the channel when and as she should have done, and to the right of the Ellwood to believe that the Brower would make this turn, and would not continue on into the course of the Ellwood, and lead to the conclusion that, in relying upon this belief, the Ellwood did not thereby, in blameful degree, contribute to the collision.

It remains only to consider whether the Ellwood should, before it was too late, have observed that the Brower was not meeting this anticipation, but was keeping a course likely to be dangerous, and so whether the Ellwood should have checked or blown an alarm. This query is emphasized by the fact that after the meeting signals were exchanged, but before the Brower entered between the dredges, the lookout of the Ellwood had been recalled from his position at the bow and sent about some other work. We think it should be assumed that the absence of the lookout would be a condemnatory fault, unless it satisfactorily and clearly appears that his presence would have made no difference (The Ariadne, 13 Wall. 475, 20 L. Ed. 542; The Roby [C. C. A. 6] 111 Fed. 601, 612, 49 C. C. A. 481); but we are unable to see any reasonable ground for thinking that the absence of the lookout could have been material. The Brower had already been observed and a meeting agreement had been made, the night was clear,

the Brower's lights were in plain sight, there was no obstruction of any kind, and there was nothing to distract the captain's attention in any other direction. It is obvious from the sketch that, as the Brower entered the channel and began to turn, both her lights would open to the Ellwood, if they were not already open; that this condition would be modified by the forward progress of both boats towards their course intersection; and that the difference in the amount which these two lights would open to the observer on the Ellwood as between a careful and safe turning into the channel and the kind of a turn which actually was made could hardly, for some time, be sufficient, even to an attentive and skilled observer, to show that the Brower was turning so slowly as to be creating danger; nor can we think, when we remember the Ellwood's rightful anticipations as to what the Brower would do, that probable danger should have appeared to the Ellwood's captain, or would have appeared to her lookout, before the time when both boats did appreciate the danger and make the efforts to escape which were then bound to be ineffectual.

The decree below is affirmed.

TROPICAL FRUIT S. S. CO., Limited, v. TOWLE.

(Circuit Court of Appeals, Fifth Circuit. April 28, 1915.)

No. 2754.

1. SEAMEN ⟸29—PERSONAL INJURIES—LIABILITY OF VESSEL.

Where a ship is seaworthy and properly equipped, neither the vessel nor owner is liable for an injury to a seaman, resulting from the negligence of other members of the crew.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188–194; Dec. Dig. ⟸29.]

2. SEAMEN ⟸29—PERSONAL INJURIES—LIABILITY OF VESSEL—STATE STATUTE.

Civ. Code La. § 3237 (12), giving a privilege to any individual injured in person or property by "any carelessness, neglect or want of skill in the direction or management" of any vessel, has no application to the case of a seamen injured on board the ship through the negligence of other members of the crew.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188–194; Dec. Dig. ⟸29.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by Frank Towle against the steamship Cartago; the Tropical Fruit Steamship Company, Limited, of Glasgow, Scotland, claimant. Decree for libelant, and claimant appeals. Reversed.

This is a suit in admiralty against the steamship Cartago by Frank Towle, a seaman thereon, to recover the sum of $1,500 for personal injuries alleged to have been sustained by him through the negligence of the officers in charge of said vessel.

The gist of the action is set forth in the following allegations of the third paragraph of the libel: "That on a recent outward voyage or trip of the Cartago, on or about April 30, 1914, this libelant, while on board said vessel,

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

engaged in the performance of his duties as one of the crew and, acting under orders and while battening down or covering and securing one of the hatches of said vessel, did sustain a severe bodily injury while working, and the right hand of this libelant was injured and crippled by the crushing of two fingers, thereby losing a joint of his middle finger and crushing and disabling another finger of his right hand, by the same being crushed by a barrel or cylinder containing oil or similar liquid, which had been improperly or insecurely placed or left carelessly upon or near the deck of the vessel near the hatch."

The claimant in due course filed its answer, admitting the employment of the libelant on the Cartago and the occurrence of the injury, but denying the other allegations of the libel. The evidence was taken out of court before a commissioner, and the case was then submitted to the court, which entered a decree against the claimant and its surety in the sum of $500. The court held that the accident was due to the negligent manner in which the barrel of oil had been placed and to the negligence of libelant in not taking proper precautions, and accordingly divided the damages. From this decree appellant prosecutes this appeal, and has filed the following assignments of error:

"(1) That the court erred in handing down any decree at all in favor of the libelant, but should have dismissed his claim and entered a decree in favor of respondent.

"(2) That the court should have held that the evidence in this case failed to show any negligence on the part of the respondent, and therefore erred in allowing libelant any recovery whatsoever.

"(3) That the court should have held that, even if there were any negligence on the part of respondent, it was the negligence of the fellow servants of libelant, and that no recovery could be allowed therefor, and that the court, therefore, erred in not rendering judgment in favor of respondent, dismissing libelant's suit.

"(4) That the court should have held that the libelant had failed to bring his case within the exceptional class of cases in which a seaman is allowed to recover indemnity for personal injuries, inasmuch as the evidence failed to show that the ship was unseaworthy, or that there was any defect in the appliances thereof, and that the court, therefore, erred in entering any decree whatsoever for libelant, inasmuch as the evidence showed that libelant had been fully maintained and cured at the expense of respondent."

Esmond Phelps, of New Orleans, La., for appellant.

C. L. Walker, of New Orleans, La., for appellee.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). [1] The evidence is taken as fully proving the facts alleged in the third paragraph of the libel, and yet we are constrained to deny the libelant relief.

The matters complained of arose on a vessel practically on the high seas, and thus within the admiralty jurisdiction, and the responsibility of the ship must be determined according to admiralty law and usages.

In The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, the Supreme Court discussed at length the extent of recovery in admiralty allowed for an injury to seamen received on a vessel, and therein announced the following propositions as the settled law of England and this country:

"1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

"2. That the vessel and her owner are, both by English and American law,

liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. * * *

"3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

"4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

The libelant injured in this case received all the medical care and attention his case required, and his wages were continued, and he makes no claim in that respect. There is no contention but that the Cartago was in all respects seaworthy. The barrel or cylinder containing oil that was improperly and insecurely placed or left carelessly upon or near the deck of the vessel near the hatch, which caused the injury received by the libelant, was so placed or left through the negligence of other members of the crew for which the ship is not liable.

The Osceola has been followed and applied in cases similar to the one under consideration in many instances. See City of Alexandria (D. C.) 17 Fed. 390, in which Judge Brown said:

"In effect, the maritime law makes no account of mere ordinary negligence in such cases. More or less negligence is in fact to be expected, and the rules long established, as regards the relief to be afforded, are irrespective of such negligence, whether by the seamen or others. When the owners perform all that can be reasonably done on their part by the proper equipment of the vessel for the voyage and the selection of competent officers and a sufficient crew, no reason exists in natural justice for holding them or their vessel answerable for the accidents to seamen, which happen during the voyage, beyond the limits which the maritime law has established."

See, also, Olson v. Oregon Coal & Navigation Co., 104 Fed. 574, 44 C. C. A. 51, in which it is held that a ship could not be held liable for injuries received by a member of the crew falling through a hatchway negligently left open.

In The Drumelton (D. C.) 158 Fed. 455, it is said:

"According to libelant's" plea a tank "engine cover fell upon him because proper lashings, although provided, had not been made fast. If this be true, he is certainly not entitled to any recovery under the fourth statement of law in The Osceola."

And see The Nyack, 199 Fed. 383, 118 C. C. A. 67; also The Santa Clara (D. C.) 206 Fed. 179.

[2] The proctor for libelant contended in the lower court, and contends here, that The Osceola Case and other decisions cited were inapplicable because of the provisions of article 3237 of the Civil Code of Louisiana, as follows:

"The following debts are privileged on the price of ships and other vessels, in the order in which they are placed: * * *

"12. Where any loss or damage has been caused to the person or property of any individual by any carelessness, neglect or want of skill in the direction or management of any steamboat, barge, flatboat, water craft or raft, the party injured shall have a privilege to rank after the privileges above specified."

The Osceola, supra, fully answers this contention. In that case in discussing a similar statute of Wisconsin, Mr. Justice Brown, speaking for the court, said:

"The statute was doubtless primarily intended to cover cases of collision with other vessels or with structures affixed to the land, and to other cases where the damage is done by the ship herself, as the offending thing, to persons or property outside of the ship, through the negligence or mismanagement of the ship by the officers or seamen in charge. To hold that it applies to injuries suffered by a member of the crew on board the ship is to give the act an effect beyond the ordinary meaning of the words used. Would it apply, for instance, to injuries received in falling through an open hatchway? Or to a block blown against a seaman by the force of the wind, though the accident in either case might have resulted from the negligence of the master? We think not."

The case of Carter v. Brown, 212 Fed. 393, 129 C. C. A. 69, cited by the libelant, is easily distinguishable from the case at bar. That was a suit in personam against the owners of the steamboat Queen of the Bend, a coast packet running from one part of Louisiana to another, to recover damages by the libelant while employed as a laborer thereon by the falling of certain sacks of sugar. The court found that Carter, the master and one of the owners, had actual knowledge of the method adopted for piling the sacks, and either directed or acquiesced therein. In other words, there was personal negligence on the part of the owner.

The decree of the District Court is reversed, and the cause is remanded, with instructions to dismiss the libel.

CLAUSS et al. v. PALMER UNION OIL CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2428.

COURTS ⊂=278—JURISDICTION—DIVERSITY OF CITIZENSHIP—INTERVENERS.

Where a suit was instituted by a resident of Ohio, on behalf of himself and all other persons similarly situated, against certain California corporations and their directors, who were citizens of California or Oregon, to set aside for fraud a conveyance of the property of the corporation, in which complainant was a stockholder, and thereafter numerous other stockholders, 12 of whom were citizens of California, intervened as co-complainants, and filed bills identical with the bill of the original complainant, the federal court no longer has jurisdiction, and a motion to vacate a decree dismissing the suit was properly denied.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 819; Dec. Dig. ⊂=278.

Diverse citizenship as a ground of federal jurisdiction, see note to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

Appeal from the District Court of the United States for the Second Division of the Northern District of California; M. T. Dooling, Judge.

Suit by Andrew Clauss and others against the Palmer Union Oil Company and others. From an order denying a motion to vacate a

decree dismissing the suit, and for leave to file an amended bill, complainants appeal. Affirmed.

See, also, 213 Fed. 286.

John E. Bennett and Jesse Olney, both of San Francisco, Cal., for appellants.

Gavin McNab, of San Francisco, Cal., for Anglo-California Trust Co.

Luther Elkins, of San Francisco, Cal. for George I. Stewart and Gavin McNab.

Gavin McNab, B. M. Aikins, R. P. Henshall, Robert R. Moody, and Nat Schmulowitz, all of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This suit was brought in the court below by the appellant Andrew Clauss alone, but who the defendants thereto were does not appear, since the original bill is not in the record. The amended bill, however, is, and in that Clauss, a resident and citizen of the state of Ohio, was still the sole complainant, suing, as therein alleged, "on behalf of himself and all other persons similarly situated, and for the use and benefit of the Palmer Oil Company," against Palmer Union Oil Company, a corporation of the state of California, the Anglo-California Trust Company, a corporation of the same state, and Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, Gavin McNab, H. C. Stratton, and George I. Stewart, as directors of the Palmer Union Oil Company, and also individually, all alleged to be citizens of the state of California, except Ladd, who is therein alleged to be a citizen and resident of the state of Oregon, and also against the same named individuals "as directors of said Palmer Oil Company, * * * or trustees thereof, if said corporation be defunct, also against the several parties in their individual capacities."

The amended bill alleges that on or about October 21, 1911, the Palmer Oil Company was a California corporation capitalized at 2,000,000 shares of capital stock of the par value of $1 each, all of which was issued, and of which the complainant Clauss was the owner of 1,000 shares. The purpose of the suit was the annulling, on the ground of alleged fraud and conspiracy on the part of the directors of the Palmer Oil Company and the Palmer Union Oil Company, of a conveyance made by the former company to the latter of all of its property, which is alleged to be of the value of $2,500,000, and to recover from the directors the value of the property so transferred, and to recover the consideration for such transfer from the transferee —the bill alleging the various acts relied upon as showing the fraud and conspiracy to the wrong and injury of the minority stockholders.

The amended bill was filed November 15, 1913, and on the 25th of the same month the Palmer Union Oil Company filed a motion in the court below for the dismissal of the amended bill upon various grounds, as did the defendant Anglo-California Trust Company and the individual defendants. Those motions were pending and undetermined when, on the 19th day of January, 1914, the clerk of the

court below, upon application of the solicitors for the complainant, entered an order that the amended bill of complaint "be and the same hereby is taken pro confesso against" the various defendants, which order was subsequently and on January 21, 1914, vacated by the court as to each and all of the defendants, on motion, and subsequently, to wit, on the 4th day of March, 1914, the court below granted a motion that had been made for the dismissal of the suit, and that had been argued on behalf of the respective parties; the order of dismissal being duly entered. Thereafter, to wit, on the 10th day of March, 1914, the solicitors for the complainants filed a motion, containing, among other things, the following:

"That said decree dismissing said amended bill of complaint, dated the 4th day of March, 1914, be vacated and set aside and held for naught. That plaintiff above named further moves this honorable court that he may be at liberty to amend his said amended bill of complaint in the following particulars:

"First. That said amended bill of complaint be dismissed without prejudice as to the following defendants, viz.: Anglo-California Trust Company, a corporation, Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, H. C. Stratton, Gavin McNab, and George I. Stewart, as individuals and as directors either of said Palmer Union Oil Company or as directors of said Palmer Oil Company.

"Second. That there be stricken from the first prayer of said amended bill of complaint the last line thereof, which reads as follows: 'Or to a receiver, if such receiver be appointed as hereinafter prayed.'

"Third. That the prayers for relief contained in said amended bill of complaint numbered 3, 5, 6, and 7 be stricken out.

"Fourth. That so much of said amended bill of complaint beginning with the words 'California, having its principal place of business at Sisquoc,' etc., at line 30, page 1, of said amended bill of complaint, and ending with the word 'capacities,' at line 14, on page 2, of said amended bill, be stricken out, and that there be inserted in lieu thereof the following: 'California, having its principal place of business in the city and county of San Francisco, state of California, and Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton, and Charles E. Ladd, in so far as they claim to be, or may be found to be, trustees of said Palmer Oil Company, the said Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton, and Charles E. Ladd, claiming that said Palmer Oil Company has been dissolved and no longer exists as a corporation. Complainant alleges on information and belief that there are no creditors existing of said Palmer Oil Company.'

"Fifth. That the title of this cause in said amended bill of complaint be amended to read as follows: Andrew Clauss, Plaintiff, v. Palmer Union Oil Company, a Corporation, Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, Gavin McNab, H. C. Stratton, and George I. Stewart, as Directors of Said Palmer Union Oil Company, and in Their Respective and Individual Capacities, Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton, and Charles E. Ladd, as Directors of Palmer Oil Company, a Corporation, and in Their Respective Individual Capacities, Anglo-California Trust Company, a Corporation, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe, Tenth Doe, Palmer Oil Company, a Corporation, Defendants.

"Sixth. And complainant prays for such further and other relief as to the Court may seem meet and equitable"

—which motion was denied by the court below by order entered April 3, 1914. While the record does not contain any petition in intervention in the suit, it does show, both by the petition for and allowance of an appeal, by the assignments of error on the appeal, by the order allowing the appeal, by the docket of the court below, which is print-

ed in the record, and by the opinion of the court also appearing therein, that various named persons did intervene and become co-complainants, and did become and are coappellants. In the order of the court denying the motion to vacate the order dismissing the suit it is said:

"The relief sought is the setting aside, on the ground of fraud, of a transfer made by the corporation of property stated to be worth $2,500,000; the plaintiff averring that the action is brought on behalf of himself and all others similarly situated. After the filing of said bill, a petition was presented by the attorneys for plaintiff on behalf of 15 other stockholders of said Palmer Oil Company asking leave to intervene, and such leave having been granted by the court, said attorneys filed a bill of intervention by said 15 stockholders identical in all essential particulars with the original complaint. In this bill of intervention 12 of the plaintiffs, owning 125,567 shares, are citizens of California, and 3, owning 3,500 shares, are citizens of other states. So that, if the present motion were granted, we would have a situation with 4 plaintiffs, citizens of other states, owning in all 4,500 shares, and 12 plaintiffs, citizens of California, owning 125,567 shares, all in this court clinging to the complaint of a single stockholder, resident of Ohio, owning but 1,000 shares, and all represented by the attorneys of the original plaintiff. Under these circumstances, aside from the fact that the proposed amendments are for the most part amendments to the prayer of the original bill, and not amendments to the bill itself, the motion to amend will be denied; and it is so ordered."

We are of the opinion that the court below was right in dismissing the suit, for the reason that it was not one properly cognizable by the federal courts. Quincy v. Steel, 120 U. S. 241, 7 Sup. Ct. 520, 30 L. Ed. 624, and authorities there cited.

The judgment is affirmed.

BRADY v. KERN.

(Circuit Court of Appeals, Third Circuit. May 26, 1915.)

No. 1934.

1. EVIDENCE ⊜441—PAROL EVIDENCE TO VARY WRITING.

Though a written contract is preceded by parol negotiations, if the parties put the complete contract into writing, it may not be contradicted or varied, unless fraud, accident, or mistake has supervened.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723–1763, 1765–1845, 2030–2047; Dec. Dig. ⊜441.]

2. EVIDENCE ⊜155 — ADMISSIBILITY BY REASON OF ADMISSION OF SIMILAR EVIDENCE.

Plaintiff sued defendant on a written agreement to pay a specified price for shares of stock; the agreement containing no promise by plaintiff to deliver the stock. Practically all of the stock in such corporation was held by voting trustees, and plaintiff therefore had no shares of stock, but had only voting trust certificates, and they were pledged as collateral. He was permitted to prove by parol that the parties treated such certificates as the equivalent of shares of stock, and that defendant knew the stock was pledged, and agreed to dispense with physical delivery of the certificates. *Held* that, having shown by his own proof that the contract was partly oral and partly written, and having been permitted to prove the parol terms thereof, defendant was properly permitted to show by

parol that, if he was unable to procure a purchaser for the stock, the amount paid down by him was to be the limit of his liability.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445–458, 2148; Dec. Dig. ⊜155.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by Arthur C. Brady against Martin E. Kern. Judgment for defendant (218 Fed. 862), and plaintiff brings error. Affirmed.

E. Spencer Miller, of Philadelphia, Pa., for plaintiff in error.

Owen J. Roberts, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. Although many facts of this controversy appear already in Judge Dickinson's opinion refusing a new trial ([D. C.] 218 Fed. 862), it may not be undesirable to restate them briefly in order to bring out distinctly the point on which we think the decision should rest.

Brady, the plaintiff, and Kern, the defendant, were both stockholders, and were otherwise interested, in the International Motor Company. From the beginning of the enterprise all the stock, preferred and common, except the directors' qualifying shares, had been issued to voting trustees, so that the stockholders were not in possession of the usual certificates of stock, but of so-called "voting trust certificates" that represented the stock. The financial condition of the company had become unsatisfactory, not to say critical, and the stock, which was an unlisted security, was only occasionally in demand, and its value in the market was uncertain. In this situation, seven persons interested in the company (including the present litigants) met at dinner in a New York hotel on December 2, 1912, and shared the customary solids and liquids of such a repast. The company's condition was discussed, and Brady said he was not satisfied and desired to sell out.

Apparently the principal conversation on this particular subject was between Kern and himself, and they are in agreement on the point that the talk resulted in a contract, although they differ decidedly about terms. They do not differ, however, about the fact that the agreement was first completed by parol, whatever its terms may have been. Brady's position is that he agreed to sell his holdings outright to Kern at a specified price, and received $100 on account, the balance to be paid the next day at 12 o'clock; while Kern's position is that he was so confident he could raise the money himself, or at least could find a purchaser at the price named, that he took an option to buy at the hour designated, and handed $100 to Brady as a forfeit, but with the distinct agreement that this sum was to be the limit of his liability in case he should fail in his efforts. The jury has determined that Kern's version is correct, and nothing is presented for our consideration except the question whether there was substantial error during the trial.

[1, 2] We need not take up the assignments in detail; the vital ques-

tion for decision is whether the parol evidence rule was violated. It is almost always true that a written contract has been preceded by parol negotiation, and that the terms of the contract are thus agreed upon before they are reduced to writing. Of course, the parties may leave the transaction in parol, and if they adopt this course the contract must be proved by oral testimony in the usual manner; but, if they put the complete contract into writing afterwards, they may not contradict or vary the writing, unless fraud, accident, or mistake has supervened. Let us see what happened here. A contract of some sort had been made, and money had been paid over, so that the rights of both parties had already been fixed, when Brady suggested that a memorandum should be made of the transaction. Accordingly he wrote an acknowledgment that he had received $100 on account, and the receipt was handed to Kern. This paper has been lost, but Brady testified that "the form and substance" were as follows:

"New York, December 2, 1912.

"Received of Martin E. Kern the sum of one hundred dollars on account of the purchase price of about 1,900 shares of the common, and 1,500 shares of the preferred, stock of the International Motor Company. Common at $10.00 per share. Preferred at $75.00 per share. Balance to be paid before 12 o'clock noon December 3, 1912. [Signed] Arthur C. Brady."

On his part Kern wrote and handed to Brady the following memorandum:

"I agree to pay to Arthur C. Brady $75.00 per share for approximately 1,500 shares of the preferred stock of the International Motor Company, and $10.00 per share for about 1,900 shares of the same company, before 12 o'clock noon, December 3, 1912. [Signed] Martin E. Kern."

It is this memorandum on which Brady relies as a contract of sale so complete and definite that Kern is not at liberty to vary it by parol. But the strength of this position is much weakened by the fact that he was himself obliged to vary it before he could make out a prima facie case. It is quite clear that the memorandum is incomplete in at least two particulars: It contains no promise by Brady to deliver, and, while such promise may no doubt be implied, it must nevertheless be a promise to deliver the thing specified in the writing, namely, "stock" or "shares"; and of this Brady had none to deliver. Of course he had voting trust certificates; but, in order to prove that the parties regarded one as the equivalent of the other, he was obliged to offer evidence of the parol agreement that preceded the memorandum. So, also, with regard to the matter of delivery. He was unable to fulfill the implied promise to deliver, and in order to excuse noncompliance he was compelled to go again into the parol agreement for the purpose of showing that Kern was acquainted with the fact that the stock was pledged as collateral, and had therefore agreed to dispense with physical delivery of the certificates. Before he had finished his proof, he had himself made it clear that the contract on which he sought to recover was partly oral and partly written. Having thus had the aid of the parol terms to add to the writing whatever was necessary for his own side of the case, he was scarcely in a position to object successfully to Kern's use of the parol terms to establish the conflicting theory, namely, that

a clause should be added limiting his liability to $100. We do not see that one use of these terms is either more or less objectionable than the other, and to Brady's contention that he has thus suffered defeat it seems sufficient to reply that he could not have made out his own case at all, if he had been strictly confined to the writing. In either event, therefore, he was in danger of defeat, and practically it made little difference on which horn of the dilemma he was impaled. The decided weight of the evidence seems to have been with the defendant, but in any event the verdict is conclusive here in favor of Kern's account of the transaction.

We do not think it necessary to prolong the discussion. If authority is needed for the proposition that whenever a contract is partly in writing and partly in parol, and one party has given testimony concerning the parol terms, the other party has a similar right, the whole matter (save in exceptional circumstances) thus falling within the province of the jury as a question of fact, it may be found in Bogk v. Gassert, 149 U. S. 25, 13 Sup. Ct. 738, 37 L. Ed. 631, Sun Ass'n v. Edwards (C. C. A. 2d Circuit) 113 Fed. 448, 51 C. C. A. 279, and Donner v. Alford (C. C. A. 3d Circuit) 136 Fed. 750, 69 C. C. A. 402.

The judgment is affirmed.

W. G. CORNELL CO. v. SCHUYLKILL COUNTY.

(Circuit Court of Appeals, Third Circuit. May 3, 1915.)

No. 1920.

CONTRACTS ⇐300—CONSTRUCTION—BUILDING CONTRACT—OWNER'S LIABILITY FOR DELAY.

Where a contract for the construction of certain portions of a building provided in one article that, if the contractor should be delayed in the prosecution or completion of the work by the act, neglect, or default of the owner, the architects, or any other contractor employed by the owner on the work, the time fixed for the completion of the work should be extended for a period equivalent to the time lost by such delay, and the next article provided that the owner agreed to provide all labor and materials essential to the conduct of the work, not included in the contract, in such manner as not to delay the progress of the work, and in the event of failure so to do, thereby causing loss to the contractor, the owner should reimburse the contractor, the clause in the latter article requiring the owner to provide labor and materials referred only to such labor and materials as the owner himself was required to furnish, and does not render the owner liable for delay to the contractor caused by delay in the work being done by other contractors.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372–1381; Dec. Dig. ⇐300.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by the W. G. Cornell Company against the County of Schuylkill. Judgment for defendant, and plaintiff brings error. Affirmed.

Charles L. McKeehan, of Philadelphia, Pa., for plaintiff in error.

E. D. Smith, of Pottsville, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The county of Schuylkill proposed the erection of a public building, and entered into contracts with different contractors for the several parts of its construction, reserving, however, a limited part of the work to be done directly by itself. Under contract with the county, the plaintiff company installed in the building the water, sewage, lifting, heating, ventilating, and lighting systems. Against delays and their consequences the parties contracted as follows:

"Art. VI. The contractor shall complete the several portions, and the whole of the work comprehended in the agreement, by and at the time or times hereinafter stated, to wit, within ten months from the date of the approval of this contract. * * *

"Art. VII. Should the contractor be delayed in the prosecution or completion of the work by the act, neglect, or default of the owner, of the architects, or of any other contractor employed by the owner upon the work, * * * then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid. * * *

"Art. VIII. The owner agrees to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of the failure so to do, thereby causing loss to the contractor, agrees that it will reimburse the contractor for such loss; and the contractor agrees that if he shall delay the progress of the work, so as to cause loss for which the owner shall become liable, then he shall reimburse the owner for such loss."

The contract embraced specifications of the labor to be performed and materials to be furnished by each party. The labor and materials required of the defendant included the digging of a well, the opening of a roof for a stack, the construction of an elevator shaft, and the necessary inclosures and supports for elevator attachments, and the excavation, and furnishing of materials, for machine foundations. Delays were occasioned the plaintiff. Suit to recover damages was brought under article VIII of the contract, and the breach was laid in its language. The defendant pleaded non assumpsit.

In support of the issue raised, the plaintiff made no attempt to prove that the defendant had failed to provide the labor and materials required of it by the specifications, and that thereby it caused the delay and damage complained of, but sought to prove that the defendant had failed to cause other contractors engaged in other work upon the building to conduct their work in such a manner as not to delay the plaintiff in the progress of its work. The trial court rejected the testimony and directed a nonsuit.

The question in controversy is presented by the offer and rejection of proofs, and calls for a construction of the contract. While the sole parties to the contract were the plaintiff and defendant, it is apparent that the contract was entered into with full knowledge on the part of each that in the construction of other parts of the building other contractors would be employed and engaged. The possibility of delay in the progress and completion of the plaintiff's work, caused by delays of other contractors, was recognized by both, and express and specific provision therefor was made in article VII of the contract.

Having considered, and, as we believe, disposed of, the matter of delays to the plaintiff incident to delays of other contractors, the parties proceeded to draft article VIII. In this article the parties made no reference to the subject-matter of the preceding article, namely, delays that might be occasioned the plaintiff by delays of other contractors, but addressed themselves to delays which each might cause the other. In this article, and elsewhere in the contract, the expression "labor and materials" was used to denote the thing each required the other to do, and, for failure so to do, each became liable to the other in damages. What was each required to do?

The plaintiff was required to install certain fixtures and appliances pursuant to elaborate specifications. The defendant was required to prepare the land and certain parts of the building for the plaintiff to do its work, pursuant to, and certainly to the extent provided by, the specifications. It is contended by the plaintiff, however, that the undertaking of the defendant "to provide all labor and materials essential to the conduct of [the plaintiff's] work" was not restricted to providing such labor and materials required of it by the specifications, but extended to the construction of the building and its completion at all times to stages which would permit the plaintiff to commence, continue, and complete its work, and that, when the plaintiff's work was controlled or affected by the progress of the work of other contractors, it was the duty of the defendant to see that the work of the other contractors progressed in a manner and was completed to a point that would not delay the work of the plaintiff under its contract.

We are of opinion that, if it was the intention of the parties that the defendant should cause its other contractors to keep the construction work upon the building ahead of the work contracted to be done by the plaintiff, and that the defendant at all times and under all circumstances should be responsible to the plaintiff for damages arising from delays occasioned by its other contractors, they failed expressly to embody that intention in the contract. The language used is at least susceptible of one certain, clear, and unambiguous meaning, and that meaning is that the defendant undertook to provide the labor and materials required of it by the specifications. If another meaning was included, the additional meaning can be found only by construction. We find nothing in the context to lead us to believe that the parties meant more than they said, and that the contract implies something that was not expressed. As the parties expressly provided for delays through different causes, the law will imply nothing different from that which was expressed by the language employed. The parties expressly provided for two kinds of delays: First, delays incident to the delays of other contractors, resulting in an extension of time to the plaintiff; second, delays occasioned by the contracting parties, resulting in damages. These provisions leave nothing to implication.

The cases cited by the plaintiff in support of its contention that the contract contains an implication that the defendant should keep the building so advanced in its construction as to cause no delay to the plaintiff are principally cases in which the delays complained of were the delays of the owner himself, or of his architect as his agent, and

in which the actions were based upon the failure by the owner to do the things which the owner was obliged to do, and not the failure of the owner to compel others to do the things which others had undertaken to do. Del Genovese v. Third Avenue R. R. Co., 13 App. Div. 412, 43 N. Y. Supp. 8; Lauman v. Young, 31 Pa. 306; See v. Partridge, 9 N. Y. Super. Ct. 463.

Between the contract, as we have construed it, and the evidence, there was complete variance. The trial court, therefore, committed no error in directing a nonsuit.

The judgment below is affirmed.

GREAT NORTHERN RY. CO. v. MUSTELL.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2509.

1. MASTER AND SERVANT ⟸278, 280—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—NEGLIGENCE OF MASTER—ASSUMPTION OF RISK.

In an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]) for the death of a car checker, evidence *held* to warrant a finding that the railroad company was negligent in violently shunting a string of cars against the one which struck and killed the checker, and that the checker did not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977, 981–986; Dec. Dig. ⟸278, 280.]

2. MASTER AND SERVANT ⟸297—INJURIES TO SERVANT—SPECIAL VERDICT—ASSUMPTION OF RISK.

Where the jury returned a general verdict for plaintiff in an action for the death of a railroad employé, and in answer to a special question as to whether the employé assumed the risk replied, "No unusual risk," the answer must be taken to mean that the risk of the injury which caused the death was an unusual one, which he did not assume, since in no other way can it be reconciled with the general verdict.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195–1198; Dec. Dig. ⟸297.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Frank H. Rudkin, Judge.

Action by Grace Mustell, as administratrix and personal representative of the estate of Fred G. Mustell, deceased, against the Great Northern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles S. Albert and Thomas Balmer, both of Spokane, Wash., for plaintiff in error.

Plummer & Lavin, of Spokane, Wash., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

GILBERT, Circuit Judge. Fred G. Mustell, a car checker employed by the Great Northern Railway Company, the defendant herein, was on his way to the depot to turn in his report of cars that he had checked, and, accompanied by one Cantley, was crossing the tracks of the defendant in the yard at Hillyard, Wash. Upon track No. 1 stood a string of about 15 box cars, with the brakes set. Mustell and Cantley started to cross this track at a short distance from the end of the string of box cars. There was nothing to indicate to them that the cars were about to be moved, or that other cars were about to be kicked down against them. They could see the switch engine, which stood about 1,025 feet distant, and its smoke "going straight up" was an indication to them that the engine was standing still. The track curved away from the place where the box cars were standing, so that, as Mustell and Cantley approached track No. 1, they could not see any other cars approaching or being kicked against the cars which stood there. Just as Mustell got upon the track, the string of box cars suddenly and without warning moved, striking Mustell, who was 5 or 6 feet in advance of Cantley, before he had time to get out of the way.

The plaintiff, as administratrix, in her complaint to recover damages for the death of Mustell under the federal Employers' Liability Act, alleged negligence on the part of the defendant, in that the switching crew suddenly caused the cars which were standing upon the track to be moved violently forward and upon the said Mustell, knocking him down and causing him injuries which resulted in his death.

[1] The defendant assigns error to the denial of its motion for an instructed verdict in its favor at the close of the testimony, on the ground that there was no evidence to go to the jury to show that the cars which struck Mustell were moved in an extraordinary, unusual, or negligent manner, and that the evidence proved that Mustell was thoroughly familiar with the switching movements in the yards, appreciated the danger, and assumed the risk thereof. We think the court committed no error in submitting the case to the jury. There was evidence tending to show that the defendant was negligent. Mustell, a car checker, in the ordinary course of his duties, was crossing the defendant's tracks. He found upon track No. 1 a string of freight cars with at least three brakes set. He undertook to cross the track at a distance of 3 or 4 feet from the end of the standing cars. There was evidence tending to show that the cars were struck with great violence by another group of eight or ten cars that had been kicked down upon the same track. There was nothing to warn Mustell that such a movement was about to take place. He could see the smoke of the switch engine at a distance of more than 1,000 feet away, and the smoke indicated that the switch engine was standing still. Whether he heard any sound of approaching cars, or of any warning movement of the string of cars which struck him, cannot be known; but Cantley, who was with him, and who at the time of the trial was in the employment of the defendant, testified that he heard no sound of the taking up of the slack between the standing freight cars, such as would ordinarily be heard when they were struck with another car

for the purpose of coupling onto them, but that the whole group of cars moved suddenly and with such force as to knock Mustell to one side of the track, and to move four car lengths beyond the point where Mustell was crossing, and Cantley himself barely escaped with his life.

The defendant contends that the movement of the cars was in the ordinary course of coupling the same, and that it was a "running switch"; but there was evidence to the contrary. A witness testified that the cars were "moved violently," and a switchman on the moving string of cars that struck the standing cars stated that the former were "cut off," and struck the cars standing on track No. 1, "bumping them back four or five car lengths." Cantley testified:

"I heard the crash of the coupling. The end of the car that Mustell and I were passing by at that time moved very quickly. It hit Mustell."

The jury, in answer to the special questions which were submitted to them, found that the switch was not a "running switch," and that the cars were moved in an "extraordinary and unusual manner." Mustell was an active young man 23 years of age, and had had experience of 2 years in the yards. Cantley had been 2 days under his charge, to receive instruction concerning the checking of cars. We may infer that Mustell was careful, for he had warned Cantley to be careful, and not to climb around on the cars, as they were liable to switch at almost any time, and kick a bunch of cars and hurt him. The evidence was that there was no man standing upon any of the cars, and that no warning was given of any kind of the approach of the cars that were kicked from the switch engine.

[2] In view of the evidence, the question of the assumption of risk was a question for the jury. The charge of the court to the jury is not presented to us in the bill of exceptions, and we must assume that the jury were properly instructed upon that subject. The special question was presented to them: "Did Mustell assume the risk?" and their answer was, "No unusual risk," which must be taken to mean that the jury found that the risk of the injury which caused Mustell's death was an unusual one, and that he did not assume it, for their general verdict for the plaintiff could have been based on no other theory.

We find no error. The judgment is affirmed.

MAYER v. WELLS.

(Circuit Court of Appeals, Sixth Circuit. April 16, 1915. Rehearing Denied June 18, 1915.)

No. 2552.

CONTRACTS ⇐320—PERFORMANCE—FAILURE TO PERFORM—EFFECT.

Where an architect, employed to prepare plans and specifications to be approved by defendant and a city inspector of buildings for remodeling a building, which was to be made new with the exception of the outside walls, prepared plans and specifications showing that the basement walls

were 26 inches thick, and, after learning from defendant that they were in fact only 18 inches thick, corrected the plans, but never submitted the corrected and changed plans, or any plans showing an 18-inch wall, to defendant for approval, he failed to comply with a most important provision of the contract, and could not recover the contract price for his services.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1459, 1469, 1493–1527; Dec. Dig. ⟸320.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Action by M. E. Wells against D. H. Mayer. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

F. J. Wing and E. J. Thobaben, both of Cleveland, Ohio, for plaintiff in error.

S. H. Holding, of Cleveland, Ohio, for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge. The plaintiff in error (hereinafter called the defendant) seeks a reversal of the judgment entered against him on a verdict in favor of the defendant in error, who was the plaintiff below. The only assignment of error that need be considered is that which relates to the refusal of the trial court at the close of all the evidence to direct a verdict in favor of the defendant.

The parties agreed that the plaintiff, an architect, should make for the defendant the plans and specifications for the remodeling of a building in Cleveland, Ohio, all of which, excepting the outside walls, was to be made new. The plans and specifications were to be in accordance with the building code of that city, and were also to be satisfactory to the defendant and approved by both him and the city inspector of buildings. The plaintiff was to assist in letting the contracts for erection and to superintend the work of construction. For all of his services he was to receive 5 per cent. on the cost of the improvement. The defendant wished a six-story building, if the walls were of sufficient size and strength to meet the requirements of the code.

About two years prior to the date of the contract the defendant exhibited to the plaintiff a copy of a set of plans prepared by another architect for the proposed building, but they did not show the thickness of the walls or give any information in that respect, except such as the plaintiff obtained by estimation. The plaintiff affirms, and the defendant by necessary implication denies, that the latter represented the foundation walls to be solid and 26 inches thick. The plaintiff, however, did not rely on such statement, if made, or on his estimate of their thickness made from the plans exhibited to him; but, that he might learn their dimensions and ability to carry the load which would be imposed on them, and might also obtain such other information as would be conducive to accuracy in the preparation of the plans, he caused his draftsman to examine and make measurements of the build-

ing. The walls as originally built had been reinforced by pilasters about 9 inches thick and about 5 feet apart. The measurements made by the draftsman at the point where he digged through the south wall of the basement showed such walls, according to his recollection, to be 26 inches thick. The plaintiff was with him at different times when measurements were made.

On account of suggestions and changes made by the defendant, considerable time and labor were expended by the plaintiff in preparing the plans and specifications. He submitted a copy of them to the inspector of buildings, with an application for a permit to erect the proposed structure, and in such application represented the front wall of the basement to be 17 inches, its rear wall 21 inches, and the side walls for the entire height of the building 21 inches including the pilasters. Following such application and submission to the inspector, the plaintiff forwarded to the defendant a copy of the plans and specifications. They showed the basement walls to be solid and 26 inches thick. The defendant did not approve them, but wrote the plaintiff that, "with a slight omission on the blueprint and a few changes in the specifications, we will be ready for action," and that he would be in Cleveland within the next four days. Feeling uncertain about the thickness of the walls, upon his arrival in Cleveland he personally measured the walls and found their thickness to be 18 inches, which was less than the building code required, and the pilasters not to extend as far below the surface as had been supposed. He thereupon notified the plaintiff that the plans were radically wrong in their representations and measurements, unsatisfactory and rejected, that they would receive no further consideration, and that he did not wish the plaintiff to proceed further in the matter. The plaintiff in turn informed him that he held himself in readiness to carry out his contract and that he expected the defendant to do the same. He corrected the plans, so as to show the basement walls to be 18 inches with 9-inch pilasters. He also changed the light wells, relocated the heating apparatus, which had been previously shown under the sidewalk, extended the water pipes to meet the requirements of the other changes made, and provided for pilasters to correspond with those shown below, and also for rebuilding a portion of the second story wall where it had been shown on the plans as solid. Such other modifications were made as the above changes rendered necessary. After obtaining a permit to build and receiving bids for the erection of the structure, he notified the defendant of his action and called upon him to perform. Receiving no response, he in due time sued for the full contract price for his services, averring that he had faithfully performed all the terms and conditions of his contract. This was denied by the answer.

The evidence is conflicting as to whether the plaintiff, before he submitted the plans to the defendant for approval, knew of a want of correspondence between the walls actually existing and as shown on the plans, and as to whether the plaintiff's draftsman had made a statement to that effect to the defendant. Whatever the fact may be as to such matters, the plaintiff freely admits that he erred in his representation to the defendant and the inspector of buildings as to the thickness of

the walls; that he never learned their true thickness until after he obtained information on that point from the defendant, which information on verification he found to be correct; and that after his discovery of his errors there was nothing for him to do but to change the plans and see if the inspector would grant a permit to build. He did not at any time submit his corrected and changed plans to the defendant for his approval. Testifying on that subject, he said:

"I never sent him plans that showed an 18-inch wall, and he never in any way approved of them to my knowledge."

This statement was confirmed by the defendant and was controverted by no one. The plaintiff consequently never complied with a most important provision of his contract.

On the record presented, the defendant was entitled to a directed verdict, and for this reason the judgment is reversed, and the cause remanded to the District Court, with directions to award a new trial and to take further proceedings not inconsistent with this opinion.

In re GENERAL EQUITY RULE 75.

In re OUR RULE 15.[1]

(Circuit Court of Appeals, Sixth Circuit. October 14, 1914.)

1. COURTS ⟸356—FEDERAL COURTS—APPEAL—TIME FOR SETTLING AND FILING STATEMENT OF FACTS.

General equity rule 75 (198 Fed. xi, 115 C. C. A. xi) requires the appellant to file a præcipe indicating the portions of the record to be incorporated into the transcript on appeal, and provides that the evidence shall be stated in condensed form, that the duty of condensing and stating it shall rest on the appellant, who shall prepare his statement and lodge it in the clerk's office before filing his præcipe, and notify the other parties of the time, at least 10 days after the notice, when he will ask the court or judge to approve it, and that the statement shall be presented to the court or judge, and, if true, approved, or, if not true, made so under the direction of the court or judge, and that, when approved, it shall be filed and become a part of the record. *Held* that, while it is the better practice to have such statement settled and filed before claiming, or at least before perfecting, the appeal, and, if the term expires before it is filed, to have an order entered carrying the matter into the next term, the trial court has power to approve and direct the filing of the statement of evidence, though the term has expired, and though no order was entered carrying the matter over until the next term, especially as under the existing practice appeals are claimed and perfected regardless of the expiration of terms.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⟸356.]

2. COURTS ⟸356—FEDERAL COURTS—APPEAL—TIME FOR SETTLING AND FILING STATEMENT OF FACTS.

Under general equity rule 75 (198 Fed. xi, 115 C. C. A. xi), the perfecting of an appeal by the approval of a bond and the signing of a citation does not deprive the trial court of jurisdiction to settle the evidence, as the settlement of the evidence is rather ministerial, and pertains to the

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1]For equity rule 15 for the Sixth Circuit, see 202 Fed. ix, 118 C. C. A. xi.

making of the return to the appeal, especially as the time may be wholly insufficient to perfect the record before the appeal is perfected.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⊂⊃356.]

3. COURTS ⊂⊃356—FEDERAL COURTS—APPEAL—RECORD—MATTERS TO BE INCLUDED.

In equity appeals, if counsel overlook general equity rule 75, and follow the old practice of including the evidence in full, the clerk, in making up the return to the appeal, should not include the evidence in full.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⊂⊃356.]

4. COURTS ⊂⊃356—FEDERAL COURTS—APPEAL—RECORD—VIOLATING RULES—REMEDY.

Where, contrary to general equity rule 75 (198 Fed. xi, 115 C. C. A. xi) the record contains the evidence in full in accordance with the old practice, the appeal will not be dismissed, nor will the evidence be stricken from the record, at least during transition in the general practice; a sufficient remedy being provided by rule 76, providing, relative to the inclusion in the transcript of immaterial papers, that for any infraction of that or "any kindred rule" the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⊂⊃356.]

In the matter of General Equity Rule 75 and Rule 15 for the Sixth Circuit. Rules construed.

PER CURIAM. Motions recently decided and others now pending involving these rules justify a formal statement of our conclusions.

[1, 2] Rule 75 fixes no time within which the statement of evidence must be settled and filed in order to "become a part of the record for the purposes of the appeal." Undoubtedly, the better practice is to complete this step before claiming, or, at least, before perfecting the appeal, and if the term expires before the final statement of evidence is filed, to enter an order carrying this matter into the next term; but where appeals are required within 30 days, or even within ten days, the time may be wholly insufficient to perfect the record in this respect, and the expiration of the term may very commonly be forgotten, particularly as it has never been a matter of importance in equity appeals. It is said that the completing of this statement of evidence corresponds to the settling of a bill of exceptions at law, and the familiar rule is invoked that a purported bill of exceptions which was not settled within the trial term or pursuant to a reservation during the trial term is a nullity and will be stricken from the record. We are not satisfied that the analogy is close enough to justify the incorporation of this harsh rule into the practice pursuant to rule 75, which must have been adopted with due consideration of the existing practice by which appeals were claimed and perfected regardless of the expiration of terms; and we conclude that the trial court has power to approve and direct the filing of the statement of evidence, although the

term has expired when the decree was rendered, and although no order was entered carrying the subject-matter over until the next term.

The same general view leads also to the conclusion that the perfecting of an appeal by the approval of a bond and the signing of citation does not deprive the trial court of jurisdiction to settle the evidence. It is true that for general purposes, jurisdiction over the cause is thereby ended, and that the shaping of this statement of evidence involves the decision by the judge of disputed claims; but, upon the whole, the proceeding is rather ministerial, and it sufficiently pertains to the making of the return to the appeal so that we think a statement of evidence so approved and filed cannot, for that reason alone, be stricken from the record.

[3, 4] Instances occur where rule 75 is wholly disregarded, and the return to the appeal includes the evidence in full, in accordance with the old practice, and we are asked to dismiss appeals where the record is so made up, or to strike out the statement of evidence, thereby leading to an affirmance. To send the record back for correction in this respect involves delay and the exercise of uncertain power; while, to dismiss the appeal or to strike all the evidence from the record may cause the loss of substantial rights through the blunder in practice by counsel. This drastic remedy may prove to be necessary in some cases, but we are reluctant to apply it now. The enforcement of both rules rests, primarily, upon the district judges, whose obligation we pointed out in Pittsburgh, etc., R. Co. v. Glinn, 208 Fed. 989, 126 C. C. A. 77; and we have no doubt that they will observe the new practice when approving a statement of evidence or bill of exceptions; but in equity appeals, if counsel overlook the rule and follow the old practice, the matter may not come to the attention of the trial judge. If such cases occur, the clerk who makes return to the appeal should not include the evidence in full, and his due attention will usually prevent informality in this respect. In those instances, however, where the record reaches this court containing the evidence in full, we think general equity rule 76 provides a remedy which, at least during the transition in the general practice, will be sufficient. The reference in rule 76 to "any kindred rule" quite clearly applies to rule 75. It is true that the offending solicitor in this situation is the solicitor for appellant, and that appellant pays, in the first instance, the entire cost of printing, so that if he is unsuccessful in this court, no disposition of the costs of printing can operate as a penalty, but if he is successful, he can be denied the recovery of such costs; and the further affirmative costs, contemplated by rule 76, might, in a proper case, be imposed upon the offending solicitors.

OREGON-WASHINGTON R. & NAV. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2490.

MASTER AND SERVANT ⊂=13—HOURS OF SERVICE—OMISSIONS IN REPORTS OF EXCESSIVE HOURS OF SERVICE—LIABILITY.

A carrier, inadvertently and honestly omitting from its report, required by order of Interstate Commerce Commission, pursuant to Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act June 18, 1910, c. 309, § 14, 36 Stat. 555 (Comp. St. 1913, § 8592) instances in which employés were permitted to remain on duty for a longer period than that prescribed by Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. 1913, §§ 8677–8680), is not subject to the penalties imposed by the Interstate Commerce Act, but any omissions must be scrutinized, so as to prevent any evasions of the requirements to make reports in such instances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⊂=13.

Hours of service of employés, see note to United States v. Houston Belt & T. Ry. Co., 125 C. C. A. 485.]

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action by the United States of America against the Oregon-Washington Railroad & Navigation Company. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

W. W. Cotton, Arthur C. Spencer, and Charles E. Cochran, all of Portland, Or., for plaintiff in error.

Clarence L. Reames, U. S. Atty., and Robert R. Rankin, Asst. U. S. Atty., both of Portland, Or., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C., for the United States.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. The government brought this action to recover 30 penalties, of $100 each, for the alleged violation of a certain order made by the Interstate Commerce Commission, the authority of which is not questioned. It was made June 28, 1911, and is as follows:

"It is ordered, that all carriers subject to the provisions of the act entitled 'An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon,' approved March 4, 1907, report within 30 days after the end of each month, under oath, all instances where employés subject to said act have been on duty for a longer period than that provided in said act.

"It is further ordered, that the accompanying forms, entitled 'Interstate Commerce Commission Hours of Service Report,' and the method embodied in the instructions therein set forth, be and the same are hereby adopted and prescribed, and all common carriers subject to the said act are hereby notified to use and follow the said prescribed forms and method in making monthly reports of hours of service of employés on duty for a longer period than that named in said act, commencing with and making the first report for the month of July, 1911.

"And it is further ordered, that copies of said forms, together with a copy of this order, be forthwith served upon all common carriers subject to said act."

The fact is conceded that the plaintiff in error is a common carrier engaged in interstate commerce, and that its railroad extends through the district of Oregon, and that it failed to include in its reports to the Commission the specific instances counted on in the complaint in which employés of the plaintiff in error were permitted to remain on duty for a longer period than that prescribed by Act March 4, 1907, c. 2939, commonly called the Hours of Service Act (34 Stat. 1415 [Comp. St. 1913, §§ 8677–8680]); but it seems to be also conceded by the respective parties that those omissions were inadvertently made, and that all other instances in which such employés were permitted to work overtime were duly reported to the Commission by the railroad company; and the question of law presented for decision is whether such inadvertent omissions rendered the company liable for the fines. The court below, in granting the government's motion for a directed verdict in its favor, and in refusing a like motion made by the defendant railroad company for one in its favor, held that it did, and the sole question for determination here is whether or not that ruling was correct.

The Interstate Commerce Act approved February 4, 1887 (24 Stat. 386, c. 104, § 20), as amended by Act June 18, 1910, c. 309, § 14, 36 Stat. 556 (Comp. St. 1913, § 8592), after authorizing the Commission to require a certain report from all common carriers subject to the provisions of the act touching their income, expenses, indebtedness, etc., and to fix the time and prescribe the manner in which such reports shall be made, provides that:

"If any carrier, person, or corporation subject to the provisions of this act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided."

The order of the Commission above set out, upon which the action is based, was made pursuant to that statutory provision. In the recent case of San Pedro, Los Angeles & Salt Lake Railroad Co. v. United States (decided February 1, 1915) 220 Fed. 737, 136 C. C. A. 343, in considering the Hours of Service Act, we held that the whole of it "must be taken together, and be so construed as to give effect to its humane purpose, and at the same time to give the railroad companies the benefit of the exceptions and provisos in all cases fairly

brought within their terms and true intent"; that the paramount purpose of the act was to prevent the overworking of the employés, to the end that their efficiency be not impaired; and that the obligation was thereby imposed upon the carriers to comply with that requirement, unless prevented therefrom because of a valid excuse.

We think the same common sense and just construction should be placed upon the order of the Interstate Commerce Commission adopted for the purpose of giving effect to that act, and that an omission honestly and inadvertently made from a report of a carrier, filed pursuant to the order, should not be held to subject the carrier to the penalty prescribed by the act of Congress. Undoubtedly the courts should, and no doubt always will, scrutinize any and all such omissions with care (and in jury cases, as was the present, so instruct the jury), to the end that there be no evasion of the requirements; but we cannot think that an honest mistake or omission fairly comes within the provision of either the statute or the order of the Commission. The only reported case cited by counsel directly upon the point is that of Northern Pacific Railroad Co. v. United States, 213 Fed. 162, 129 C. C. A. 514, decided by the Circuit Court of Appeals for the Eighth Circuit, which is in accordance with these views.

It results that the judgment must be and hereby is reversed, and the cause remanded to the court below for a new trial in accordance with the views above expressed.

PENNSYLVANIA MINING CO. v. JARNIGAN.

(Circuit Court of Appeals, Eighth Circuit. March 8, 1915.)

No. 4273.

1. PLEADING ⊂=34—OBJECTIONS TO EVIDENCE—INSUFFICIENCY OF COMPLAINT.
In the federal courts, on an objection by defendant to the introduction of any evidence, on the ground that the complaint fails to state a cause of action, every reasonable intendment will be indulged in favor of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66–74; Dec. Dig. ⊂=34.]

2. PRINCIPAL AND AGENT ⊂=159, 193—LIABILITY OF PRINCIPAL FOR ASSAULT BY AGENTS—SCOPE OF AGENT'S AUTHORITY—QUESTION FOR JURY.
For an assault by agents the principal is responsible, if within the general scope of their authority, although they acted wantonly; and when the evidence and circumstances are open to conflicting inferences, the question whether the acts were within the scope of their authority is one for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 599–612, 721½–726; Dec. Dig. ⊂=159, 193.

Liability of principal for torts of agent, see note to Bradford v. Hanover Fire Ins. Co., 43 C. C. A. 316.]

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Action at law by Frank Jarnigan against the Pennsylvania Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ira D. Oglesby, of Ft. Smith, Ark. (George O. Patterson and Paul McKennon, both of Clarksville, Ark., on the brief), for plaintiff in error.

Covington & Grant, of Ft. Smith, Ark. (J. V. Bourland, of Ft. Smith, Ark., on the brief), for defendant in error.

Before ADAMS and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. Jarnigan was plaintiff below. He was a union leader and organizer. There had been trouble at the mine of the defendant in Arkansas, and further trouble was apprehended. Defendant's superintendent testified that he had heard that there might be a disturbance, and that the union was going to come down and clean up the camp and burn all the buildings. Guards had been appointed to meet this danger. A superintendent by the name of Eyster was in charge of them. He says he was out to protect the property because warning had been sent that the camp and buildings were going to be destroyed. A group of these guards, with Eyster, superintendent, met the plaintiff at a gate in the highway leading into defendant's property. Eyster said to him:

"Frank, you have been scaring the women and children of this camp a good deal lately. Do you think it is right?"

Further words followed, when the guards and Eyster set upon plaintiff and beat him severely. At the conclusion of the assault, Eyster said to plaintiff:

"Frank, you done well to get out as well as you did; if you ever come again, and try to organize, you will get more than you did."

[1] The complaint charged that:

"The defendant stationed at its mine certain named men and other agents and employés for the purpose of guarding and protecting its property and interest, and while its said agents and employés were acting within the general scope of their employment, assisted by, and under the personal order, guidance, and direction of, its superintendent, Bob Eyster, they waylaid this plaintiff while he was on the public highway leading from Clarksville to Jamestown, at what is known as the 'district gate,' and with deadly weapons unlawfully, wantonly, wickedly and maliciously attacked, beat, bruised, and wounded him."

Several assignments of error are based upon the action of the court in overruling defendant's objection to the introduction of any evidence under the complaint, because it failed to state a cause of action. We think the complaint is sufficient. Even if it were not, the objection would not support an assignment of error. The practice of attacking a complaint in this manner, after the trial has commenced, has been frequently condemned by this court. Against such an attack, every reasonable intendment will be indulged.

[2] At the conclusion of all the evidence, defendant moved for a directed verdict. This is the only assignment of error that has merit. There was evidence tending to support the claim of the company that the assault was personal, and not made for the purpose of protecting the company's property. On the other hand, there was evidence and

circumstances tending to support the claim of the plaintiff. This issue was submitted to the jury in a charge of which the defendant has no cause of complaint. If the guards acted within the general scope of their authority, the company is responsible for what they did, although they acted wantonly. Denver & Rio Grande Ry. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146; Lake Shore Ry. Co. v. Prentice, 149 U. S. 101, 109, 13 Sup. Ct. 261, 37 L. Ed. 97; Stewart v. Wright, 147 Fed. 321, 77 C. C. A. 499; Southern Express Co. v. Platten, 93 Fed. 936, 36 C. C. A. 46. When the evidence and circumstances are open to conflicting inferences, the question whether the acts were within the scope of the agent's authority is for the jury. Collins v. Wise, 190 Mass. 206, 76 N. E. 657; Bergman v. Hendrickson, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 47; Deck v. Baltimore & Ohio R. R. Co., 100 Md. 168, 59 Atl. 651, 108 Am. St. Rep. 399; Magar v. Hammond, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. (N. S.) 1038; Brennan v. Merchant, 205 Pa. 258, 54 Atl. 891.

The jury returned a verdict in favor of the plaintiff for $5,000. The trial court, on motion for new trial, required this to be reduced in the sum of $1,800. Upon that being done, the motion for new trial was denied. We find no error in the record.

The judgment is therefore affirmed.

UNITED STATES v. TURNER.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1915.)

No. 4262.

PUBLIC LANDS ⇐120—SUIT FOR CANCELLATION OF PATENTS—FRAUD.

Evidence *held* insufficient to sustain the allegations of a bill by the United States for the cancellation of patents to land on the ground that they were obtained by fraud and false testimony.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. ⇐120.]

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit in equity by the United States against Owen F. Turner. Decree for defendant, and the United States appeals. Affirmed.

Isaac D. Taylor, Asst. U. S. Atty., of Guthrie, Okl. (John A. Fain, U. S. Atty., and T. G. Chambers, Jr., Asst. U. S. Atty., both of Oklahoma City, Okl., on the brief), for the United States.

Charles Swindall, of Woodward, Okl., for appellee.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. This is an action by the United States to cancel for fraud two certain land patents, issued August 10, 1906, and April 7, 1910, to Owen F. Turner and Samuel J. K. Hayhurst, respectively. The alleged fraud consisted in alleged false testimony as to residence and cultivation by Turner and Hayhurst and their witness-

es. The action is brought against Turner, as the legal title to the land, except that portion thereof which Turner conveyed to Millard, has become vested in Turner. The trial court found that the United States had not clearly shown that the patents were obtained by fraud or false testimony. A condensed statement of the evidence appears in the record.

The question to be decided is one of fact. To state a portion of the evidence would serve no useful purpose, and the whole thereof cannot be stated within the limits of an opinion. We have, however, read the evidence contained in the record, and after careful consideration have arrived at the conclusion that no serious error intervened in the consideration thereof by the trial court.

The judgment below should be affirmed; and it is so ordered.

WALTERS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2494.

1. RAPE ⊜16—ASSAULT WITH INTENT—FORCE.

In a prosecution for assault with intent to commit rape on a girl six years of age, it is not necessary to prove an intent to overcome any resistance she might offer, since she is in law incapable of giving consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 15–19; Dec. Dig. ⊜16.]

2. CRIMINAL LAW ⊜1030—APPEAL—PRESENTING QUESTIONS IN LOWER COURT—TIME OF TRIAL.

One convicted of a crime cannot contend on writ of error that he was denied a fair trial, by being placed on trial within a week after the indictment was found, where he employed his own attorney, who made no objection to going to trial at that time, and there is nothing to show any prejudice resulting to him from the short time between the indictment and the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619–2621, 2632, 2653; Dec. Dig. ⊜1030.]

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Fuller, Judge.

O. H. Walters was convicted of assault with intent to commit a felony, and he brings error. Affirmed.

Bates, Peer & Peterson, of Tacoma, Wash., and John W. Dunn, of Fairbanks, Alaska, for plaintiff in error.

R. F. Roth, U. S. Atty., and G. Ellis Gardner, Asst. U. S. Atty., both of Fairbanks, Alaska, and M. A. Thomas, Asst. U. S. Atty., of San Francisco, Cal., for the United States.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The plaintiff in error, a man of 51 years, was convicted of an assault with intent to commit rape upon the person

of a female child of the age of 6 years, and was sentenced to be imprisoned in the penitentiary for a term of 15 years.

[1] Error is assigned to the refusal of the court to grant the instruction requested by the defendant as follows:

"The jury are instructed that, in order to convict the defendant of an assault to commit rape, the jury must be satisfied beyond a reasonable doubt from the evidence that the defendant assaulted Hester Quiner with the intent at the time to overcome any resistance that might be offered by her."

It is the rule established by the decided preponderance of the authorities and by sound reason that in the case of an assault to commit rape upon a female under the age of consent it is not necessary to prove want of consent, for the reason that in law she cannot consent to such an assault. Cyc. 1434; Bishop's New Criminal Law, par. 1120; State v. Sargent, 32 Or. 110, 49 Pac. 889; People v. Roach, 129 Cal. 33, 61 Pac. 574; State v. Johnson, 133 Iowa, 38, 110 N. W. 170; Commonwealth v. Roosnell, 143 Mass. 32, 8 N. E. 747; Liebscher v. State, 69 Neb. 395, 95 N. W. 870, 5 Ann. Cas. 351.

It is contended that the court erred in overruling the defendant's motion for an instructed verdict upon the conclusion of the evidence. It is said that, taking the evidence of the government to be true, it shows no more than that the defendant took indecent liberties with the child. But the record shows otherwise. It proves not only the intent charged, but it tends to prove that in law the crime of rape was actually committed.

[2] Counsel for the defendant who appeared in this court were not the counsel who conducted the defense in the court below, and they present under this assignment of error the proposition that the defendant was denied a fair trial in the court below, in that he was indicted on August 28th, and was placed on trial on September 3d following, and thereby he was not afforded sufficient opportunity to prepare his defense; he being penniless and apparently without friends. The defendant was represented by counsel employed by him at his own expense. Neither the defendant nor his counsel made any objection to going to trial on the day when the case was set. For all the record shows to the contrary, they were desirous of having the case speedily tried and determined. No suggestion is made of any fact to show prejudice to the defendant, resulting from the short space of time between the indictment and the trial. It is not claimed that any witnesses could have been obtained other than those who testified, or that anything could have been done in behalf of the defendant other than what was done. There is nothing in the record to justify this court in concluding that the defendant did not have a fair trial, and full opportunity to make his defense.

The judgment is affirmed.

VROOMAN et al. v. PENHOLLOW et al.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1915.)

No. 2588.

PATENTS ⇐321—ACCOUNTING FOR INFRINGEMENT—CONSTRUCTION OF DECREE.

Two or more defendants cannot be jointly sued for infringement, except for acts in which there is some kind of common participation, and the general language of a decree against joint defendants must be read with this principle in mind, and not construed to charge one defendant with liability for infringements by a codefendant with which he had no connection.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 588, 589; Dec. Dig. ⇐321.

Accounting by infringer for profits, see notes to Brickill v. Mayor, etc., of City of New York, 50 C. C. A. 8; Clark v. Johnson, 120 C. C. A. 389.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Suit in equity by Warren F. Vrooman and Arba E. Vrooman against Grant S. Penhollow, Frank Penhollow, and Wallace L. Baker. From final decree, after accounting, complainants appeal. Modified decree entered.

See, also, 186 Fed. 495, 108 C. C. A. 502.

O. C. Billman, of Cleveland, Ohio, for appellants.

F. A. Henry, of Cleveland, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This court decided (179 Fed. 296, 102 C. C. A. 484) that Vrooman patents Nos. 580,742 and 676,549 were valid, and that the three defendants (Penhollow Bros. and Baker) infringed. After our mandate went down, the District Court entered a decree for injunction and accounting. Proceedings before the master, with incidental applications to the District Judge, were long drawn out. Eventually the master reported that the damages were $23. The report was confirmed, and a final judgment for that amount entered against all three defendants; but all the costs of the accounting, amounting to about $530, were taxed against Vrooman. From this decree, Vrooman appeals, claiming error as to both damages and costs.

It seems that Baker was the only defendant pecuniarily responsible, and, on the accounting, there was much controversy regarding the character of his liability as fixed by the opinion of this court and the interlocutory decree below. It was Baker's claim before the master, accepted by the master and the District Judge, that he had nothing to do with, and was not liable for, any act of infringement whatever, save as he might have become liable by the decree for the acts of his codefendants Penhollow, but that in these acts he did not participate, and of them he had no knowledge. Accordingly, when he was required to

file his statement before the master to constitute his accounting of profits and damages, it consisted of an affidavit that he had committed no infringement. Vrooman insisted that Baker, being liable by decree for the Penhollow infringements, must file an account showing the doings of the Penhollows; and Baker protested his inability to do anything of the kind.

It is clear that the master cannot re-examine questions which have been decided by the court; and so the extent of the former adjudication, as against Baker, is the first thing to determine. The three defendants were brought in by a general allegation that they had infringed. The bill of complaint did not specify as to the character of their relations with each other, nor distinguish their respective individual parts in the infringement. The three joined in one answer, denying validity and denying infringement. The opinion of this court (179 Fed. 308, 102 C. C. A. 484) expressed some doubt as to whether Baker was sufficiently connected with the infringement to justify a suit against him, but concluded that he was. He then made a motion asking that only one-third of the costs should be taxed against him, filing in support thereof in this court an affidavit which, while insisting that he had not personally infringed, set forth that the particular acts of infringement, with which he had been upon his farm and through his son more or less connected, were relatively small in amount, and so he should not be held liable for all the costs. This court thought (186 Fed. 495, 108 C. C. A. 502) that Baker's attitude, when he was sued, had encouraged the others to persist, and had caused the defense to be made, and so had brought about the appeal, and accordingly refused to excuse him from any part of the costs.

The decree entered below thereupon—and properly—adjudged, by the fourth paragraph thereof, "that the defendants, Penhollow and Baker, have infringed upon said letters patent." It is, of course, clear that two or more defendants cannot be jointly sued for infringement, except for acts in which there is some kind of common participation, and that there could rightfully be no injunction decree nor accounting against Penhollow and Baker jointly for the independent acts of Penhollow or the independent acts of Baker. Only in cases like a corporation and its directors, or successive operators of the same business, or changing members of a continuing partnership, has joinder of acts not wholly joint been approved.[1] The general language of the opinion and decree must be read with this principle in mind; and it results that the decree is an adjudication that the Penhollows and Baker had common participation in some act, which was an infringement. Such a finding is satisfied and its necessary force exhausted by application to one infringement act. Jones v. Morehead, 1 Wall. 155, 165, 17 L. Ed. 662. Further than this the decree and the adjudication (except for a paragraph to be considered) do not go. Whatever this act or series of acts may be to which the decree refers, it is,

[1] Simonds v. Hathorn (C. C. A. 1) 93 Fed. 958, and cases cited at page 963, 36 C. C. A. 24; Herman v. Youngstown (C. C. A. 6) 216 Fed. 604, at page 610, 132 C. C. A. 608.

as against Baker, adjudged to be of Baker's doing; whatever other things, if any, were done by Penhollow without Baker's participation, or by Baker without Penhollow's participation, are not thereby adjudged to be the acts of the other. Obviously, since neither pleading, opinion, nor decree identifies the acts to which the decree relates and concerning which it creates an adjudication, we must resort to the testimony to make the concrete application.

By referring to the record upon the former appeal, we find that there was testimony tending to show that one of the Penhollows was engaged in planning or building an infringing machine about 1900; that Vrooman found one or both of the Penhollows using the machine upon the Penhollow farm at some later period, but desisted from bringing suit upon the Penhollows' promise to use the machine only for their own onions; that later it was reported that the Penhollows had built and sold one or more other machines; and that, in September, 1906, the machine, the drawings of which constituted the proof of infringement considered in the case, was found in use by Charles Baker, upon a farm belonging to his father, defendant Wallace Baker; that the latter was present, approving and perhaps directing such use, and that this machine had been purchased by Baker from the Penhollows; also, that the Penhollows were then using another machine topping onions for their neighbors.

This is the sum and substance of all the proof on that subject. There is nothing tending to show that defendant Baker had any connection whatever with any infringement, excepting so far as could be found in the use of this machine on his farm. As to that, there was some degree of common action between the three defendants, and a decree holding them joint participants in this infringement would be supported by the record; but there would obviously be no foundation for a decree that Baker had participated in everything done by the Penhollows. Some years of their activities had passed before Baker appears upon the record at all; and that, after he appeared, he had any part in what the Penhollows did on their own farm, or in what they did for their neighbors, is the merest suspicion. Baker's defiant attitude when he was sued, and his (temporarily successful) efforts to destroy the patent, doubtless encouraged the Penhollows to persist in their infringement, which otherwise they might have dropped. This sort of encouragement may well be controlling in determining a discretionary apportioning of costs; it falls far short of making the defiant defendant a participant in what other infringers did.

So we find that the record describes acts to which the decree of infringement against Baker could not properly apply, and describes other acts to which it might well apply. We must therefore think that the opinion of this court and the decree of the District Court, so far as they hold Wallace Baker guilty of infringement jointly with the Penhollows, were intended to refer to the use of that machine upon the Baker farm, and so constitute an adjudication that such use was by Wallace Baker, and was not exclusively by the son, Charles Baker. Our conclusion that we rightly interpret the real force of the decree is confirmed by the fact that, in the affidavit which defendant Wallace

Baker filed in support of his motion to apportion costs, he obviously regarded the use of the machine upon the Baker farm as the thing of which he had been convicted, and by the further fact that at the opening of the accounting, and when no one except the elder Baker and Penhollows had been called upon to account, the younger Baker filed with the master a statement purporting to show the work of this and another similar machine on this farm for the four years 1906, 1907, 1908, and 1909, covering 10,431 bushels, and paid into court $104.31, the royalty at the agreed rate for the amount of infringement which his statement showed.

Nor is the conclusion that Wallace Baker was thus adjudged to be an actor in the use of this machine modified by the fifth clause of the decree below, which directed "that the complainants recover of the defendants and each of them any and all damages which the said complainants have sustained or shall sustain by reason of said infringement by the said defendants or any of them." This has been treated by the parties as an express decree that Baker must pay the damages for any infringements which the Penhollows had committed. Its language makes it open to—and perhaps requires—that construction. If so, its entry, to that extent, was inadvertent for the reasons we have pointed out; but it was not modified or appealed from, it became final, and it must be enforced according to its terms. We see no sufficient reason to disapprove the construction which the parties all place upon it; but it does not purport to be a finding of what the parties have done. It purports only to fix a liability. If it stood alone, it might support an inference of underlying findings of facts broader than those we have found here appear, and to the effect that Baker had participated in everything; not so, when it is to be considered in connection with other paragraphs of the decree and with the testimony.

We have referred to paragraph 4 of the decree as an "adjudication." This is not a very accurate use of the word, since such a decree is classified as interlocutory; but, in so far as it was pursuant to our mandate (as this paragraph was), it was not subject to change by the trial court. Bissell v. Goshen (C. C. A. 6) 72 Fed. 545, 19 C. C. A. 25. It therefore seems the full equivalent of a more formal adjudication.

The accounting, therefore, opened on the basis, not only of a declared liability against Baker for what the Penhollows had done, but also of an adjudication that the use of this machine upon the Baker farm in 1906 was a use by defendant Baker; and we think the force of the finding ultimately extends to what was done in later seasons by this and the later machine. The ownership of the farm, the mutual relation of the two Bakers, and the title to machines and to onions were the same in later seasons as in 1906. For what defendant Baker had done he should have filed a complete statement. He could not be required to do this, as the master properly held, for what the Penhollows had done. The duty as to a statement of infringement on the Baker farm was met in substance, though not in form, by the statement filed by the son. Vrooman was thereupon entitled to an investigation

as to whether the statement was full and complete, as well as regarding the Penhollows' conduct. The ensuing testimony tended to show that Frank Penhollow made a machine in 1902 which he used one season topping onions on his own farm; that he then dismantled this, and in 1903 and 1904 built two more machines, which he used on his own farm only, and which were both burned in 1904. There was nothing to show the number of bushels treated by these machines, excepting his estimate of 1,000 bushels. In 1905 and 1906, he built two more machines for his brother Grant. One of these Grant sold to the younger Baker in 1906, and the other, after using it on his own onions (estimated 800 bushels), he sold in 1907 to Wallace Baker. At about the same time, or a little later, Frank Penhollow built two more machines. One became the property of Pangborn, who used it to an extent not disclosed, and the other was used by Frank Penhollow topping onions for neighboring farmers to some extent in the next two or three seasons.

There was nothing received in evidence tending to show use upon the Baker farm to a greater extent than shown by Charles P. Baker's statement. As the hearing progressed, both parties misapprehended their respective rights. Baker was at fault in not adopting the responsibility for the use of the machines on his farm; Vrooman was at fault in trying to compel Baker to disclose the particulars of Penhollows' infringement about which Baker was ignorant. Thus little progress was made until Baker, who had been conducting his own case before the master, employed counsel. Pursuant to his counsel's advice, he thereupon formally offered to pay the amount of royalty disclosed by his son's statement, and all the accrued costs to that date. As it turns out, this offer failed to meet the full measure of Baker's liability in two particulars: It did not include interest—some $30—on the royalties shown by the son's statement, computed from each year when they should have been paid, and it did not include the $23 ultimately found, and which then appeared as definitely as it ever did, on account of the Penhollows' infringement. Neither one of these items is very substantial. It seems rather probable that both would have been included, if attention had been called to their omission; but they were not included, and they were not, under these circumstances, negligible. Plaintiffs rejected the offer, not for these reasons, but because it did not include some large sums on account of the extensive infringements which it was vaguely claimed the Penhollows had committed; but plaintiffs failed to make good this larger and vaguer claim. We think it must be held that up to the time of the offer Baker was so substantially in fault that he should have paid all costs so far accrued, but that, after that time, the parties were equally in the wrong and each should pay his own costs.

We are aware that there can be no hard and fast rule on this subject, since each case must turn on its own facts, and the whole subject, ordinarily, rests in the discretion of the trial court; but where our action on appeal changes the basis on which the trial court has acted, it is not improper that we should dispose of the whole subject, and we think equity requires the disposition of these costs which we have in-

dicated. There is nothing in the record requiring any larger finding than the master made regarding infringement by the Penhollows. There is some evidence of the number of acres grown by one or the other Penhollow in some of the years involved, but not even estimate of the number of bushels. With regard to the work done for his neighbors, Frank Penhollow could give their names and the years, but no estimate of the amounts, and he had no record. Manifestly this was insufficient as a basis for an accounting of damages. It does not constitute "data." McSherry v. Dowagiac (C. C. A. 6) 160 Fed. 948, 952, 89 C. C. A. 26.

Plaintiffs did not call these named neighborhood farmers as witnesses, but offered copies of certain returns made by them to the assessor of the township, in which, in the course of furnishing statistical information, said to be required by Ohio laws, it was stated that their onion crops had been a certain number of bushels in each year involved. The master refused to accept these copies as evidence tending to show the number of bushels Penhollow had treated with the infringing machine. In this he was right; at the best, they were hearsay. Passing all other objections, our attention is not directed to any applicable statute which would make the original returns evidence against another, even of the number of bushels raised, much less of the number of bushels treated in a particular manner. Even the statements which refer to the Baker farm and purport to show what onion crops Wallace and Charles Baker had returned to the assessor, even if they had been admissible (as for several reasons they were not), could not be of controlling importance, when we observe that it has always been claimed part of the onions were topped by hand, and that both Bakers were upon the stand and subject to as exhaustive examination as desired regarding Charles Baker's statement of 10,431 bushels. It does not appear that any books or papers in control of either of the Bakers, and which could have had any possible bearing on the issue, were not produced by each of them as requested.

There was no foundation for double damages. The trial judge thought there was no infringement, and only by holding that the claims involved should not be construed as narrowly and literally as the court below had done did this court reach the contrary conclusion. Baker cannot well be regarded as intending a willful injury, when the trial court deemed his conduct rightful. There is nothing here to show that Baker withdrew his offer before the master, or would not have carried it out—as of the time of its making—at any time up to final decree. Then, however, he demanded and obtained a decree upon the theory that he had been wholly right from the beginning. This led to the erroneous imposition upon plaintiff of all the costs, including those which had accrued before the tender was made and while Baker had been in the wrong, and so made it necessary to prosecute this appeal.

The record does not permit us to apportion the costs before the master with perfect accuracy on the principle which we think proper; but it is better that trifling errors should be made than that there should

be a further controversy thereon in the court below. Accordingly we have made this apportionment and computed interest upon royalty as well as may be, and direct that the decree below be reversed, and a decree be entered below for the plaintiffs for $175 damages. Of the costs on the accounting, $533.96, the plaintiffs will pay one-fourth and defendants three-fourths. If either has paid more than this, he may have the proper cross-recovery. If the costs of the main case, awarded by the interlocutory decree, have not been disposed of, they should be included in the final decree. Appellants must recover the costs of this appeal, as they have, in the main, prevailed.

VROOMAN et al. v. BURDICK et al.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1915.)

No. 2590.

1. PATENTS ⊂=313—SUIT FOR INFRINGEMENT—DISMISSAL.
Where no move was made by complainant to take proofs in an infringement case within the time prescribed by the rules after the issues were made up, the court properly dismissed the bill on motion of defendant.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⊂=313.]

2. PATENTS ⊂=308—PRELIMINARY INJUNCTION—LIABILITY ON BONDS.
Federal courts of equity are not governed by state statutes fixing liability of a complainant in case of the dissolution of a preliminary injunction, but such liability depends on the terms of the bond, if any, required by the court. Where such a bond in an infringement suit required the payment of damages the defendant might sustain "if it be finally decided that the said preliminary injunction ought not to have been granted," a mere dissolution of the injunction, without further finding, does not entitle defendant to damages.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 504–506; Dec. Dig. ⊂=308.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Suit in equity by Warren F. Vrooman and Arba E. Vrooman against Will Burdick and Harrison Burdick. Decree of dismissal, and complainants appeal. Affirmed.

O. C. Billman, of Cleveland, Ohio, for appellants.

A. L. Lawrence, of Cleveland, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. [1] The appellants Vrooman, who were the successful complainants in the infringement suit decided by this court and reported in 179 Fed. 296, 102 C. C. A. 484 (Vrooman v. Penhollow), after our decision in that case, filed an infringement bill in the usual form against the present appellees Burdick, and moved for and ob-

tained a preliminary injunction. The defendants answered, denying both validity and infringement; and since they set up additional patents in anticipation, and since their machine was of a different form from that held in the former suit to infringe, it is clear that they had a full right to their day in court on both these issues. Plaintiffs filed replication on June 10, 1912. On September 14th, no proofs having been taken by either party, and the three months provided therefor by rule having expired, defendants set the cause for hearing on bill, answer, and replication, and it was accordingly so brought on for hearing. Plaintiffs made no effort to get permission to take proofs, nor any application at any time to be in any way relieved from the situation thus created. The affidavits on the motion for injunction could not be considered as evidence on the hearing, there was no proof of validity or infringement, and the court could do nothing, except dismiss the bill, as it did. Robinson v. American Co. (C. C. A. 7) 135 Fed. 693, 68 C. C. A. 331.

[2] The decree also directed a special master to state an account of defendants' damages by reason of the granting of the preliminary injunction. We understand that nothing has been done pursuant to this reference, and defendants' counsel disclaims any intention to proceed thereunder; but we think the practice on this subject has been somewhat misconceived. In Ohio, the party, who obtains a preliminary injunction is required, by statute, to indemnify defendant against damages caused by the issue of the injunction, if it shall thereafter be dissolved. This statute does not apply to the federal courts sitting in equity, and in those courts there is no fixed rule on the subject. A preliminary injunction is not, ordinarily, granted until after a hearing, and the court does not require the plaintiff to give indemnity as a condition of receiving that to which the court has held he is entitled, unless some special considerations upon the balancing of equities seem to make it just to do so. If such bond is required, its conditions, since they are dependent on no statute, should be carefully fixed, so that the security which is given to defendant shall be real and not merely colorable. If a preliminary injunction is reversed on appeal, or discharged on final hearing, it does not follow that its issue was wrongful. In patent cases, especially, any condition in such a bond which requires damages for the wrongful issue of preliminary injunction is liable to confuse; and this because the preliminary right and final right are so often different.[1]

In this case the granting of a restraining order was conditioned upon the execution of "a satisfactory bond," and the bond given pursuant thereto was conditioned that the plaintiff should "pay all moneys and costs which should be adjudged against them in case the said injunction should be dissolved." The preliminary injunction was allowed

[1] This court has (without special mention of this point) approved bonds conditioned "if the cause shall ultimately be determined against [plaintiff]," or "if it be finally determined either that the patent sued on is invalid or that defendants were not acting in infringement of it." Grand Rapids v. Warren, 196 Fed. 892, 893, 116 C. C. A. 454; Acme Co. v. Commercial Co., 192 Fed. 321, 323, 329, 112 C. C. A. 573.

upon the execution of a bond "conditioned according to law," and when this bond was filed it was conditioned that the plaintiffs pay the damages which defendants "may sustain by reason of the preliminary injunction in this cause, if it be finally decided that the said preliminary injunction ought not to have been granted." It will be seen that without the aid of the Ohio statute the force of these bonds is very doubtful, and the final decree in this case, while it doubtless dissolves the preliminary injunction, is far from being a decision that such writ of injunction "ought not to have been granted."

There is no assignment of error complaining of the decree because it directs this accounting, and so we will not order any modification. In view of counsel's disclaimer, no further proceedings need be apprehended. We find no merit in appellant's other contentions.

The decree is affirmed.

BUSH & LANE PIANO CO. v. BECKER BROS.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 192.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—DESIGN FOR PIANO CASE.
The Lane design patent, No. 37,501, for a design for a piano case, *held* valid and infringed.

2. PATENTS ⇐318—INFRINGEMENT OF DESIGN PATENT—PROFITS RECOVERABLE.
On an accounting for profits for infringement of a design patent for a piano case, complainant is entitled to recover the profits made on the case alone, and not on the piano as a whole.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. ⇐318.

Accounting by infringer of patent for profits, see notes to Brickill v. Mayor, etc., of City of New York, 50 C. C. A. 8; Clark v. Johnson, 120 C. C. A. 389.]

Ward, Circuit Judge, dissenting.

On appeal from a final decree of the District Court of the United States for the Southern District of New York entered in an action based upon a design patent for a piano case granted to Walter Lane of Chicago, Ill., July 25, 1905, for the term of seven years. The court found the patent valid and infringed and referred it to a master to assess the amount of damages and profits. The master found that there was due the complainant on account of such infringement the sum of $35,640.61. The final decree was entered on September 9, 1914, in favor of the complainant for $36,541.15. The decision of the District Court is reported in 209 Fed. 233.

John McCormick, of New York City, for appellant.

John J. O'Connell, of New York City, and Willard Schwartz, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The patent, which is commendably short, is as follows:

United States Patent Office.
Walter Lane, of Chicago, Illinois.
Design for a Piano Case.

Specification forming part of Design No. 37,501, dated July 25, 1905.
Application filed June 8, 1905. Serial No. 264,349. Term of patent 7 years.

To All Whom It may Concern:

Be it known that I, Walter Lane, a citizen of the United States, residing at Chicago, in the county of Cook and state of Illinois, have invented a new, original, and ornamental design for piano cases, of which the following is a specification, reference being had to the accompanying drawing, forming part thereof.

The figure is a perspective view showing my new design.

I claim—

The ornamental design for a piano case as shown.

Walter Lane.

Witnesses:
Bertha Lane,
R. J. Jacker.

[1] The drawing of the design shows an upright piano case in the conventional form. The casual observer, unless his attention were particularly directed to the new features, would hardly be able to distinguish the patented design from many of the designs found in the prior art. However, we agree with Judge Hazel in the statement that:

"On comparison with the prior art, because of the configuration of the columns, the paneling, and the substantiality thereof, it is easily distinguishable from other upright pianos."

There are some characteristic features of the design in controversy which distinguish it from those of the prior art although the general contour of the case is alike in all, and several of the cases of the prior art show designs which, to the ordinary purchaser whose attention is not called to details, would seem to embody the principal features of the design of the patent. Nevertheless, having in mind the rule applicable to design patents, we cannot say that it is anticipated or void for lack of patentability.

We also think that infringement is clearly shown and upon the two questions of invention and infringement we do not deem it necessary to add anything to the opinion of Judge Hazel.

[2] The question which seems to have received little attention upon the accounting, due probably to the form of the decree, is whether the profits made by the defendant should be the entire profits of the sales of the piano and case or the profits upon the sale of the case which alone is the sole subject of the patent. We are of the opinion that the latter rule should have controlled the accounting.

We assume that the "case" is nothing more than the structure which incloses and holds in position the piano proper, viz., the part which produces the music. The former appeals to the eye, the latter to the ear. Pianos are of different forms and shapes, depending upon whether they are large or small, "upright" or horizontal. A purchaser desiring a piano of a particular manufacturer may have the piano placed in any one of several cases dealt in by the maker. One style of case

may appeal to one purchaser and another style to another purchaser, but the music is the same in each instance. To attribute the sale of 958 Imperial pianos solely to the design of the case which inclosed them seems unwarranted. Such a supposition is unsupported by the proof and involves too violent a presumption to be accepted. What Lane invented was a piano case, not a piano. He received a patent for a "piano case" and not for a piano, but he has recovered the profits on 958 pianos.

There is testimony in the record that the cost of the case is $38 and that the manufacturing cost, including the case, is $118. The complainant has, therefore, been awarded the profits on the piano proper, for which it holds no patent, when its recovery should have been confined to the part which alone is covered by the claim of its patent.

As no attempt was made at the accounting to state with accuracy the amount of profits derived from the case alone, we use these figures only by way of illustration. We are unable, however, to understand why there should be any serious difficulty in computing the profits on the case alone, in view of the fact that Jacob M. Becker, who is the defendant's president, testifies that the defendant does not manufacture the cases used by it but purchases them from others at a cost of $38 for each case.

We cannot resist the conclusion that the large recovery in this case, which we think is out of proportion to the injury done, is due to the fact that it was not at all times kept in mind that the design is not for a piano but for a piano case—an ornamental decorated wooden box in which the piano is placed, but which may be and is sold separate and apart from the music-making apparatus. Of course in many design patents—as, for instance, in Gorham v. White, 14 Wall. 511, 20 L. Ed. 731, and Dominick & Haff v. Wallace, 209 Fed. 223, 126 C. C. A. 317—the design is inseparable from the article to which it is attached, or of which it is a part. A design for a spoon handle, for instance, cannot be separated from the completed spoon and there is justice in the rule which gives the owner of such a design the entire profits made by the sale of the article to which the design has been unlawfully applied. We do not see that the act of February 4, 1887, need be considered here as we understand that there is no serious controversy as to the liability of the defendant for the profits made by infringing cases, if the patent be declared valid. The principal question involved is whether the recovery should be confined to the subject of the patent—a piano case. We have been unable to find an authority where the rule of recovery has been extended to the limits demanded in the present controversy. The master awarded the complainant, as he was perhaps required to do by the decree, the entire net profits in the sale of Becker Bros. pianos contained in the patented case and his report was confirmed by the District Court. Judge Lacombe, who heard the motion to confirm, expressly stated that in his judgment the recovery should be confined to the piano case alone, but thought it proper that the question should be determined by this court. We are clearly of the opinion that the rule adopted, giving the owner of a design patent for a receptacle intended to hold an expensive

article of manufacture the profits made on the sale of the receptacle and its contents, must certainly lead to inequitable results and cannot be sustained. Lane did not invent a piano, but a piano case; the piano could be made to fit as well in a case of entirely different design. When the patent owner is awarded the profits due to his design he receives all he is entitled to. If the rule be established that a design for a case enables the owner to collect damages for the case not only, but for the contents of the case as well, it will lead to results which shock the conscience. A design for a watch case will include the watch itself. A design for a gun case will include the gun, a design for a hat case will include the hat and so on. Indeed, it must logically follow that one who patents a new design for a cigar box may recover the profits made on the cigars which it contains. All that Lane did was to produce a design which added some new ornamental features to the old form of piano case. When he secures the profits made by the seller of that case based on the design itself, he will receive all he is entitled to. It may be noted in this connection that in the case of Untermeyer v. Freund, cited by both parties ([C. C.] 37 Fed. 342; [C. C.] 50 Fed. 77), the subject-matter was a design for watch cases and profits were awarded on the case alone. The question here in issue was not under discussion, but if the doctrine now contended for be the law, a person who patents a new design for a watch case can recover the entire profits made by one who sells a $100 watch in a case worth less than $10.

The decree is reversed with the costs of this court and the cause is remanded to the District Court with instructions to enter a decree based upon the profits due to the defendant's infringement by the sale of piano cases embodying the design of the patent.

WARD, Circuit Judge (dissenting). I cannot agree with the conclusion of the court as to the extent of the complainant's recovery. The value of a design patent is as a seller of the article to which the design is applied. The profits attributable to it cannot be traced as can profits due to greater economy, durability, or efficiency in the case of other patents. So long as the law required the owner of a design patent to do this, he could get only a nominal recovery. It was to correct this rule as laid down in Dobson v. Dornan, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. Ed. 63, that Congress enacted chapter 105, Laws 1887. Untermeyer v. Freund (C. C.) 50 Fed. 77. The act gives the patentee $250 as a penalty, and in case the total profit from the manufacture or sale of the article to which the design "has been applied" exceeded that sum, then all the profits in excess thereof. The alternative was either to give the design patentee nothing or to give him all the profits. The latter rule is no doubt hard, but no more so than that which requires the infringer of a copyright to account for all the profits of his publication when the profits due to the infringement cannot be separately ascertained. Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547. It is necessary if the owner of the copyright is to have any protection at all. It is true that the patent under consideration is for a design for a piano case, but the article which the complainant

manufactures and sells is a piano and the article to which the design is applied is a piano. The complainant neither manufactures the case nor sells it separately. I think it is therefore entitled to all the profits derived from the sale of pianos in the case.

STOCKLAND v. RUSSELL GRADER MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1915.)

No. 4162.

1. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—ROAD GRADER.
The Clemons patent, No. 924,966, for a road-grading machine, claims 2 and 17, are sufficiently specific, when read in connection with the specification and drawings, to enable one skilled in the art to construct an operative machine. Such claims also *held* not anticipated, valid, and infringed.

2. PATENTS ⊜26—"INVENTION"—NEW COMBINATION OF OLD ELEMENTS.
A new combination of old elements may disclose patentable invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⊜26.
For other definitions, see Words and Phrases, First and Second Series, Invention.
Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

3. PATENTS ⊜234—INFRINGEMENT—IDENTITY OF MODE OF OPERATION.
Making what is a single part in a patented machine in two pieces does not avoid infringement, where they do the same work as the single piece in substantially the same manner.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370, 381; Dec. Dig. ⊜234.]

4. PATENTS ⊜240—INFRINGEMENT—IMPROVED DEVICE.
That a patented machine is an improvement on that of a prior patent does not negative infringement of the earlier patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 379; Dec. Dig. ⊜240.]

Appeal from the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Suit in equity by the Russell Grader Manufacturing Company against Charles K. Stockland, doing business as the Stockland Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

Frank A. Whiteley, of Minneapolis, Minn., for appellant.

Amasa C. Paul, of Minneapolis, Minn., for appellee.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

REED, District Judge. In June, 1912, the Russell Grader Manufacturing Company, a corporation, sued Charles K. Stockland, doing business under the name of the Stockland Manufacturing Company, for infringement of claims 2, 3, 6, 11, 16, and 17 of letters patent of

the United States, No. 924,966, issued to Harry K. Clemons, June 15, 1909 (application filed January 11, 1907), and a number of the claims of letters patent No. 918,633, issued to Carl O. Wold, April 20, 1909 (application filed October 12, 1908), both of which are for alleged improvements in road-grading machines, and for damages and an accounting of profits. (The Clemons patent was assigned to plaintiff November 26, 1910.)

The defendant by its answer admits the issuance of the patents and the assignments thereof to plaintiff as alleged, but denies their validity and its infringement of them. The hearing resulted in a decree sustaining claims 2 and 17 of the Clemons patent and that both of said claims were infringed by defendant, with the usual order for an accounting of profits and the assessment of damages, and dismissing the bill as to the other claims of that patent and the several claims of the Wold patent, because not infringed by the defendant. The case is here upon appeal by defendant from the decree against it upon claims 2 and 17 of the Clemons patent.

The road-grading machine of the plaintiff is so arranged that the moldboard, or scraper blade, as it is called, is carried upon a frame supported by wheels or trucks in the rear and in front of the blade, with mechanism by which the blade may be controlled in the operation of the machine in either direction along the road or grade upon which it is used. The patentee in his specifications describes the machine and its mechanism and mode of operation by appropriate reference to the drawings, and distinctly claims as his invention, among others, claims 2 and 17, which read in this way:

2. "In a road-grading machine, the combination with a pair of wheels connected to a pair of swinging oscillating brackets pivotally attached to a blade, with means for holding said swinging brackets where set, substantially as described."

17. "In a road-grading machine, the combination with a scraper blade of supporting wheels at the front and rear of said blade, crank axles connected to said blade with freedom for both lateral and vertical swinging movements, and to the rear portions of which crank axles the said rear wheels are journaled, independent devices for vertically adjusting said crank axles, and means holding the said crank axles for parallel lateral swinging movements, substantially as described."

[1] It is urged in behalf of the defendant that these claims are so vague, indefinite, and uncertain that they are void; that a machine made according to their disclosures would be inoperative; that they are anticipated by patents of the prior art, and, finally, that it does not infringe either of them if they are held to be valid. To follow counsel in the discussion in detail of these various objections to the claims would unduly extend the opinion and serve no useful purpose. It must suffice, therefore, to say of these objections that in our opinion each of these claims, when read in connection with the drawings and specifications of the patent, is sufficient to enable one skilled in the art to make the several parts of the machine described therein; and this satisfies the requirements of section 4888 of the Revised Statutes of the United States (Comp. St. 1913, § 9432). Mowry v. Whitney, 14 Wall. 620, 645, 20 L. Ed. 860; Ives v. Hamilton, 92 U. S. 426,

431, 23 L. Ed. 494; Brammer v. Schroeder, 106 Fed. 918, 930, 46 C. C. A. 41.

The contention that the machine of the Clemons patent in suit is inoperative, and the patent therefore invalid, rests chiefly upon the testimony of the patentee, Clemons, who testified in effect, as a witness in behalf of the defendant, that he had made two or three machines according to the specifications and drawings of that patent and that they proved inoperative; that he finally abandoned the attempt to make an operative machine and made machines upon other principles of construction which worked quite satisfactorily. The weight of the testimony of this witness is much lessened by the fact that upon advertising circulars of the machines that proved satisfactory were placed the words, "Patented June 15, 1909," and that he intended by this to convey the idea that they were covered by the patent to him in suit of that date, which he afterwards sold to the plaintiff; that before he so sold it he wrote the plaintiff that its "Simplex" machine, under which name the plaintiff sold its Clemons commercial machine, was an infringement of his patent that he afterwards sold to plaintiff. At the time the witness testified he was employed as manager (not as an officer) of a company that was a competitor of the plaintiff in selling road-grading machines. Having procured the patent upon the specifications and drawings originally filed by him in the Patent Office, and sold it to the plaintiff presumably for a fair consideration, he should not be heard to say in his own behalf, or for a competitor of his assignee of the patent, that a machine made according to its disclosures was inoperative and the patent therefor of no value; nor should it be held invalid, in favor of alleged infringers of the patent in the hands of his assignee, upon such testimony. Besides, it is not entirely clear from the testimony of Clemons that the changes in the construction of the machine which he says proved satisfactory were other than mere matters of detail. The specifications and drawings of a patent are intended only to enable one skilled in the art to make the machine therefrom, and the efficiency of the machine as an operative device depends very much, if not wholly, upon the skill of the mechanic who makes it. Ives v. Hamilton, 92 U. S. 426, 431, 23 L. Ed. 494. The defense of the invalidity of the patent because the machine of its disclosures was inoperative cannot be sustained.

The defendant pleaded and offered in evidence some 15 patents of the prior art, and contends that some of them at least anticipate the Clemons patent. The one chiefly relied upon is that to Mendenhall of May 13, 1884, No. 298,604. In this patent the supporting wheels are rigidly attached to a side beam *G* (of the drawings) and always move with it. They can have no movement independent of the beam, which also moves with the drawbar. In the Clemons machine the wheels are independent in their oscillating movement, both of the beam *26* and of the drawbar *15* of the drawings of that machine; and they can be held in position in which they may be set with reference to the beam and drawbar by means of the alignment bar *5* and the collars and stops connected therewith. The Clemons

construction is substantially different in this respect from the Mendenhall machine, and is not anticipated by it. That none of the prior patents show the entire combination of either of claims 2 or 17 of the Clemons patent is clear from the defendant's own testimony, who said upon cross-examination:

"Q. Now, what patent of the prior art offered in evidence comes the nearest to embodying the structure and mode of operation of the machine shown and described in the Clemons patent in suit, No. 924,966? A. I think the Mendenhall machine, patent No. 298,604, embodies the most of those features. Q. What one comes next? A. I think the Farmer machine, patent No. 151,656. Q. Those two, you think, come nearest of all in this lot to embodying all of the features and mode of operation of the Clemons patent? A. No; the Clemons machine has one operation that neither one of us has. Q. Well, I am asking you which of these patents of the prior art comes the nearest to embodying all of the features of the Clemons machine; and I understand you to say the Mendenhall and the Farmer come the nearest—is that right? A. Those are two of them; yes, I think so. Q. Now, if there are any others that in your judgment come close to the Clemons, I wish you would mention those. A. The Dague machine, patent No. 233,117; the Aldrich machine, patent No. 703,977; the Skinner machine, patent No. 364,445; the Maxey machine, patent No. 610,550; the Minard machine, patent No. 370,077; the Van Voorhis machine, patent No. 113,950; and the Everingham machine, patent No. 360,380. Q. You don't find in any one of these prior patents all of the features of the machine of the Clemons patent in suit, do you? A. In these old patents? Q. Yes. A. Not all the features; no."

[2] That some of the elements of claims 2 and 17 may be found in one or the other of the prior patents would not be an anticipation of the Clemons patent, which is for a new combination of elements that may be old. Bates v. Coe, 98 U. S. 31, 48, 25 L. Ed. 68; Imhaeuser v. Buerk, 101 U. S. 647, 660, 25 L. Ed. 945; Hobbs v. Beach, 180 U. S. 383, 392, 21 Sup. Ct. 409, 45 L. Ed. 586.

Does the defendant infringe the plaintiff's machine? The complainant corporation was organized in 1906; the defendant Stockland was an officer of that corporation from its organization until the fall of 1910, when he sold his stock therein and withdrew from the company. During his connection with the plaintiff he was superintendent of its factory. An "original" Clemons machine, as it is called, was built in the plaintiff's factory during the fall of 1907, while the defendant was plaintiff's superintendent, and he was familiar with its construction. It did not prove a complete success. In 1908 the plaintiff made and put upon the market its commercial machine under the name of "Simplex," in which some changes in detail of construction were made. It went into immediate use; its sales increased year by year, until they amounted to upwards of 2,200 prior to the commencement of this suit. The defendant Stockland was entirely familiar with this machine before he left the plaintiff company.

[3] After leaving the plaintiff he designed, made, and put upon the market and sold the machine complained of by plaintiff as infringing its "Simplex" machine, upon which he obtained a patent December 19, 1911, No. 1,012,109, upon an application filed in the Patent Office, December 27, 1910. This machine has a pair of wheels connected to a pair of swinging oscillating brackets at the rear of the scraper blade, corresponding to those in plaintiff's patent, which are pivotally at-

tached to the blade. The means for holding these brackets in position where set are connecting links or arms extending from the top of the pivot bars and two reversely positioned holding bars, *81* and *82* of the drawings. These bars perform in defendant's machine in connection with their locking means the same function in substantially the same way as do the alignment bar *5*, and the devices connected with it, of the Clemons patent. The fact that defendant makes its alignment bar in two parts or pieces, instead of one, will not relieve it from infringement of claim 2 of the Clemons patent if the alignment bar in two pieces does precisely what the single alignment bar of the plaintiff's machine does and in substantially the same way. Seymour v. Osborne, 11 Wall. 516, 560, 20 L. Ed. 33. The defendant's machine has two supporting wheels in front of the blade and such wheels perform the same function and in substantially the same way that the caster wheel, *23*, of claim 17 of the Clemons patent, does.

[4] It is urged that there is a presumption that the Stockland patent, which is later than the Clemons patent, does not infringe the earlier patent; and so there is; but there is an equally strong presumption that the Stockland patent is an improvement only of the Clemons machine. Century Electric Co. v. Westinghouse E. & Mfg. Co., 191 Fed. 350, 363, 112 C. C. A. 8. Defendant was familiar with the Clemons patent, saw the machine that was built by him in the plaintiff's factory during the late summer and fall of 1907, was familiar with the plaintiff's commercial machine "Simplex," and knew that plaintiff was selling this machine for some two years while he was superintendent of its factory and connected with the plaintiff before he applied for his patent. His invention, therefore, if any there be, is not prior to the Clemons invention, and at best is but an improvement thereof. It may be that his machine in some respects is better than that of Clemons, which we need not decide; but, if so, defendant does not escape infringement of Clemons if the devices are substantially alike. Machine Company v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935; Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017; and see Hobbs v. Beach, 180 U. S. 383, 401, 21 Sup. Ct. 409, 45 L. Ed. 586. In Machine Company v. Murphy, above, the Supreme Court said:

"In determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions, or in a different way, or produce a substantially different result, * * * as it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained. Inquiries of this kind are often attended with difficulty; but if special attention is given to such portions of a given device as really does the work, so as not to give undue importance to other parts of the same which are only used as a convenient mode of constructing the entire device, the difficulty attending the investigation will be greatly diminished, if not entirely overcome."

Without continuing the discussion further, it is sufficient to say that in our opinion the District Court rightly held claims 2 and 17 of the Clemons patent to be valid and infringed by the defendant's machine. The decree is affirmed.

MERRELL-SOULE CO. v. POWDERED MILK CO. OF AMERICA.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 141.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—METHOD OF DESICCATING MILK.

The Stauf patent, No. 666,711, for a method of desiccating milk, etc., was not anticipated, discloses patentable invention, and is entitled to a liberal construction; also *held* infringed.

2. PATENTS ⟸66—RIGHT TO PATENT—PRIOR FOREIGN PATENT—"PATENTED"—"AUSGEGEBEN DATE."

An invention is not "patented" in a foreign country, within the meaning of Rev. St. § 4887 (Comp. St. 1913, § 9431), until the date of its actual issuance, which under the German law is the "ausgegeben," or publication, date.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. ⟸66.

For other definitions, see Words and Phrases, First and Second Series, Patented.]

Appeal from the District Court of the United States for the Western District of New York.

On appeal from an interlocutory decree holding valid and infringed the single claim of letters patent No. 666,711 granted to Robert Stauf for a method of desiccating milk, blood and the like and producing a dry powder therefrom. The patent was held valid and infringed by Judge Hazel ([D. C.] 215 Fed. 922). Subsequently Judge Ray upon an independent examination reached the same conclusion upon a motion for a preliminary injunction.

Archibald Cox and Robert W. Byerly, both of New York City, for appellant.

Livingston Gifford, of New York City, and Howard P. Denison and Eugene A. Thompson, both of Syracuse, N. Y., for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1] The patent is unusually clear, concise and brief in its statements and for present purposes may be sufficiently understood by reading the claim which is as follows:

"The process of obtaining the solid constituents of liquids such as blood, milk, and the like, in the form of powder, said process consisting in converting the liquid into a fine spray, bringing such spray or atomized liquid into a regulated current of heated air so that the liquid constituents are completely vaporized, conveying the dry powder into a suitable collecting-space away from the air-current, and discharging the air and vapor separately from the dry powder."

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The powder is produced by making very fine spray of the liquid and subjecting it to a desiccating process, when in that condition, by which the moisture is removed and the resulting product becomes a dry powder. The process takes place at a predetermined temperature. The apparatus for producing the result is a comparatively simple one. Air is forced into the supply pipe under pressure to the spray nozzles and thus draws the liquid to be operated upon—milk in the present case—from the vessels containing the milk, through tubes. It then projects the same in a finely atomized condition in oblique jets into the interior of a shaft-like casing, the lower part of which is provided with a source of heat. The air admitted through registers is heated by the source of heat and rises. The spray of atomized milk coming from the jets or nozzles mixes with the heated air and the watery constituents of the spray are evaporated. The steam and dry particles are carried upward by heated air and are induced to separate and drop into chambers surrounding the central shaft. The sides of the said chamber or gallery are made of gauze permitting the air and vapors to pass off and escape while the dry powder falls down and is collected in hoppers, whence it can be removed by any convenient apparatus.

Without discussing unnecessary details, it may be stated generally that a process for converting milk from a liquid to a dry powder had long been sought and many efforts were made to accomplish this result, but with very indifferent success. Stauf succeeded where others failed and now the powdered milk is sold everywhere and is used with success where fresh milk is not obtainable. None of the prior processes produced the desired result, so that the product could be used commercially as a substitute for milk. Many experimenters conceived the idea of a dry powder which could be converted into milk but no one succeeded in making a commercial article. Stauf has succeeded in producing a dry powder which can be converted into milk, having all the characteristics of milk as it comes from the cow. There were numerous attempts to reach this result but no one succeeded in solving the problem prior to Stauf. He has produced a powder which with the addition of water produces original fresh milk. Infringement is clearly shown. Stauf, being the first to solve the problem completely, is entitled to a liberal construction of the claim and we agree with Judge Hazel in thinking that:

"Except as to a few unimportant changes the apparatus of the defendant company for desiccating milk is not thought patentably different from complainant's."

As we agree with his conclusion, we do not deem it necessary to add to the discussion of this subject found in his opinion. The complainant is unquestionably entitled to an interpretation of the claim sufficiently broad to hold as infringers those who use equivalent processes. This the defendants clearly do.

[2] The defense of prior patenting in Germany is not established. The date of the American patent is January 29, 1901, and the proof falls far short of establishing the proposition that prior to that date the process was patented in Germany. The German patent did not issue, according to the law as understood in the United States, until

March 14, 1901, six weeks after the United States patent, which is dated January 29, 1901. That the "ausgegeben" date, which is the date when the title deed of the patent issues in Germany, must be considered as the date of the patent, is established by numerous authorities. In Edison Co. v. Waring Co. (C. C.) 59 Fed. 358, Judge Shipman said:

"This question was recently examined by Judge Jenkins in Telephone Co. v. Cushman [C. C.] 57 Fed. 842. He refers to the various decisions upon the question, and concludes that the invention is not patented abroad before the actual sealing and issuance of the patent, and that the term 'patented' as used in section 4887 of the Revised Statutes 'does not mean the preliminary proceedings, but the actual issuance of the patent under the seal of the government, speaking the exercise of sovereign will, investing the patentee with the grant of a monopoly.' In this conclusion I entirely concur."

See also Queen v. Friedlander (C. C.) 149 Fed. 775, where Judge Kohlsaat says:

"Under the patent laws of Germany, a patent when granted becomes operative from the day following the filing of the application. The publication or 'ausgegeben' date is the date upon which the patent is actually issued."

Certainly the invention was not patented as we understand that term. Even if the German law differs from ours, in this respect, it is clearly the duty of our courts to follow our own, rather than the German interpretation, of our laws.

The decree is affirmed with costs.

MERRELL-SOULE CO. v. NATURAL DRY MILK CO. (three cases).

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

Nos. 215–217.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—POWDERED MILK.

The Stauf patent, No. 666,711, for a process of desiccating milk, etc., *held* not anticipated, valid, and infringed.

Appeals from the District Court of the United States for the Northern District of New York.

Suit in equity by the Merrell-Soule Company against the Natural Dry Milk Company. From orders granting preliminary injunctions, defendant appeals. Affirmed.

For opinion below, see 219 Fed. 572.

Melville Church, of Washington, D. C., and Paul Carpenter, of Chicago, Ill., for appellant.

Howard P. Denison, of Syracuse, N. Y., Livingston Gifford, of New York City, and Eugene A. Thompson, of Syracuse, N. Y., for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. There is nothing in this appeal, which is from an order granting a preliminary injunction and an order refusing to vacate the same, which requires a different result from that reached in the Powdered Milk Co. Case, 222 Fed. 911. The British patent to

Williams for recovering salt from brine is not an anticipation and we think Judge Ray is right when he says:

"It is evident that Williams had no conception of a process for making dry or powdered milk by commingling ascending hot air, ascending milk spray and air under pressure, with the heat so regulated and controlled that the solids of the milk would not be at all changed and would be left in a form which, on their being mixed with water would produce pure, sweet milk, having all the properties it had before being subjected to the process."

Substantially all of the other questions were discussed at length in the Powdered Milk Case, supra, and need not be again considered.

The orders are affirmed. The motions to dissolve or suspend the injunction are denied.

HEIM v. ROBT. G. SPEER CORPORATION et al.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1915.)

No. 4187.

PATENTS ⊂=328—INVENTION—SMOKE CONSUMER.

The Heim patent, No. 759,711, for a steam-jet smoke consumer, in view of the prior art, *held* void for lack of invention.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by Frank C. Heim against the Robert G. Speer Corporation and others. Decree for defendants, and complainant appeals. Affirmed.

John C. Higdon, of St. Louis, Mo., for appellant.

Comfort S. Butler and Frederick R. Cornwall, both of St. Louis, Mo., for appellees.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree of dismissal of a suit for the infringement of letters patent No. 759,711, issued to Frank C. Heim, May 10, 1904, for an improved steam-jet smoke consumer constructed according to the following claim:

"An improved steam-jet smoke consumer, comprising the combination with a furnace, of a horizontal air-pipe, one end of which projects free on the exterior of the furnace-wall, a removable cover for said projecting end of said air-pipe, a steam-pipe having a series of nozzles and detachably mounted within said air-pipe, but bodily removable therefrom while said nozzles are intact, said steam-pipe extending through a central opening in said cover, and means for supplying air to the said air-pipe, substantially as specified."

An examination of the prior art, including letters patent No. 371,804, to G. F. Tinkham, October 18, 1887; No. 527,895, to S. N. Smith, October 23, 1894; No. 259,277, to T. Murley, June 6, 1882; and No. 430,955, to Holmes & Sieben, June 24, 1890—has convinced that the only novelties embodied in the device of the patentee were that he so constructed his air-pipe and his steam-jet pipe within it that the latter can be more readily and easily detached and removed from the former

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

than by the use of prior like devices, and that he so placed and constructed his air-pipe that the cover of one end of it could be more readily and easily removed and replaced than the covers of the ends of the air-pipes or conduits of previous patents. But the use in smoke consumers of steam-jet pipes within air-pipes and conduits was old years before Heim's application for his patent. In their construction it was evidently necessary, or at least convenient and practicable, to make the pipes separately and then to place the steam-jet pipes within and attach them to the air-pipes. If it was desirable that the steam-jet pipe should be detachably secured within the air-pipe, so that it could easily and quickly be removed while the furnace was in operation, it could not have been beyond the capacity of a mechanic skilled in the art to so locate and attach the two pipes that the jet-pipe could be readily detached and removed. And if it was desirable that one end of the air-pipe should be temporarily, rather than permanently, closed, so that the cover to it might be readily removed, and so that the engineer could look into the air-pipe without interrupting the operation of the furnace, and observe the working of the steam through the jets, it could not have been beyond the capacity of such a mechanic to have so located and covered one end of the pipe as to have accomplished that object.

The conception and construction of the improvement disclosed by the patent to the plaintiff did not rise to the dignity of invention, and the decree below is affirmed.

BARNARD v. DEMING CO.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2563.

PATENTS ⊂⇒328—INFRINGEMENT—FLUID DISTRIBUTOR.

The Barnard patent, No. 580,151, for a fluid distributor, *held* not infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Suit in equity by William N. Barnard against the Deming Company. Decree for defendant, and complainant appeals. Affirmed.

Logan, Demond, Hanford & Read, of New York City, for appellant.

A. H. Bates, of Cleveland, Ohio, for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

PER CURIAM. The same patent here involved (Barnard, fluid distributor, No. 580,151, issued April 6, 1897, on application filed August 4, 1882) was by this court held valid and infringed. Forest City Co. v. Barnard, 176 Fed. 561, 100 C. C. A. 197. The patent was there sustained as against an alleged anticipation found in Forster, No. 220,277, October 17, 1879. The opinion of this court was by

Judge Severens, and the essential differences between Forster and Barnard, which permitted the conclusion that Barnard had made an invention, were found to be two: First, that Barnard used a wide, low "reverberatory" chamber, as distinguished from the more elongated nozzle of Forster; and, second, that Barnard introduced his fluid through a purely tangential port in the side of the chamber, instead of through spirally winding ports in the end thereof, as did Forster. This latter difference seems to have been thought the really vital one.

The defendant in the present case uses a device of the Forster type, as thus distinguished from the Barnard type. Deming's chamber is a compromise between the proportionately shorter one of Barnard and the proportionately longer one of Forster. If it produces any of Barnard's supposed peculiar effects, they are present in minimized degree. In the spiral, instead of tangential, form of inlet ports, Deming differs from Forster only in the pitch of the spiral. Upon the whole, we are satisfied that, if Forster did not anticipate, Deming does not infringe. This conclusion is emphasized by additional references in the present record strongly tending at least to limit the field of advance which was open to Barnard, and is not modified by the fact that the present charge of infringement is confined to the third and fourth claims of the patent.

The District Court rightly dismissed the bill because there was no infringement, and this conclusion makes unnecessary any examination of other serious difficulties in plaintiff's path.

The decree below is affirmed, with costs.

BRUNSWICK REFRIGERATING CO. v. WOLF, SAYER & HELLER.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 177.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—GAS PUMP.
The Whitaker patent, No. 899,583, for a gas pump, discloses patentable invention, and is valid; also *held* infringed.

2. PATENTS ⇐312—SUIT FOR INFRINGEMENT—PRESUMPTION OF VALIDITY.
When an agent has appropriated his principal's patent, every fair presumption upon the question of validity should be resolved in its favor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. ⇐312.]

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from a decree of the United States District Court for the Southern District of New York (221 Fed. 639), holding valid and infringed both claims of letters patent No. 899,583, for a gas pump, issued September 29, 1908, to the complainant, as assignee of the inventor, Richard Whitaker.

Richard Whitaker, Max W. Zabel, of Chicago, Ill., and Hirsh & Newman, of Brooklyn, N. Y., for appellant.

Archibald Cox, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. [1] This is an appeal from a decree of the District Court holding valid and infringed letters patent No. 899,583 for a gas pump. Infringement is not denied. The only question is whether it required an exercise of the inventive faculties to construct the pump in question. In other words, is the patented structure an invention or a mere aggregation? There can be no doubt that the patentee has produced a gas pump which is superior to those which preceded it. It is more accurate, more enduring and more efficient than those of the prior art. The presumption arising from the patent itself should not be overcome by any speculative doubt and especially should this be the case where the defendant was the complainant's agent, selling and recommending its machines.

[2] When an agent thus appropriates his principal's patent every fair presumption upon the question of validity should be resolved in its favor. We do not think the patentee has made any radical discovery in the art of constructing gas pumps, but we do think that he has perfected the prior pumps and has thus produced a machine of wonderful accuracy and one very much more efficient than those of the prior art.

The claims contain eight and nine elements respectively, as construed by the complainant, and seven elements as construed by the defendant. The defendant has appropriated them all. The court should be clearly convinced of the rectitude of its position before holding a patent invalid at the instance of an infringer who has copied the patented combination down to its most minute details.

The District Judge has carefully and accurately discussed the issues involved and we see no occasion to add further to what he has written. We agree with him in thinking that if there be a doubt, the presumption of novelty and invention arising from the patent should resolve that doubt in favor of the complainant.

The decree is affirmed with costs.

LAYNE et al. v. GETTY.

(Circuit Court of Appeals, Fifth Circuit. April 20, 1915.)

No. 2760.

PATENTS ⊂=298—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where ex parte affidavits filed by complainant in an infringement suit in support of a motion for a preliminary injunction leave the question of infringement in doubt, although the patent has been adjudged valid, it is within the discretion of the court to deny the injunction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 478; Dec. Dig. ⊂=298.

Grounds for denial of preliminary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Suit in equity by Mahlon E. Layne and others against Fred I. Getty. From an order refusing a preliminary injunction, complainants appeal. Affirmed.

Coke K. Burns, of Houston, Tex., J. D. Wilkinson, of Shreveport, La., and Paul Synnestvedt, of Philadelphia, Pa., for appellants.

Edgar H. Farrar, of New Orleans, La., and Francis M. Phelps, of Washington, D. C., for appellee.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. Bill was filed by the appellants, in the court below, charging infringement of letters patent No. 821,653, and praying an injunction and for profits and damages. A hearing was had upon the motion for a preliminary injunction, based upon ex parte affidavits, and the injunction was refused. To review this order the appellants have brought the case to this court.

Claim 20, sustained as valid by this court in Van Ness v. Layne, 213 Fed. 804, 130 C. C. A. 462, is the only claim of the patent involved in the present controversy. As before stated, the hearing before the District Judge was had upon mere ex parte affidavits. Appellee denied that his improvement infringed claim 20 of appellants' patent, and it is apparent from an examination of the contradictory affidavits that the question of infringement vel non is left in considerable doubt. Without expressing an opinion upon the merits of the question submitted, we think that the discretion exercised by the trial judge in refusing the preliminary injunction should not be revised by this court. When the cause comes up for final hearing upon full proofs, the court will be in a position to intelligently determine whether an injunction should issue. See Texas Traction Co. v. Barron G. Collier, Incorporated, 195 Fed. 65, 115 C. C. A. 82; Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 52 C. C. A. 559; Crescent Specialty Co. v. National Fireworks Distributing Co., 219 Fed. 130, 135 C. C. A. 28; Whippany Mfg. Co. v. United Indurated Fibre Co., 87 Fed. 215, 30 C. C. A. 615.

The order of the lower court is affirmed.

BENTHALL MACH. CO. v. NATIONAL MACH. CORPORATION, Inc.
SAME v. VIRGINIA-CAROLINA PEANUT PICKER CO.
SAME v. DEBNAM et al.

(District Court, E. D. Virginia. April 2, 1915.)

Nos. 1760, 1759, 1762.

1. PATENTS ⇐289—SUIT FOR INFRINGEMENT—LACHES.

Unless under very special circumstances, a court should not sustain the defense of laches in an infringement suit which was commenced within the statutory period of limitation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467–469; Dec. Dig. ⇐289.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. PATENTS ⊂=66—ANTICIPATION—INOPERATIVE DEVICE.
Machines which, although patented, were not practically operative and were abandoned after slight use, are not anticipations which will invalidate a subsequent patent for an operative and successful machine.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. ⊂=66.]

3. PATENTS ⊂=81—ANTICIPATION—BURDEN OF PROOF.
A defendant has the burden of proof to establish anticipation of a patent by prior use with all the presumptions against him.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. ⊂=81.]

4. PATENTS ⊂=26—INVENTION—NEW COMBINATION OF OLD ELEMENTS.
That all of the elements of a patented combination were old does not negative invention, where they were not found in the same structure.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⊂=26.]

5. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—PEANUT PICKER AND STEMMER.
The Ferguson & Benthall patent, No. 808,442, for a peanut picker, and the Benthall patent, No. 890,401, for a peanut stemmer, were not anticipated and disclose patentable invention; also, *held* infringed.

6. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—PEANUT PICKER AND STEMMER.
The Jones patent, No. 908,271, for a combined peanut picker and stemmer, *held* void for anticipation by the prior use for several months of an unpatented machine; also, *held* not infringed if conceded validity.

7. PATENTS ⊂=90—PERSONS ENTITLED TO PATENT—PRIORITY OF INVENTION.
To entitle one to a patent he must have been not only an original, but the first, inventor.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 113–120; Dec. Dig. ⊂=90.]

In Equity. Suits by the Benthall Machine Company against the National Machine Corporation, Incorporated, against the Virginia-Carolina Peanut Picker Company, and against Thomas H. Debnam and Walter C. Ferguson, partners trading as the Ferguson Manufacturing Company. On final hearing. Decrees for complainant in part.

The complainant, the Benthall Machine Company, the owner of the Ferguson & Benthall patent, No. 808,442, for a peanut picker, of the Benthall patent, No. 890,401, for a peanut stemmer, and of the Jones patent, No. 908,271, for a peanut picker and stemmer combined, filed its bills in equity in these causes (hereafter for convenience referred to as causes Nos. 1, 2, and 3); No. 1 being against the National Machine Corporation, Incorporated, No. 2 against the Virginia Carolina Peanut Picker Company, and No. 3 against Thomas H. Debnam and Walter C. Ferguson, otherwise known as the Ferguson Manufacturing Company.

The complainant, and the defendants the National Machine Corporation and the Virginia-Carolina Peanut Picker Company are corporations duly organized under the laws of the state of Virginia, and Debnam and Ferguson are copartners trading as the Ferguson Manufacturing Company, and each doing business in this judicial district.

The subject-matters of the patents in suit relate to machines for picking peanuts from vines, and for removing stems from peanuts after they are picked. The peanut picking mechanism operates first upon the vines, picking and removing the peanuts therefrom, which thereafter, and in a continuous operation, are delivered to the stemming mechanism, which removes the stems from the peanuts, and the peanuts are delivered by the machine practically in

marketable condition; that is to say, that the patents in suit involve the manufacture of peanut picking and stemming machines by the complainant, embodying and containing the peanut picking apparatus under the Benthall & Ferguson patent, and the stemming apparatus under the Benthall patent conjointly.

The three separate causes, as they relate generally to the same subject-matter, and as one patent is involved in all the suits, and another in two of the suits, and the defenses attacking the validity of the patents are generally the same, are for convenience heard together.

In the first suit, against the National Machine Company, the complainant alleges infringement of claims 4 and 5 of the Benthall patent, which are as follows:

"4. In a peanut stemmer, a stemming device comprising a disk provided on its periphery with a plurality of teeth, said teeth being inclined to radii of the disks, and having their front edges straight, the edges of the adjacent teeth meeting at an acute angle, and the points of the teeth being nearer the centers of the disks than the heels thereof, and the spaces between the teeth being of a width at the widest part approximately equal to that of the teeth.

"5. In a peanut stemmer, a stemming device comprising a disk provided on its periphery with a plurality of spaced teeth having straight front edges, the heels of the teeth being farther from the centers of the disk than the points thereof, whereby to form a guard for the point, and the edges of the adjacent teeth meeting at an acute angle, whereby to exert a wedging action on the stem."

(These claims relate to an improved stemming disk or saw.) Also, the infringement of claims 8 and 9 of the Jones patent, as follows:

"8. In a device of the class described, a peanut stemmer comprising a hollow cylindrical rotary drum having circumferential slots through its wall, rotary toothed wheels extending into said drum through said slots, means for supplying peanuts at one end of the drum, and means for discharging said peanuts at the other end of the drum.

"9. In a device of the class described, a peanut stemmer comprising a hollow cylindrical rotary drum having circumferential slots through its wall, a shaft parallel with said drum carrying stemming wheels extending into the slots of said drum"—and are directed to the construction of the stemming mechanism generally.

In the second suit, against the Virginia-Carolina Peanut Picker Company, the complainant alleges infringement of claim 1 of the Ferguson-Benthall patent, as follows:

"1. A picking machine for picking nuts, etc., from the vines, consisting of a stationary picking screen for catching and holding the nuts, combined with a carrier belt for dragging the vines over the screen and a stirring device consisting of a horizontally reciprocating frame with downwardly projecting spring fingers arranged above the carrier belt to spread the vines and work the nuts through the screen."

And claims 1 and 3 of the Benthall patent, as follows:

"1. In a peanut stemmer, and in combination, a relatively long open rectangular frame, friction rollers journaled at the corners thereof, a relatively short rectangular frame resting on the rollers, the bottom of said short frame being composed of a series of longitudinally arranged transversely spaced slats, a plurality of mandrels journaled transversely of the lower frame and spaced apart from each other, spaced stemming devices secured to the mandrels, each device comprising a disk having upon the periphery thereof spaced teeth, the points of the teeth being within the circumference of the circle whose radius is equal to the distance from the center of the disk to the heels of the teeth, means for vibrating the upper frame toward and from the stemming devices, comprising a shaft journaled in the lower frame and having a cranked portion, an arm hinged to the upper frame and pivoted on the cranked portion, and means for rotating the shaft and the mandrels."

"3. In a peanut stemming device, the combination with the frame, of a plurality of mandrels journaled in the frame, stemming devices on the mandrels, each comprising a disk provided on its periphery with spaced teeth,

the points of the teeth being within the periphery of the circle whose center is the center of the disk and whose radius is equal to the distance from the center of the disk to the heel of the teeth, means for receiving the vines, and means for vibrating said receiving means toward and from the stemming devices."

And, in the third suit, against the Ferguson Manufacturing Company, complainant alleges infringement of claims 2, 4, and 5 of the Ferguson & Benthall patent, which are as follows:

"2. In a picking machine, the stirring device consisting of a frame bearing downwardly projecting fingers, combined with a subjacent carrier and a subjacent picking screen, the stirring device being provided with means for imparting a lateral motion to the same."

"4. A machine for picking nuts, pods, etc., from vines, comprising a carrier for the vines, a picking screen arranged below the carrier through which the nuts may drop while still adhering to the vines and movable brush below the screen to clean the same.

"5. A machine for picking nuts, pods, etc., from vines, comprising a carrier for the vines, a picking screen arranged below the carrier, a movable cleaner below the screen and a stirring device arranged above the carrier to work the nuts through the screen."

And claims 1 and 3 of the Benthall patent, hereinbefore set out as involved in the second suit.

Charles A. Munn and T. Hart Anderson, both of New York City, and Tazewell Taylor, of Norfolk, Va., for complainant.

George W. Ramsey and L. S. Bacon, both of Washington, D. C., and Lee Britt, of Suffolk, Va., for defendants.

WADDILL, District Judge (after stating the facts as above). The defenses to the several suits involve many charges of invalidity, the two prominent defenses, however, that apply to all the cases, being: (1) That the patents respectively are invalid because of lack of patentable novelty as shown in the prior art. (2) They deny infringement of any of the patents, and allege special objections to the several patents, as follows: To the Jones patent, (a) the invalidity thereof, because of the anticipation in the prior art by the Pope stemmer; (b) because it describes an inoperative machine; to the Ferguson & Benthall patent, (c) the invalidity thereof, because of anticipation by the prior use of the Ben Hicks machine; (d) because it describes an inoperative machine; (e) because the same was not legally issued; and to the Benthall patent, (f) the invalidity thereof, because of the anticipation in the prior art by use of the Gwaltney machine; (g) of the Ben Hicks machine; (h) of the Hundley machine; and (i) because of defective description in the application for the patent.

It will be observed that in these nine enumerations of specific objections to the three patents in suit, lettered from "a" to "i," five of them relate to lack of novelty because of alleged anticipation in the prior art, and two for failure to disclose operative appliances. They will be considered as respects each patent in discussing that general subject, leaving but two objections that need be specially considered, namely: (1) That the Benthall patent was void because of defective description in the application therefor; and (2) the Ferguson & Benthall patent was void because it described an inoperative machine, and that it was not legally issued.

It seems to the court that these specific objections are technical in character, and without merit. The Benthall patent was sworn to by the patentee, and fully set forth its purposes; and the alleged lack of oath relates to a failure to file an additional affidavit, upon the requirement of the authorities of the patent office, to amplify certain of the provisions of the claims in the patent, which being made, that office acted upon without further affidavit.

The Ferguson-Benthall patent sets forth its purposes with sufficient certainty to demonstrate its working capacity to one skilled in the art, which is what the law contemplates; and the objection to its issuance originally to the assignee, Barnes, as an entirety, instead of one-half interest therein, which was promptly corrected by the Commissioner of Patents by proper certificate, is likewise without merit, as heretofore determined by this court in overruling the demurrer in this cause.

1. Recurring now to the general defense, interposed in each of the causes, that the complainant is equitably estopped from the institution and prosecution of the same, because of its conduct in advertising the advantages of its patent, and warning others against its unlawful use by reason of alleged injunction proceedings, the claim being that the complainant had exceeded the bounds of propriety in the latter respect, and claimed more than it was entitled to in the former. While the complainant may not be entirely free from criticism in both respects, in issuing circulars tending to intimidate, and especially by threatening litigation against those supposed to be infringing upon its patent rights, and in anticipation of the action of the court in their favor, still the breach of propriety in this respect does not seem to have been sufficiently reprehensible to justify the court in denying to it its just rights under its patents.

[1] 2. As to laches, the defendants insist that under the circumstances of these causes, having regard to the alleged knowledge and opportunity of knowledge on the part of the complainant of what the defendants were doing under their patent, it was guilty of such laches in the institution of these suits as to disentitle it to prosecute the same. Undoubtedly one may so sleep upon his rights, and allow his adversary to proceed apparently in contravention thereof, as to disentitle him in equity and fair dealing to assert his conflicting claim, and in determining this question, in patent cases as well as in litigation generally, each case must be controlled by its own peculiar facts and circumstances. In other words, what may be considered grave laches in one case would not in any respect be such in another. Almost innumerable conditions would determine this question, and only under very special circumstances should the court hold one guilty of laches whose litigation was instituted within the statutory limitation, which in patent cases is six years. Act March 3, 1897, 29 Stat. L. c. 391, § 6, p. 694. The Ferguson & Benthall patent was issued on the 24th of March, 1906; the Benthall patent on the 9th of June, 1909; and the Jones patent on the 2d of September, 1909. These several suits were instituted in September, 1912, and the alleged acts of infringement were from and after July 5, 1909, which would seem clearly to indicate that the court would not be warranted in applying that doctrine; the suits having

been instituted within the statutory period, and within some three years of the alleged act of infringement.

3. Considering the validity of the patents in suit because of the lack of novelty in the several claims in issue in the Ferguson & Benthall and Benthall patents, and as containing nothing involving inventive skill or genius, but a mere aggregation of old elements, it will be observed that the defendants insist especially that the Ferguson & Benthall patent was anticipated by that of the patent of Ben Hicks, and the Benthall patent by those of P. D. Gwaltney, Ben Hicks, and John Hundley. Much consideration has been given to the subject of validity, in the light of the several patents specially enumerated, as well as others set up in the pleading, and it seems entirely clear to the court that in neither instance do the patents thus introduced as showing the prior state of the art disentitle the complainant to the benefit of its patents. The court will refer in detail only to those which are especially claimed as anticipatory of the prior art, that is, the Hicks, Gwaltney, Hundley and Pope patents, and will, in determining the validity of complainant's two patents, as well as the matter of infringement thereof, consider the several claims in said two patents together, as it will not be practicable within a reasonable length of this opinion, covering the three causes before the court, to discuss in detail the several alleged anticipatory acts and evidences of patentability or the alleged infringements.

The Ferguson & Benthall patents, and neither of the claims thereof, in suit in either the second or third of these causes, can be said to have been anticipated by the Ben Hicks machine. Nor was the Benthall patent in any of the claims thereof in suit in each of the three causes anticipated by anything contained in either the P. D. Gwaltney, the Ben Hicks, or the John Hundley patents. It is true that the Hicks and Hundley patents were for peanut pickers, and the Gwaltney for a peanut stemmer; but they consisted merely of crude and imperfect efforts to produce something that would answer the purpose desired—certainly so far as the Hicks and Hundley machines were concerned. They were of the most primitive kind, from an intelligent mechanical view, and entirely valueless from the standpoint of securing any practical results in the accomplishment of the object sought to be attained. Only one each of the two machines was built, and neither used to the extent of actually perfecting anything, though it is claimed that the Hicks machine was occasionally worked for a short time on patentee's small farm. The Gwaltney stemmer may be said to have been more mechanically built; but only one machine was made, and it, too, was found inoperative from a practical standpoint, and was quickly put aside. So far from the Gwaltney stemming machine anticipating that of the saw in claims 4 and 5 of the Benthall patent, involved in the first of these causes, the latter machine, with its saw, antedated the former. The earliest date allowable to the original Gwaltney patent is December 3, 1905, the improved Gwaltney March 22, 1906, whereas the Benthall patent was marketed as early as August, 1905, and in this respect it should be noted that the date of invention, and not the time

of application for the patent, controls. Klein v. Russell, 86 U. S. (19 Wall.) 433, 22 L. Ed. 116.

[2, 3] As to each of these three machines, it may be said that they were never in effective and successful operation; the first two at no time, and the last, if at all, subsequent to the date of complainant's patent, and they all belong to the class of inoperative, unsuccessful, and abandoned experiments, and will not serve to invalidate patents subsequently acquired for perfected machines. Brown v. Guild, 90 U. S. (23 Wall.) 181, 23 L. Ed. 161; American Co. v. Fiber Co., 90 U. S. (23 Wall.) 566, 23 L. Ed. 31; Deering v. Winona, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153. Moreover, it cannot be said that the defendants have established their claim to anticipation by the prior art with the character of evidence, and that degree of certainty, imposed upon them by the law. They bear the burden of proof, with all the presumptions against them so far as they seek by unsupported oral testimony to establish their claim of prior use. Washburn v. Beat-Em-All, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; Mast v. Dempster, 82 Fed. 327, 27 C. C. A. 191; Buser v. Novelty, 151 Fed. 478, 81 C. C. A. 16.

The defense of prior anticipation of the art having failed, has complainant shown itself entitled to valid patents as respects the several claims in the Ferguson & Benthall patents in suit? It seems to the court that it has; that in each of the claims hereinbefore set forth something new and useful, that required inventive skill and knowledge, has been furnished to the art in securing an effective peanut picker and stemmer. Others, it is true, had made attempts, and some of them had almost reached the goal, but they failed, and to the patentees or their assignees has been accorded the great satisfaction of producing something that is at once effective and valuable. It has produced something in no sense a mere aggregation of old elements, with each part performing its own function, and nothing more; but, on the contrary, a new combination of parts, coacting in the manner of the true combination to produce a new and useful result, and hence something clearly patentable.

[4] The thoughts and ideas of others, as suggested by old patents, may have been availed of, and different elements, suggested by the art embodied in prior patents, may have been included in the patent; but that will not avail the defendants as a defense, or serve to annul complainant's patents, as it constitutes no anticipation, and no defense to a claim of infringement, that one or more elements of the patented combination, or one or more of the parts of the patentable improvement, may have been found in an older patent, another in a second, and another still in a third. It is indispensable that all of them, or their mechanical equivalents, be found in the same appliance, where they do substantially the same work, by the same means. Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68; Imhaeuser v. Buerk, 101 U. S. 647, 660, 25 L. Ed. 945. Here we have a complete appliance, made up, it may be, in part, from the use of old elements, but which produces a result due to the joint and co-operate action of all of the elements, and making at once a complete and efficient machine of great value and utility in the

large field of human endeavor, where real success has heretofore never been attained, and the commercial value of which has been readily recognized by its quickly taking the place virtually of all similar appliances theretofore.

[5] The complainant's Benthall and Ferguson & Benthall patents in suit, as respects all of the claims aforesaid, in issue in these three causes, are clearly valid, and belong to the class of cases, not perhaps of entire novelty, so far as the end sought to be attained is accomplished, yet showing such improved advancement therein as involves mechanical skill and genius, and constitutes a distinct and positive advance in the science and art involved, resulting in bringing forth something at once workable, practicable, and of great value to its owners, and of general benefit to the public. In the light of these assured results, it will not do to say they were all readily foreseen, and easy of accomplishment. Difficulties in the light of after events generally so appear. Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428, 434, 435, 442, 443, 31 Sup. Ct. 444, 55 L. Ed. 527; Computing Co. v. Automatic Co., 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645; Washburn v. Beat-Em-All Barbed Wire Co., 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; American Co. v. Fiber Co., 90 U. S. (23 Wall.) 566, 23 L. Ed. 161; National v. Interchangeable, 106 Fed. 693, 45 C. C. A. 544; Mahoney v. Malcolm, 143 Fed. 124, 74 C. C. A. 318; Morton v. Llewellyn, 164 Fed. 693, 90 C. C. A. 514.

4. Infringements. Coming to the alleged acts of infringement by the defendants in these several causes, the same will be considered in reference to the different specifications of infringement of the Benthall patent, set forth in the first-named cause, and of said patent, as well as of the Ferguson & Benthall patent in the last two causes, claims 4 and 5 of the Benthall patent being involved in the first cause, claims 1 and 3 of the same patent, and claim 1 of the Ferguson and Benthall patent in the second cause, and the said two claims 1 and 3 of the Benthall patent, and claims 2, 4, and 5 of the Ferguson & Benthall patent in the third cause, and they will be discussed in the order named.

First. Claims 4 and 5 of the Benthall patent in the first cause.

These two claims have been heretofore recited. Briefly, the patentee claims the peculiar and novel construction of his peanut stemming disks or saws to be a toothed disk in which the teeth have rounded or heel-like formations at their ends, which extend further outward than the points of the teeth, so that these points are in effect guarded, and thus prevented from engaging or injuring the shells of the nuts. The teeth are spaced apart at such a distance that the nuts cannot get between them, and preferably the widest portion of this space is approximately the same as the width of the teeth. The sides of the teeth are in converging relation, so as to exert a wedging action on the stems, and the front edges of the teeth are preferably straight, and the edges of the adjacent teeth meet at an acute angle.

Claim 4, a stemming device (a) comprising a disk; (b) provided on its periphery with a plurality of teeth; (c) said teeth being inclined to the radii of the disk; (d) having their front edges straight; (e) the edges of the adjacent teeth meeting at an acute angle; (f) the points

of the teeth being nearer the centers of the disks than the heels thereof; (g) the spaces between the teeth being of a width at the widest part approximately equal to that of the teeth. And claim 5, a stemming device, (a) comprising a disk; (b) provided on its periphery with a plurality of spaced teeth; (c) having straight front edges; (d) the heels of the teeth being further from the center of the disk than the points thereof, whereby they form a guard for the point; (e) the edges of the teeth meet at an acute angle, whereby to exert a wedging action.

Defendant's expert seeks to differentiate its saw from that set forth in the claims of the Benthall patent, because in the National, or Lilliston, saw of the defendant, the converging sides of the gullets do not meet at an angle, but the lower end of the gullets is slightly rounded. And he analyzes the difference in the two patents, but in the end, as the court thinks, demonstrates that the only point of difference between the two is that the apex of the gullets is rounded, and not angular; in other words, that the base of the gullets in the defendant's saw does not meet at an angle. This angular formation is not essentially different, and in the judgment of the court produces no material change in the mode of operation of the two machines. The claims of the Benthall patent in suit contemplate only that opposing straight edges of the gullet should converge towards the base of the gullets, to such an extent as to cause an effective engagement with the peanuts stemmed thereby, and this result is secured by the defendant's saw substantially as it is accomplished with the saw of the complainant. The court is convinced that the saw of the defendant's Lilliston machine conforms substantially to that of the saw of the complainant, covered by claims 4 and 5 of the Benthall patent; that the two are designed for and perform the same service in substantially the same manner, certainly so far as the result is concerned; and that any difference between them is not real, but merely colorable.

Second. Claim 1 of the Ferguson & Benthall patent, and claims 1 and 3 of the Benthall patent, are covered by the second suit.

These three claims have been heretofore recited.

The Ferguson & Benthall patent, claim 1, briefly, comprises suitable framework in which is mounted a substantially horizontally disposed picking screen. An endless chain carrier is mounted on sprockets, and this chain carrier carries at intervals transversely disposed pins; the chain carrier runs in close proximity to the upper surface of the horizontally disposed picking screen, and, in operation, the vines, with peanuts attached thereto, are fed from a trough onto the moving chain carrier, and dragged along and over the upper surface of the picking screen. Located above the carrier is a frame which the patent describes as an agitator frame. This frame is substantially parallel to the picking screen and the chain carrier which passes between the picking screen and the agitator frame. The agitator frame is provided with downwardly extending spring fingers, arranged in parallel rows, the ends of the spring fingers being closely adjacent to the carrier chains, and the slats and pins carried thereby, and in close proximity to the picking screen. This agitator frame spreads and loosens up the vines by means of the spring fingers as they are dragged by the carrier

chain between the picking screen and the ends of the spring fingers. This agitator frame moves in a horizontal plane, and laterally or transversely of the frame of the picking screen.

A critical analysis of the defendant's alleged infringing machine will show that it contains a picking screen, a vine carrier, and an agitator frame, arranged and having the same relation substantially to each other as the corresponding parts of the machine aforesaid of the Ferguson & Benthall patent; the real difference between the two being that in the former the agitator frame is so arranged as to move laterally and horizontally, while in the latter the same agitator and the spring fingers carried thereby are in a direction longitudinally, or lengthwise, of the machine. There is confessedly a difference in the direction of the horizontal reciprocation of this frame in the two machines, and in both cases is the reciprocatory a substantially horizontal one, and the results secured practically the same.

The fact that the reciprocating picker frame or agitator frame of the defendant's machine is normally inclined to a horizontal plane, and moves longitudinally, and not transversely, does not make that machine substantially a different machine from the one described in the patent in suit, as set forth in claim 1, one being in effect the equivalent of the other; and whether the agitator frame moves laterally, or longitudinally, or horizontally, is immaterial, so long as the elements are arranged and combined, and move to produce the result desired.

Considering claims 1 and 3 of the Benthall patent in the second suit, being the stemming mechanism, they consist briefly of a supporting frame supported on rollers, a reciprocating trough or frame, provided with a slatted bottom formed by longitudinally extending slats, mounted upon mandrels, arranged in a frame. And extending transversely are a group of stemming saws, there being two mandrels and two groups of saws, the saws projecting through the slats in the slatted bottom of the reciprocating trough. The trough is reciprocated by means of a crank shaft, connected by a strap or link pivotally connected to one end of the reciprocating trough. The crank shaft and the mandrels are provided with sprocket wheels, which are engaged and driven by a sprocket chain, so that as the crank shaft is rotated, imparting longitudinally shaking or reciprocating movements to the trough, the mandrels and saws are rotated in an opposite direction.

The stemming device of the defendant the Virginia-Carolina Company's machine will be found, upon careful examination into its mechanism, to be substantially like that of claims 1 and 3 of complainant's Benthall patent. There is some difference between them. In the complainant's machine, the reciprocating trough is mounted upon and supported by rollers, whereas in the Virginia-Carolina Company's machine its reciprocating stemming trough is mounted on hangers, which is the only real difference between them; though the defendant insists that in its machine is not found the long open rectangular frame as set forth in claim 1. There is undoubtedly the full equivalent of this frame in the Virginia-Carolina machine, and it relates to the same subject-matter, and the main frame of its machine corresponds in all substantial particulars to the frame of the stemming device of the Benthall

patent; and in these respects, as well as in the matter of the structures of the two machines, it contains substantially the mechanical equivalents of the other.

Third. Claims 2, 4, and 5 of the Ferguson & Benthall patent, involved in the third suit, will now be considered; claims 1 and 3 of the Benthall patent, also in the same suit, having been reviewed in connection with the second suit, and need not be further referred to.

These several claims are alleged to have been infringed by the defendant Debnam and Ferguson, trading as the Ferguson Manufacturing Company, by their patent, designed by Finton F. Ferguson, the father of Walter C. Ferguson, the inventor of the Ferguson & Benthall patent in suit, and who, by reason of his connection with the two patents, and his relationship in question, it is charged is really engaged in furthering the infringement on the part of the defendants of the patent sold to the complainant. The three claims have been hereinbefore recited, and relate to a machine for picking peanuts, pods, etc., from the vines. Claim 2 containing briefly: (a) A stirring device consisting of a frame bearing downwardly projecting fingers; (b) a subjacent carrier; (c) a subjacent picking screen—the stirring device (a) being described as provided with means for imparting a lateral motion to it. Claim 4 of: (a) A carrier for the vines; (b) a picking screen arranged below the carrier through which the nuts may drop while still adhering to the vines; (c) a movable brush below the screen to clean the same; and claim 5: (a) A carrier for the vines; (b) a picking screen arranged below the carrier; (c) a movable cleaner below the screen; (d) a stirring device arranged above the carrier, to work the nuts from the screen.

The defendant's infringing machine, as respects these three claims, is built on different lines from those of the machine alleged to have been infringed. The picking screen instead of being flat, and supposedly substantially horizontal, is formed cylindrically or drumlike, and the carrier, instead of being a separate instrumentality, is connected to the stemming frame, which carries the drumlike picking screen, and moves in unison therewith, and the agitator with the spring fingers is curved and centrically arranged with relation to the picking screen, and parallel thereto, and, instead of being moved as an entirety, has a portion which is fixed, and another portion which is moved horizontally and laterally, and likewise the brushes which clean the screen, instead of being composed of bristles mounted on an endless carrier, as shown in complainant's patent, consist of flexible strips extending transversely beneath the picking screen, and are carried by an oscillating counterbalanced spring.

It is on these differences that the defendants rely for their defense of noninfringement of complainant's patent.

While constructed on these apparently somewhat different lines, it must be patent to a casual observer that the subject-matters of the two machines are the same, and their respective mechanisms in all essential materials one the equivalent of the other, designed for, and which produce the same result, and the variation between them perhaps being no more than would have been expected from a second

inventor who had theretofore sold a previous invention covering the same general ideas.

Having thus reviewed the several grounds of alleged invalidity of the claims in suit, of the Benthall & Ferguson and Benthal patents, and for the reasons herein stated, the conclusion that the said several claims were valid, each involving novelty and inventive genius, which had not been anticipated by the prior art, and having likewise reviewed the alleged acts of infringement by the defendants of the several claims of said two patents, alleged to have been infringed by the defendants, the conclusion of the court is that the complainant has sustained the charges of infringement by the defendants thereof. It is entirely true that the complainant has not been able to establish against the defendants that their machines in terms infringe in every instance those of the complainant, but they have established that, where said machines are not exactly the same, they are so in effect; that they were made and intended for the same purpose, to produce the same results, and constitute the substantial equivalents one of the other. Morey v. Lockwood, 75 U. S. (8 Wall.) 230, 19 L. Ed. 339; Sewall v. Jones, 91 U. S. 171, 23 L. Ed. 275; Union v. Murphy, 97 U. S. 120, 24 L. Ed. 935; Imhaeuser v. Buerk, supra, 101 U. S. 647, 25 L. Ed. 945; Norton v. Jenson, 49 Fed. 859, 1 C. C. A. 452; National v. American, 53 Fed. 367, 3 C. C. A. 559; Standard v. Osgood, 58 Fed. 583, 7 C. C. A. 382; Crown v. Aluminum, 108 Fed. 845, 48 C. C. A. 72; Kinloch v. Western, 113 Fed. 652, 51 C. C. A. 362; Dowagiac v. Minnesota, 118 Fed. 136, 55 C. C. A. 86; Anderson v. Collins, 122 Fed. 451, 58 C. C. A. 669.

[6] 5. Claims of the Jones patent. Coming to the consideration of claims 8 and 9 of the Jones patent, alleged in the first-named suit to have been infringed by the National Machine Corporation, having heretofore to this time discussed only the alleged infringement of the Benthall and Ferguson & Benthal patents, and which claims 8 and 9 are set out in the statement of facts herein, the defendant National Machine Corporation assails the validity of this patent: First, in that it contains no patentable novelty in view of the prior art, as shown by certain earlier patents; second, that it is invalid because of prior use of the machine known as the Pope stemmer; third, that it is invalid because it describes and claims an inoperative machine; and, fourth, that it has not committed any of the acts of infringement as alleged.

These defenses will be considered in the order named. Unquestionably, a patent, to be valid, must contain elements of novelty and inventive genius, and if, as claimed, the prior state of the art as shown by previous patents would demonstrate the lack of either of the two elements mentioned, the patent would fail. Defendant cites 14 previous patents, in some or all of which they say the essential elements of the claims in question have been anticipated. The court, having carefully examined all the patents referred to, and given full consideration to that subject is convinced that the claim is not well made. Indeed, practically all of the patents referred to are for machines other than peanut pickers or stemmers, and generally, certainly in so far

as they relate to the material elements involved in the two claims in question, may be said to belong to a class of unsuccessful and abandoned experiments.

The second defense proves of greater difficulty. The Pope stemmer, it is true, was never patented. But that is not material if the prior machine was complete within itself, and had been in practical operation, and demonstrated its commercial value before the issuance of the Jones patent. The inventor, Pope, a witness introduced on behalf of the defendant, thus described his peanut stemmer, which shows how nearly the Jones patent in suit follows it, namely:

"A cylinder stemmer, made of 24" cast-iron pulleys by 2" face-about 3/8 space between each pulley, driven by a belt, these pulleys sit on shafting, and using a sufficient number to make a cylinder about 4 feet long, and peanuts fed through one end of the cylinder and tailed out of the opposite end, with circular saws of the ordinary gin saw type, revolving in the space between each pulley, with a cylinder revolving in opposite direction of the same, thereby moving the peanuts about and the stems taken off as they went through the revolving cylinder."

The complainant insists that the Pope machine was but a crude effort to form a drum, arranged to rotate on an inclined axis, with saws rotating in a direction opposite to that of the drum, resulting in the production of a peanut stemmer which proved wholly inoperative, and should be placed in the class of abandoned experiments.

With this view, the court cannot agree under the evidence in this cause. It is true only one of the machines was made; but that one cannot be said to have been unsuccessful, for the undisputed testimony is that it was operated in Pope's factory for the whole season of eight months, that its use was well known, and that it may be said to have been fairly successful in the then state of the art, having successfully stemmed some 10,000 bags of peanuts, and compared favorably with the Benthall machine, save that the vines would pass through the latter stemmer with greater facility, but not performing the work with the same cleanliness as the cylinder of the Pope stemmer, and with the special objection to the Pope patent only that it would occasionally drag the peanuts, which defect, however, it was claimed was due to the fact that the pulleys used were too narrow on the face, making the space between the spokes of the pulleys and saw not of sufficient distance to avoid cracking the peanuts occasionally. The court can but believe that the Pope stemmer included in a practical way substantially every element of the Jones stemmer, comprising an inclined rotary drum suitable to work with circumferential slots in the walls thereof, and stemming saws extended through the slots into the drum, and that the same had been in actual commercial use, stemming large quantities of peanuts, some three years before the Jones patent was applied for. Prior use of a machine has always been held to anticipate and invalidate a later patent on the same device, and authorities to support that doctrine could be cited almost without number. Nor is it material that the prior invention should have been generally known, or the output used. Knowledge of its existence will be presumed.

[7] In Reed v. Cutter, 20 Fed. Cas. No. 11,645, Judge Story held a patent on a pump valve invalid on a pump including the same struc-

ture, which had been invented and reduced to practice before the date of complainant's patent, saying:

"Under our patent laws, no person, who is not at once the first, as well as the original, inventor, by whom the invention has been perfected and put into actual use, is entitled to a patent. A subsequent inventor, although an original inventor, is not entitled to any patent. If the invention is perfected and put into actual use by the first and original inventor, it is of no consequence whether the invention is extensively known or used, or whether the knowledge or use thereof is limited to a few persons, or even to the first inventor himself."

And in Coffin v. Ogden, 85 U. S. (18 Wall.) 120, 21 L. Ed. 821, Mr. Justice Swayne, speaking for the Supreme Court, held a patent on a lock to one Kirkham, who made his invention in March, 1861, to be completely anticipated and the patent void by a lock made not later than January 1, 1861, by one Erbe; the learned justice saying:

"Here it is abundantly proved that the lock originally made by Erbe 'was complete and capable of working.' The priority of Erbe's invention is clearly shown. It was known at the time to at least five persons, including Jones, and probably to many others in the shop where Erbe worked; and the lock was put in use, being applied to a door, as proved by Brossi. It was * * * tested and shown to be successful. These facts bring the case made by the appellees within the severest legal tests which can be applied to them. The defense relied upon is fully made out."

In Evans v. Eaton, 3 Wheat. 454, 4 L. Ed. 433, Mr. Chief Justice Marshall, referring to the question of originality as an element in patent law, said:

"Admitting the words 'originally discovered' to be explained or limited by the subsequent words, still, if the thing had been in use, or had been discovered in a public work, anterior to the supposed discovery, the patent is void. It may be that the patentee had no knowledge of this previous use or previous description. Still his patent is void; the law supposes he may have known it."

In Allen v. Steele (C. C.) 64 Fed. 793, Judge Buffington, in the United States District Court for the Western District of Pennsylvania, in construing the effect of a prior device on an oil pumping apparatus, stated:

"While Mr. Allen may not have known of this Shippen device, yet knowledge of it must be imputed to him, and, with this state of the art before him, he made application for the patent in controversy."

The case of Brush v. Condit, 132 U. S. 48, 10 Sup. Ct. 1, 33 L. Ed. 251, will be found especially interesting. It involved a patent on an electric lamp which had been in prior use. Mr. Justice Blatchford, speaking for the court, said:

"The case is that of the public, well-known, practical use in ordinary work, with as much success as was reasonable to expect at that stage in the development of the mechanism belonging to electric arc lighting, of the exact invention which was subsequently made by the patentee; and, although only one clamp and one lamp were ever made, which were used together two and one half months only, and the invention was then taken from the lamp and was not afterwards used with carbon pencils, it was an anticipation of the patented device, under the established rules upon the subject."

The Pope stemmer, in the judgment of the court, cannot be treated as an abandoned experiment. The machine was a complete one; there

is no element of uncertainty as to its use, and no attack made on the witnesses, nor effort to controvert what they said. Indeed, its actual parts were brought before the court; it was in successful operation, and a part of the regular equipment of the Pope factory, and used with profit; whereas, the Jones device has never been put in operation, though an unsuccessful attempt was made to build one of the machines; and the Pope patent therefore constitutes a prior dedication to the public, invalidating the Jones patent, which has never been put in use.

Considering the third and fourth objections to the machine together, that is to say, that the Jones patent is inoperative, and that there has been no infringement thereof, it will be noted that the complainant admits that the Jones patent in some respects does not present a complete appliance, but insists that the particulars in which it is alleged to be defective do not apply to its stemming apparatus, but to its picking mechanism, and hence it is immaterial here, and that the alleged defects or inoperative features would be readily observed and remedied by one skilled in the art. However this may be, the complainant has not subjected its device to the crucial test of ascertaining whether it is a workable machine or not, and admits that in some particulars it is deficient. Hence the court should not too readily allow this appliance to be made the basis of a suit for an alleged infringement against one using a patent subsequently issued, and in successful operation. Prima facie, the subsequent patent does not infringe, as the Patent Office would presumptively not have issued a patent to the defendant, covering, as complainant insists, the exact structure of its machine. Boyden Power Brake Co. v. Westinghouse, 70 Fed. 816, 17 C. C. A. 430 (C. C. A. 4th circuit), affirmed by the Supreme Court in 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136; Corning v. Burden, 15 How. 252, 14 L. Ed. 683; Miller v. Manufacturing Co., 151 U. S. 208, 14 Sup. Ct. 310, 38 L. Ed. 121; Boyd v. Janesville Tool Co., 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973 (opinion of the lower court in 37 Fed. 887); Ney v. Ney Mfg. Co., 69 Fed. 405, 16 C. C. A. 293.

The complainant has introduced expert testimony with a view of showing that the defendant's machine as covered by the Lilliston patent, No. 1103305, of July 14, 1914, is an exact counterpart of the Jones patent, as respects the claims in question; and the defendant introduced expert witnesses who seek to discriminate between the two appliances as patented. The court is inclined to agree with complainant's expert as to the similarity of the two patents in material particulars, and undoubtedly in some respects they are, though not to the extent of justifying the court in sustaining the alleged acts of infringement complained of by the complainant under the facts and circumstances of this case. Krupp v. Midvale Steel Co., 191 Fed. 588, 112 C. C. A. 194. Where the patent claimed to have been infringed is incomplete upon its face, its efficiency as far as tested a failure, and its owner has not sought to avail himself of its advantages, and thus afford the public the benefit to which it is entitled, if it possesses the advantages claimed for it, the language of Judge Morris, in Crown Cork & Seal Co. v. Aluminum Stopper Co. (C. C.) 100 Fed. 849, is strikingly appropriate and illustra-

tive of the apparent weakness of the complainant's position here. The learned judge said:

"It is somewhat significant, also, that the complainant has never put upon the market, or otherwise in any way used, the device described in the patent in suit. The reason for this is asserted to be that the other bottle-stopper devices manufactured by the complainant corporation, under other patents granted to Painter for other forms of stoppers, are so highly esteemed by the public that the complainant has never considered it worth while, so long as the defendant's conflicting contention had not been adjudicated, to attempt to commercially introduce this device. This nonuser would not, in my opinion, affect the legal right of the complainant to enjoy the monopoly given it for 17 years by the Painter patent, and to enforce it by the aid of an injunction, if the defendant clearly infringed; but this nonuser does give support to the contention that the Painter patent in suit was not made use of, because the device has defects which make it difficult to use commercially, and that it was not the equivalent of the defendant's device, which is free from these difficulties."

What is said there is doubly true, if the defendant's patent is invalid, as held herein, as it would in that event not form the basis of infringement.

The conclusion of the court upon the three causes is that complainant's patents referred to as the Ferguson & Benthall patent and the Benthall patent, as respects the several claims of each of said patents in suit, are valid; and that the defendants have severally infringed the same as charged in the several suits; and that, as respects the patent referred to as the Jones patent in suit, it is that the complainant is not entitled to the relief sought; that said patent had been anticipated in the prior art by the Pope machine, and that the alleged claim of infringement should not be sustained.

A decree in accordance with these views will be entered on presentation.

NICHOLAS POWER CO. v. C. R. BAIRD CO.

(District Court, S. D. New York. March 18, 1915.)

1. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—APPARATUS FOR EXHIBITING MOVING PICTURES.

The Power patent, No. 826,112, for apparatus for exhibiting moving pictures, was not anticipated and discloses patentable invention. Defendant, however, *held* not chargeable with contributory infringement.

2. PATENTS ⊂⊃36—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.

Unusual commercial success of a patented article is entitled to great weight on the question of invention, when it is otherwise in doubt, as business ability, finely constructed machine parts, and good selling organization cannot accomplish such a result without a basically satisfactory product; and especially is this true where other noted inventors have patented articles for the same purpose which were unsuccessful.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 40; Dec. Dig. ⊂⊃36.]

3. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—FIREPROOF MAGAZINE FOR FILM REELS.

The Power patent No. 959,601, for a fire-proof magazine for film reels, *held* not anticipated, valid, and infringed.

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4. CRIMINAL LAW ⟸561—EVIDENCE—SUFFICIENCY—PROOF BEYOND A REASONABLE DOUBT.

Where a trial judge, on the evidence before him, if sitting as a juror in a criminal case and charged that, if a certain fact in issue was proved beyond a reasonable doubt, defendant was guilty, would vote for a verdict of not guilty, and if, per contra, under a similar charge that, if the contrary of such alleged fact was proved, defendant was guilty, he would likewise vote for a verdict of not guilty, he can be said to have a reasonable doubt on the issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. ⟸561.]

In Equity. Suit by the Nicholas Power Company against the C. R. Baird Company and Chester R. Baird for infringement of letters patent No. 826,112, for apparatus for exhibiting moving pictures, granted to Nicholas Power, July 17, 1906, and No. 959,601, to the same patentee, May 31, 1910, for a fireproof magazine for film reels. Dismissed as to first patent, and decree for complainant against defendant company on the second.

Edmund Wetmore, Oscar W. Jeffery, and W. Brown Morton, all of New York City, for plaintiff.

Messimer & Austin, of New York City (Albert M. Austin, of New York City, of counsel), for defendants.

MAYER, District Judge. This litigation involves two patents in the motion picture art, and, from the nature of the controversy, these must be separately considered. On the trial, one was familiarly called the "framing device" and the other the "fire valve."

The Framing Device Patent.

[1] "This invention," says Nicholas Power, the patentee, "relates to apparatus for displaying moving pictures, and more particularly to apparatus for displaying pictures which are arranged in series upon a translucent film, which is fed intermittently across a projection aperture in front of a suitable source of light for illumination. The object of the invention is to improve apparatus of the type specified in respect to the devices employed for feeding the film across the projection aperture, and with respect also to the means employed for framing or centering the pictures in relation to the projection aperture."

Claims 2, 3, 4, and 5, when read in connection with the patent drawings, may be analyzed as follows (the elements of the combination being identified with the drawings by reference numerals):

"2. In apparatus for exhibiting moving pictures—
- (a) A *shiftable carriage* (*28*);
- (b) *Film-feeding mechanism* (pinion *39*, Geneva driving wheel *31*, and stop wheel *30* and sprocket *26*), mounted on the carriage;
- (c) A *main driving gear* (*12*), turning about a *fixed axis* (*5*); and
- (d) *Shiftable intermediate gearing* (*37* and *38*), constantly in operative connection with said driving gear (*12*) and said film-feeding mechanism (*39*), etc.

"3. In apparatus for exhibiting moving pictures—
- (a) A *shiftable carriage* (*28*);
- (b) *Film-feeding mechanism* mounted on said carriage and comprising a *pinion* (*39*);

(c) A *main driving gear* (*12*), turning about a fixed axis (*5*);
(d) *Intermediate gearing* (*37* and *38*) between said main driving gear (*12*), and said pinion (*39*), and constantly in mesh with both, said intermediate gearing moving in an arc having the axis (*5*) of the main driving gear (*12*) as a center.

"4. In apparatus for exhibiting moving pictures—
(a) A *main driving gear* (*12*), turning about the fixed axis (*5*);
(b) A *shiftable film-feeding mechanism*, including a *pinion* (*39*);
(c) A *pair of detachably connected links* (*34* and *35*), one of such links (*34*) turning about the axis (*5*) of the main driving gear (*12*), and the other (*35*) turning about the axis (*33*) of said pinion (*39*); and
(d) *Intermediate gearing* (*37* and *38*) connecting said main driving gear (*12*) and said pinion (*39*), said intermediate gearing (*37* and *38*) being mounted on the pivot (*36*) connecting said links (*34* and *35*).

"5. In apparatus for exhibiting moving pictures—
(a) A *fixed projection aperture* (*7*);
(b) A *carriage* (*28*), arranged for *vertical movement* beneath said projection aperture (*7*);
(c) A *main driving gear* (*12*), turning about a fixed axis (*5*);
(d) *Film-feeding mechanism* (*39, 31, 30* and *26*), mounted on said carriage (*28*); and
(e) *Shiftable intermediate gearing* (*37* and *38*), constantly in operative connection with said main driving gear (*12*) and said film-feeding mechanism (*39*)."

The defenses are invalidity and noninfringement.

The Validity of the Patent.

When Nicholas Power entered this field, the motion picture art was about a dozen years old, but as yet in its early stages, and much was still to be accomplished in the successful projection of motion pictures, both from a scientific and commercial standpoint. The problem presented over the old magic lantern was that, instead of projecting a single picture, the motion picture projector deals with a series of successive instantaneous pictures of moving objects in such rapid succession that the eye cannot follow the change from one picture to another, but sees the changes in position of the moving objects as a gradual transition closely simulating the appearance of natural movement.

The pictures to be exhibited were produced as far back as the late '90's in their present form of a long narrow band of celluloid films with marginal sprocket holes or perforations, and containing a series of instantaneous photographs taken at intervals of one-sixteenth of a second, and designed to be exhibited at the same rate of 16 pictures to the second to reproduce natural movement. The early development of the art determined that it was essential to the production of a motion picture to maintain the picture stationary during its interval of projection, to cut off the light from the film during the interval of movement, to advance the next picture into position for projection, and to give the picture a longer interval of rest than the interval of movement. In addition to the mechanism for feeding and holding the film and the shutter for cutting off the light from the film, machines have from the first been provided with a "sight opening" of the size of the individual pictures in the film to give an even "border" to the picture on the screen. It was early discovered that some means must be provided to permit a relative adjustment of the film and the "sight opening" or aperture,

as now called, because even with the short lengths of film then used (50 or 100 feet) the original registration of the picture and opening would be disturbed by imperfections in the sprocket holes, splices in the film and the like, and necessitate readjustment or "framing of the picture" to continue the exhibition.

The patent in suit is not directed to an entire moving picture projecting apparatus, but to a portion of it, and the claims in suit are all directed to the construction for permitting the framing of the picture. It will be appreciated, at the outset, that the subject-matter involved delicate mechanism and accurate interrelation, all looking to a result which would accomplish the illusion (if it may be so called) most effectively. In an art of this character and mechanism of this delicacy, sometimes the omission or addition of merely a single element rises to the dignity of invention, and it is with this appreciation and this mental attitude that the subject must be approached. The prior art defense involves a consideration of the patents to Eberhard Schneider (United States letters No. 647,529) and Prestwich (British) and several prior use machines produced and testified about.

(a) In the structure known in the case as the first Edison machine, all the parts except the aperture plate were stationarily mounted, and the framing of the picture was accomplished by adjusting the aperture plate up or down as might be necessary for its opening to register with the picture.

Objection: The position of the picture on the screen before the audience was shifted up and down by the adjustment of the aperture plate, and, besides, the position of the film with regard to the focus of the lens varied.

(b) In the second Edison (Exhibit Q), the aperture plate was the only part of the machine to be fixed, while the film-feeding mechanism was adjustable up and down, as might be necessary to bring the picture into registration with the lens and aperture plate.

(c) In the "modified Edison" (Exhibit X), the machine frame is mounted on guide rods, instead of runways.

(d) In the Schneider modified Edison (Exhibit C), the original rack and pinion for adjusting is replaced by a crank and screw.

(e) The two early Power machines (Exhibits T and U) show the idea of the entire mechanism adjustable on its own front boards.

None of these structures shows the combination of the claims, and each lacks many of the elements. It is enough to point out that, among other things, they do not have a separate shiftable carriage nor a shiftable intermediate gearing.

(f) The Schneider machine (Exhibit B). Eberhard Schneider, at one time a member of the German navy, first became interested in the motion picture business in 1895 in Essen, Germany, when he was head draughtsman at the Krupp works, and while there made his first projecting machine. He came to this country shortly after, and in 1896 made a machine which he called the Wondroscope. This did not have a framing device. Schneider's next type, of which he made two, and which he named the American Cinematograph, was made in 1897, and did not have a framing device. Later in 1897 he made two more ma-

chines, calling them also the American Cinematograph; but these had a framing device, and one of them, known as Model 1897 No. 3, is Exhibit B in this case.

Schneider is a man of superior ability, intelligent, persistent, and possessed of that ability for and patience with detail which is characteristic of men of science and of artisans of Germanic ancestry. He understood perfectly what it was necessary to accomplish and he set about to do it. His fundamental and, in the art, advanced thought was to construct a machine having a stationary frame with fixed main shaft and stationary aperture plate, in which the framing would be accomplished by adjusting the distance between the intermittent sprocket and the aperture plate. But, when Schneider came to concrete his thought into a physical structure, he just missed making a machine which was commercially successful. Comparing Exhibit B with the machine of the Power patent, we find:

(1) That there is not the "vertically adjustable carriage." Instead, the shaft of Schneider's intermittent sprocket is carried by a pair of "cheeks" mounted to swing in the arc of a circle on the axis of the main shaft, and the whole arrangement is such that the adjustment of the cheeks swings the sprocket toward and away from the aperture which is formed in the frame above the main shaft.

(2) That in Schneider there is an oscillatory movement of the pair of cheeks, while in Power the movement of the shiftable carriage is vertical.

(3) That in Schneider, contrary to Power, there is really no intermediate gear, and no shiftable intermediate between the main driving gear and the film-feeding mechanism; the latter being driven directly from the main shaft.

It is unnecessary to go on with the details, for, giving to the Power the fair construction to which it is entitled, the Schneider Exhibit B cannot be successfully read against a single Power claim in controversy, nor can it be held that the Power mechanism is an equivalent of Exhibit B. If, however, a doubt as to invention were entertained (and I entertain none), the remarkable commercial success of the Power would conclusively resolve the doubt.

[2] The usefulness of a trial in court in cases of this kind is here well demonstrated. While the lawyers who participated in this case were trudging their way, on many days a few years ago, to the courthouse, Power was starting his inventive career in a little workshop in one of the buildings on Nassau street. Edison and Schneider were striving for a result, but Power attained it, and to-day his machine concededly dominates the market and its sales are remarkable. The little workshop has risen to a large business enterprise, while Edison's machine has lagged far behind, and Schneider (who, I hope, will some day hit the right thing) is doing business in a modest way on Second avenue.

Business ability, finely constructed machine parts, and a good selling organization cannot accomplish such a result without a basically satisfactory product. We are not dealing with some pleasing article, which,

for the time being, catches the public, but with a delicate mechanism, which, to succeed, must consistently make good with the exhibitor and the audience. I am fully convinced that the patent is meritorious and should be sustained.[1]

Infringement.

While the bill charges direct and contributory infringement, no case of direct infringement was made out nor attempted, and only a single instance of alleged contributory infringement is testified to.

Here again we have some more human nature. The Power and Baird concerns were on intimate and friendly business relations for a long time. Baird furnished Power with important and delicate parts for the Power machine. Later a break occurred in the relations, and the controversy has grown unpleasantly bitter.

Baird is an able, energetic business man, and a good fighter when the fight is on; but in his methods I think he is honest, truthful, and above-board. The evidence abundantly demonstrates that Baird has stood on the merit of his product, and that he has sought to establish a reputation for his goods as "Baird" parts. He has the right to sell the parts he advertises in his company's circulars, so long as the sales are not for rebuilding.

It is fair to assume that plaintiff has made every effort to discover whether Baird has been a party to a sale for rebuilding, and the Schneider, Springfield, Mass., incident is the only result of the quest. The transcribed testimony of Charles E. Schneider reads quite differently from the way it sounded. By this I mean that it was necessary to see and hear Schneider to understand what took place.

The fact is (and so plaintiff conceded) that the letter written by Schneider to the Baird concern was so written at the instance and request of a representative of plaintiff. There was no impropriety in this course, because such methods are often the only available means whereby infringement can be discovered. This letter was dated April 25, 1913, addressed to defendants, and is as follows:

"Dear Sir: Your letter of the 24th caught me after breakfast, but not unawares. Consequently, expecting something similar from you, I sat down and wrote out a check for the balance of my account. I do not know how I stand with you for the future, but please send me the following parts according to your catalogue, which I need for rebuilding two second-hand machines which I have on hand: [Here follows an enumeration of parts for the Power No. 5 and the Power No. 6 machines.] Besides the above numbers, please send me two dozen belt couplings and one upper gear, with spindle, for your Baird rewinder.

"Please let me know by return mail how you will deliver the goods, on credit or otherwise, and let me know the amount, which I figure will be forty some odd dollars, and I will send you a remittance for same by return mail.

"Trusting to hear from you, I am yours very truly,

"Dict. CES/KB Chas. E. Schneider."

The answer of Baird was in the breezy style affected in some lines of business, and stated, in substance, that all the desired parts could

[1] NOTE.—I think it unnecessary to discuss the Prestwich (British) patent.

not be supplied because they were not on hand, but that the superintendent of the Baird Company was—

"now hard at work on all parts of which our stock is exhausted, and we will soon have any old thing you may require. * * * Under all the circumstances, about the only thing I can do at the time of going to press is to inclose invoice for the parts we have in stock, which can be shipped as soon as we hear from you, and hope you will instruct us by return mail to get these forward."

Unless a sale of parts for rebuilding was intended by defendants, I believe that the word "rebuilding," as used and placed in this letter, carried no emphasis to the mind of the reader. The parts shipped would, in no sense, rebuild the machine, and a busy business man would need a mental microscope to pick out the word "rebuilding" in Schneider's letter as conveying to him what plaintiff contends.

It is unnecessary for me to attempt to define where repairing ends and rebuilding begins. That is always a question of fact, which must be determined upon the testimony and its fair inferences in each case. Very often, in cases involving the furnishing of repair parts, the course of business, the methods employed, and the circumstances under which the sale is made, indicate a purpose or intent which leads to the conclusion that by devious ways infringement has been accomplished.

It is not requisite to discuss the testimony on this branch of the case in detail, for such discussion would involve too elaborate a quotation from or reference to the testimony. It is enough for me to state that on the evidence in the case I am satisfied that the defendants have not intended to be parties to the rebuilding of plaintiff's machine, have pursued a course of business quite to the contrary, and in point of fact in the Schneider sale were not guilty of contributory infringement. Shickle Co. v. St. Louis Car Coupler Co., 77 Fed. 739, 23 C. C. A. 433.

As it is always desirable to end or prevent litigations, I may intimate that there may be limits beyond which defendants cannot safely go; but, if trouble should arise in the future, it must be dealt with upon the facts as they may be then presented.

The Fire Valve.

[3] "The object of the present invention," says the patentee, "is to provide a magazine for the film-reels of moving picture exhibiting machines of such construction that it will be thoroughly effective in preventing fire from reaching the reel of film inclosed in the magazine and will cause no rubbing friction upon the film as it passes into or out of the magazine. A further object of the invention is to provide a magazine of the character specified which will be simple, inexpensive, and durable and entirely positive in its operation."

Here there are five claims, any one of which is sufficiently illustrative for all, and therefore I shall content myself with quoting claim 1, which is as follows:

"1. A magazine for inflammable films, comprising a casing or housing of noninflammable material, a narrow guideway or passage having closed sides projecting from the casing, through which the film must pass into said casing or housing, and guiding means external to the casing or housing associated

with said guideway or passage to prevent rubbing contact of the film with said guideway or passage."

In the early days of the art, the necessity for fire protection was not great; but that necessity has grown increasingly urgent with the development of the business and the consequent higher requirements, and, in New York, apparently closer supervision of the municipal authorities.

We all know that motion picture exhibitions are attended daily by many thousands of people, and we all appreciate the danger which would result, not only from fire, but more seriously, perhaps, from panic. Thus any instrument of fire protection becomes important which shall instantaneously extinguish fire and be so constructed and adjusted as not to scratch nor impair the film.

The prior art defenses may be divided into (1) prior patents and (2) prior use devices. The paper art (Granichstaedten patent of February 5, 1901, Hughes British patent of 1902, and Weiser patent of February 13, 1906) neither anticipates nor negatives invention.

The previous Power patent, No. 809,981, dated January 16, 1906, was constructed differently from the device of the patent in suit. This previous Power fire valve had no casing of noninflammable material, no narrow guideway, no plurality of rollers, and no shiftable roller with its axis in inclined slots.

What the art needed from an efficient and commercial standpoint was a fire protection device which would also protect the film. It must be remembered that the film travels at the rate of 16 pictures per second, that splices are not unusual, and that scratching either destroys or impairs the film to the extent of seriously deteriorating the picture which is thrown on the screen.

Eberhard Schneider produced three valves, known as Exhibits I, J and K. I am entirely satisfied that Schneider's recollection was right in putting the date of these exhibits prior to 1906. Exhibit K need not be considered. Exhibits I and J doubtless put out fire, how efficiently is problematic; but they do not prevent scratching, and they are sufficiently crude to be a long distance away from the Power fire valve.

Indeed, Schneider had little appreciation of the possibilities of this character of device, and, in my opinion, it required a faculty more than ordinarily to be expected from the man skilled in the art to produce the Power valve over the Schneider valves, and Schneider's failure is strong evidence of Power's success. Indeed, the prior art in respect of this device, which now looks so simple, but which was unattained by others, is, to my mind, convincing proof that what Power accomplished in this regard was invention. Anderson v. Collins, 122 Fed. 451, 58 C. C. A. 669.

I should have no difficulty if I could stop here, but there was produced by Earle M. Wooden a valve which has become known in this suit as Exhibit O, or the Wooden valve. If prior use (not merely experimental) of the Wooden valve had been successfully established, I would have had no doubt that the Power patent would have been invalid as against Wooden's valve.

It seems that in 1903 Wooden and his brother-in-law, Unfried, were

experimenting in the making of a machine for moving pictures; Unfried, and a part of the time Wooden, being then in the employ of the Yale & Towne Company at Stamford, Conn. While engaged in this work Wooden and Unfried produced a valve which they testified was the reconstructed Exhibit O. This valve, at some later date which does not accurately appear, was dismembered and thrown into a sort of junk heap in a shop in New York City in which Wooden had some interest, and was apparently forgotten for a long time. Wooden is an intelligent man, with presumably considerable mechanical and perhaps inventive ability, who has studied moving picture machines and has been working on mechanical contrivances in that art. He testified that he had given a number of exhibitions of moving pictures in different places prior to 1906; but he remembered, with any definiteness, only two prior to 1906 at which Exhibit O was used. One of these was at Port Chester, N. Y., and the other, as he first testified, at Nilsson Hall in New York City.

Wooden was subjected to a close examination by the court, and an extended cross-examination by counsel for plaintiff, and when, as we all supposed, the trial had ended, I was fully satisfied that Wooden was right in his recollection, and I was well impressed with him as a truthful and straightforward man. As the result, however, of some investigations made at the instance of plaintiff, I opened the case for further hearing in respect of the Port Chester and Nilsson Hall incidents.

It appeared that Nilsson Hall did not exist at the time that Wooden believed, in the first instance, that he had given an exhibition there, and defendants then sought to show that Wooden had made an honest mistake in recollection, and that the exhibition had, in fact, been given at Teutonia Hall, which is very near to Nilsson Hall. Naturally this interesting incident reopened the question in my mind.

By a process of elimination the plaintiff succeeded in creating substantial doubt as to the correctness of Wooden's testimony in respect of the Port Chester exhibition, and as to that I have an affirmative doubt. I do not wish to be understood as stating that I do not believe that Wooden gave the exhibition at Port Chester, but I do believe that he is in error as to his date.

[4] As to the Teutonia Hall exhibition, I may say that it is entirely clear that such an exhibition took place, and, in this regard, Wooden is corroborated by credible and disinterested witnesses; but I cannot say that he has satisfied me beyond a reasonable doubt that Exhibit O was used on the occasion of the production of the "Passion Play" at Teutonia Hall.

This case has given me some practical realization of what a jury contends with when the court charges the doctrine of reasonable doubt in a criminal case, and after much consideration and a good deal of debate with myself I can only say that I am not convinced beyond a reasonable doubt. In other words, if, sitting as a juror, I were charged that, if I believed that it was proved beyond a reasonable doubt that Wooden had used the valve at the time in question, then he was guilty, I would bring in a verdict of not guilty; and if, per contra, I were similarly charged that, if Wooden had not used the valve at the time in

question he was guilty, I should likewise bring in a verdict of not guilty —and both results would be because I entertained a reasonable doubt.

But there is something besides the question of reasonable doubt upon this branch of the case. I think that, even if Wooden's recollection is right, the testimony shows that the valve and the machine with which it was made were experimental and afterwards abandoned. Wooden evidently had no appreciation of what the valve accomplished, and, instead of giving something to the world, he consigned the structure literally to the junk heap, where doubtless it would have still remained, had this litigation not occurred.

In what has been observed supra I am to be understood as not reflecting in the slightest upon the uprightness of Wooden. He looks and acts like an honest and truthful man; but experience in the courtroom teaches that honest men, after much thought and talk about just such an incident as this, sometimes become confused as to dates, and reiteration in conversations is often transmuted into a recollection honestly believed in, but inaccurate in point of fact.

As there is no question of infringement on this branch of the case, I conclude that this patent is valid, and infringed by defendant company; and, in so doing, I am of opinion that the transaction between the parties did not put the defendant company in the position of an implied licensee. I do not recall any testimony upon which infringement can be found against Baird individually.

A decree may be presented in accordance with this opinion, but there will be no award of costs.

AMERICAN THERMOS BOTTLE CO. v. SEMPLE et al.

(District Court, N. D. New York. April 24, 1915.)

PATENTS ⇐310—REISSUE—LACHES—PLEADING.

When a reissue was for the sole purpose of expanding the claims of the original patent, and a bill for its infringement discloses a delay of more than two years in applying for the reissue, it should further set out facts which excuse the laches, which appears prima facie; otherwise, it is a question of law for the court, and may be determined on the pleadings.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507–540; Dec. Dig. ⇐310.]

In Equity. Suit by the American Thermos Bottle Company against William H. Semple and Edward R. Semple, copartners trading as W. H. Semple & Sons. On motion by the defendant, after issue joined, to dismiss on the particular ground that the bill of complaint does not excuse the laches, manifest on the face of the bill, in applying for the reissued letters patent sued upon. Motion sustained.

W. T. Dunmore, of Utica, N. Y. (A. F. Herbsleb, of Cincinnati, Ohio, of counsel), for the motion.

Grant & Wager, of Utica, N. Y., and Robt. B. Killgore, of New York City, opposed.

RAY, District Judge. This suit is in equity to restrain alleged infringement of reissued letters patent No. 13,093, dated March 15, 1910, and issued to Burger and Aschenbrenner, assignors to American Thermos Bottle Company, a corporation of the state of Maine, on application for such reissue filed March 15, 1909.

The original letters patent, No. 820,347, were issued to said Burger and Aschenbrenner May 8, 1906, on application filed September 3, 1904. Between the application for the original patent and the application for the reissue over four years intervened, and between the *grant* of the original patent No. 820,347, May 8, 1906, and the *application* for this reissue March 15, 1909, about 2 years and 10 months elapsed. The original patent, No. 820,347, applied for September 3, 1904, and issued May 8, 1906, had *four* claims, and the reissued letters patent No. 13,093, applied for March 15, 1909, and issued on such application for reissue March 15, 1910, has *fifteen* claims—the original 4 and 11 additional claims. By a bill of particulars the charge of infringement has been restricted to 6 of these claims, 5, 6, 7, 8, 9, and 10; but this, as I view the matter here involved, has little, if anything, to do with the question to be decided. It is evident that the claims of the original patent and application therefor were greatly expanded. The bill of complaint contains no explanation of or excuse for the delay of a little more than 2 years and 10 months in applying for the reissue. The bill does show that the Patent Office excused the delay and granted the reissue, but does not state the grounds of such action. The bill alleges:

"That said letters patent No. 820,347 were inoperative and invalid by reason of defective and insufficient specification, and were, in accordance with the provisions of law applicable thereto, surrendered to the Commissioner of Patents, and thereupon in due form of law reissued to plaintiff as the assignee of said Burger and Aschenbrenner, as will more fully and at large appear from said reissued letters patent No. 13,093, or a duly authenticated copy thereof here in court to be produced."

While the 4 claims of the original issue were carried into the reissue, infringement of no one or more of such original claims is alleged. The defendants are alleged to infringe claims not found in the original patent.

Is the bill of complaint insufficient, in that it fails to allege some fact or facts excusing the delay in applying for the reissue more than two years? If Wollensak v. Reiher, 115 U. S. 96, 5 Sup. Ct. 1137, 29 L. Ed. 350, Mahn v. Harwood, 112 U. S. 354, 5 Sup. Ct. 174, 28 L. Ed. 665, and Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783 (especially Wollensak v. Reiher), are the law to-day, this bill is defective in the respect mentioned.

In Wollensak v. Reiher, supra, the Supreme Court of the United States held:

"The question whether delay in applying for a reissue of a patent has been reasonable or unreasonable is a question of law for the determination of the court.

"The action of the Patent Office, in granting a reissue, and deciding that, from special circumstances shown, it appeared that the applicant had not been guilty of laches in applying for it, is not sufficient to explain a delay

in the application which otherwise appears unreasonable, and to constitute laches.

"When a reissue expands the claims of the original patent, and it appears that there was a delay of two years, or more, in applying for it, the delay invalidates the reissue, unless accounted for and shown to be reasonable.

"A bill in equity which sets forth the issue of a patent, and a reissue with expanded claims after a lapse of two or more years, and states no sufficient explanation of the cause of the delay, presents a question of laches which may be availed of as a defense, upon general demurrer for want of equity."

In the opinion the court said:

"When, therefore, the injunction bill sets out, or exhibits both the original and the reissued patent, and it appears from inspection that the sole object of the reissue was to enlarge and expand the claims of the original, and that a delay of two or more years has taken place in applying for the reissue, not explained by special circumstances showing it to be reasonable, the question of laches is a question of law arising on the face of the bill, which avails as a defense, upon a general demurrer for want of equity."

There, as here, the claims made in the original application were not as full and broad as the alleged invention disclosed in the specification; there, as here, additional claims were necessary, or the matters not claimed would be deemed abandoned to the public; there, as here, the claims were expanded, the original ones being retained in the reissue; there, as here, the infringement alleged was not of such original claims, but of the new and added claims first found in the reissue; there, as here, there was a delay of more than two years in applying for the reissue, but no excuse for such delay was alleged in the bill; and there, as here, it was alleged that the Patent Office had excused the delay by granting the reissue. It is claimed by complainant that Wollensak v. Reiher does not appear to have been followed or approved by any subsequent decision of the Supreme Court of the United States; but this is a mistake, as the case was cited, quoted from, and approved in Ives v. Sargent, 119 U. S. 652, 661, 662, 7 Sup. Ct. 436, 30 L. Ed. 544, decided two years later, and Mahn v. Harwood, 112 U. S. 354, 362, 5 Sup. Ct. 174, 28 L. Ed. 665, was also cited. In Ives v. Sargent, supra, at page 662 of 119 U. S., at page 441 of 7 Sup. Ct. (30 L. Ed. 544), the court said:

"It is also settled that, while no invariable rule can be laid down as to what is a reasonable time within which the patentee should seek for the correction of a claim which he considers too narrow, a delay of two years, by analogy to the law of public use before an application for a patent, should be construed equally favorable to the public, and that excuse for any longer delay than that should be made manifest by the special circumstances of the case. Wollensak v. Reiher, 115 U. S. 96, 100 [5 Sup. Ct. 1137, 29 L. Ed. 350]; Mahn v. Harwood, 112 U. S. 354, 363 [5 Sup. Ct. 174, 28 L. Ed. 665]."

Wollensak v. Reiher has been quoted, approved, and followed in the lower federal courts. Edison v. American M. & B. Co. (C. C.) 127 Fed. 361, 362. It is also cited, and not disapproved or limited, on the question of pleading in Topliff v. Topliff et al., 145 U. S. 156, 170, 12 Sup. Ct. 825, 36 L. Ed. 658. The question of pleading facts showing an excuse for delaying the application for a reissue beyond two years, when the sole purpose of the reissue is to expand the claims,

is quite different from the sufficiency of the excuse when pleaded and the proof is before the court.

In Topliff v. Topliff, supra, at page 170, 171, of 145 U. S., at page 831 of 12 Sup. Ct. (36 L. Ed. 658), the rule is stated thus:

"First. That it shall be for the same invention as the original patent, as such invention appears from the specification and claims of such original.

"Second. That due diligence must be exercised in discovering the mistake in the original patent, and that, if it be sought for the purpose of enlarging the claim, the lapse of two years will ordinarily, though not always, be treated as evidence of an abandonment of the new matter to the public to the same extent that a failure by the inventor to apply for a patent within two years from the public use or sale of his invention is regarded by the statute as conclusive evidence of an abandonment of the patent to the public.

"Third. That this court will not review the decision of the Commissioner upon the question of inadvertence, accident, or mistake, unless the matter is manifest from the record; but that the question whether the application was made within a reasonable time is, in most, if not in all, such cases, a question of law for the court."

I think the rule is that when the reissue was for the sole purpose of expanding the claims, and both the original and reissued patents are before the court, and a delay of more than two years in applying for the reissue appears on the face of the bill, and there is no explanation or excuse given or properly inferable from facts stated for such delay, a question of law is presented. If unexcused delay is a defense, and more than two years delay is usually fatal to the reissue if not excused, and such delay appears on the face of the bill, why should not good pleading demand that the excuse, if any, be shown also on the face of the bill. Why should a defendant be compelled to go to trial in open court on a pleading showing such laches, but no excuse, and be compelled to meet excuses of which he has had no notice, and as to the truth of which he will be in ignorance? If prima facie on the face of the bill laches appears and is not excused, but the negligence appearing is excusable under some circumstances, why should not the bill bring the laches within the exception to the general rule?

This court is of the opinion that the new equity rules do not help the complainant. If the bill, in setting up the original patent, the application for a reissue and the allowance of the application, shows prima facie laches in such application, I think the bill should excuse or negative such laches by pleading the ultimate fact or facts which will have that effect. The action of the Patent Office in granting the reissue does not excuse laches in applying therefor.

It is urged that by answering the defendants have waived their right to move to dismiss for laches apparent on the face of the bill and not excused. If, when issue is actually joined, it appears from the pleadings that the bill should be dismissed, this court is unable to see why the motion may not be presented at any time; the sooner the better, if courts are to administer justice and not encourage delays.

The motion to dismiss will be granted, unless within 20 days the complainant files an amended bill, or a verified bill of particulars, stating facts excusing or tending to excuse the delay in applying for the reissue, which it may do. So ordered.

ELLIOTT CO. v. LAGONDA MFG. CO.

(District Court, W. D. Pennsylvania. April 10, 1915.)

No. 78.

PATENTS ⊂328—VALIDITY AND INFRINGEMENT—TURBINE.

The Elliott and Faber patent No. 874,174, for a turbine, relating to apparatus especially adapted to removing scale from boiler tubes, held void for lack of invention; and the Elliott and Faber patent, No. 983,032, also for a turbine, and the Elliott patent, No. 983,034, for a motor, *held* not infringed, if conceded validity.

In Equity. Suit by the Elliott Company against the Lagonda Manufacturing Company. On final hearing. Decree for defendant.

Bakewell & Byrnes, of Pittsburgh, Pa., for plaintiff.
Staley & Bowman, of Springfield, Ohio, for defendant.

ORR, District Judge. This suit, as brought originally, charged the defendant with the infringement of plaintiff's rights under five several patents of the United States. This court, upon the disposition of the case when it was first before it for final decree, found for the plaintiff with respect to all of the said patents, believing that they were all within the terms of an agreement between the parties which had been violated by the defendant, and that no consideration of the several patents hereinafter mentioned as in controversy was therefore required. 205 Fed. 152. Upon appeal by the defendant, the Circuit Court of Appeals of this circuit modified the decree by excluding from the injunction issued by this court letters patent of the United States No. 874,174, issued to Elliott & Faber on December 17, 1907, for a turbine, patent No. 983,032, issued to Elliott & Faber on January 31, 1911, for a turbine, and patent No. 983,034, issued to Elliott under date of January 31, 1911, for a motor. 214 Fed. 578, 131 C. C. A. 158.

To determine whether the said patents are valid, and whether they have been infringed, further trial was had. The disposition of the matters in controversy after such trial is now before the court. The plaintiff complains that the defendant is making and selling—first, a water motor, embracing the construction disclosed by Elliott & Faber patent, No. 874,174, and also a construction disclosed by Elliott & Faber patent, No. 983,032; and second, an air motor, embracing a construction disclosed by Elliott & Faber patent, No. 983,032, and also a novel construction disclosed by Elliott patent, No. 983,034.

The ingenuity of counsel who procured the patents has succeeded in variations of language to the extent that in patent No. 874,174 there are 24 claims, of which, however, claims 1 to 7, inclusive, and 16 and 20 only are involved in this litigation. The like ingenuity has resulted in 41 claims in Elliott & Faber patent, No. 983,032, of which, however, claims 1 to 7, inclusive, 9, 11, 13, 15, 16, 22, 23, 30, and 31 to 41, inclusive, are involved in this case with respect to the water motor, and claims 1, 4, 11, and 30 to 41, both inclusive, except claim 40, are involved with respect to the air motor. A like ingenuity has resulted in

⊂For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

15 claims in the Elliott patent, No. 983,034, of which, however, claims 10, 11, 13, 14, and 15 only are involved in this litigation. Without yielding in any particular plaintiff's position as to any of the numerous claims involved, plaintiff's counsel at the trial proposed to limit the discussion to claims 2, 5, 7, and 16 of Elliott & Faber patent, No. 874,174, to claims 4, 11, 34, and 41 of Elliott & Faber patent, No. 983,032, and to claims 10 and 14 of Elliott patent, No. 983,034.

A detailed discussion of the several claims would extend this opinion to unnecessary length. It is necessary only to determine the essential features of the constructions of the several patents, whether such features are found in motors manufactured and sold by the defendant, and whether such features are found in the prior art, or, if not clearly disclosed therein, whether any inventive faculty was required to conceive such constructions. Language used by this court in an opinion in the case of Elliott Co. v. Robertson, No. 4, May Term, 1914 (D. C.) 219 Fed. 899, may properly be adopted in explanation of the subject-matter of the several patents:

"All of said patents relate to apparatus especially adapted to removing scale from boiler tubes. The immediate factor in the removal of the scale is a cleaner head of some accepted form, which is fastened to a shaft extending through the motor, and which revolves with said shaft as said shaft is made to revolve by the operation of the motor. The shaft is made to operate by the pressure of air or steam, or some fluid forced through the end of the motor or turbine opposite to that to which the cleaner head is attached. In a turbine the motor fluid is pressed through a diaphragm, and in such way as to operate directly against a turbine wheel, thereby causing it to move with rapidity and force enough to move the shaft which is attached to the turbine wheel, which shaft is also the shaft to which the cleaner head is attached. In the rotary motors, the air or steam is forced along one side of a cylindrical chamber, which is concentric to the motor and concentric to the shaft to which the cleaner head is attached, and is forced into such piston chamber through ports from the inlet passage. The air forced thus into the piston chamber presses against a blade or blades extended longitudinally therewith and inserted into longitudinal slots in the shaft in such way as to have a lateral movement as the shaft revolves, thereby causing the space in the cylinder around the shaft to be always divided into two or more longitudinal divisions. To relieve the pressure in the cylinder which would be constant if there were no exhaust, a longitudinal outlet is made from ports which extend from the cylinder. The inlet ports and the exhaust ports are less than 180° from each other in one direction. The pressure of the air or steam against a blade forces it and the shaft in the direction of least resistance until the blade passes the exhaust ports, and as it passes the exhaust ports that pressure is relieved, but a new pressure begins by another blade having reached the position where the pressure from the inlet ports continues the revolution of the shaft. Of course, there are bearings provided for the shaft and means by which the apparatus may be lubricated."

It should also be stated that for the escape of the motor fluid, and as well to drive the loosened scale away from the operator by the force of such fluid, the front of the motor near the cleaner head should be provided with an outlet or vent. The outlet for water, which is not elastic, should be larger than that for air, which is elastic. Because of this fact, and because, also, the front bearing of the shaft should be supported, the water from the turbine finds its outlet through webs connected with the bearing and the front ends of the turbine casing. As has been seen, the air or steam from the rotary motor escapes

through an exhaust port, which can in no sense be an escape through webs. It is hard to conceive that such constructions can be the subject of 32 valid claims in three separate patents. The specifications of the patents respectively indicate that turbines and motors for the purposes aforesaid are old in the art. The evidence shows that such earlier turbines and motors would operate effectively in light work, and that some of them would operate effectively in heavy work necessary to the removal of hard scale from boiler tubes.

The essential features of the several patents are the peculiar construction of the casing and the bearings in combination with the means for locking the stationary and movable members within the casing. This is a fair conclusion from a reading of the patents and from the evidence, not only of plaintiff's expert witness, but also from the evidence of Mr. Elliott, the patentee and president of the plaintiff company. The latter testified in reference to the plaintiff's machines:

"The integral front bearing and the means for locking the parts in place within the machine are unquestionably the basis of the success of those machines."

The Elliott & Faber patent, No. 874,174, specially emphasizes longitudinal webs, integral with the casing, which support a bearing for the forward part of the rotary shaft. The difference between the construction of Elliott & Faber patent, No. 874,174, and that of Elliott & Faber patent, No. 983,032, appears to be with respect to the rear bearing only of the rotary shaft. What appears in respect to such rear bearing is disclosed, but not claimed, in the prior patent. That the later patent is a subdivision of the earlier is not clear, because there is nothing in the second application to indicate it, and because the drawings in the two patents are not the same in all respects. The later patent provides that the rear bearing of the rotary shaft shall extend into or through the stationary turbine member. That is the essential feature of Elliott & Faber patent No. 983,032.

Taking up, now, Elliott patent, No. 983,034, it is found that the essential feature therein disclosed is the means for holding the stationary, as well as the movable, parts in place within the casing. In the study of these patents, as in the study of some other patents relating to different arts, the court is impressed with the facility with which patents may be obtained for mere shop practices. From the evidence in this case it appears that, by reason of changing conditions, users of tube-cleaning apparatus required stronger flue cleaners. A tube cleaner which would be fit to remove soot or light scale would soon give way under the strain of removing heavy scale. The aim of the manufacturers of the cleaners had been to prolong the life of their cleaners, and the most apparent requirement for that purpose was increased strength. When it is considered that the tube cleaners have got to be small in diameter in order to be effective in a boiler tube, and when it is considered that, to strengthen the webs through which the motor fluid escapes, it is necessary to extend them longitudinally within the casing in order not to diminish the outlet for the fluid, it cannot be held that there is invention in meeting an obvious requirement in an obvious way.

It would serve no purpose to set forth the great number of patents of the prior art in which there is a casing surrounding the turbines or motors, and in which there are bearings; but it is well to note that in the patent to W. S. Elliott, under date of October 17, 1899, No. 635,163, the inventor calls his casing a cylindrical water shield, within which are the stationary and rotating turbine wheels. The same patentee, in patent No. 656,446, under date of August 21, 1900, calls the casing a sheathing. There is no invention in strengthening the casing surrounding movable parts. There is no invention in providing bushings for bearings, or in making such bushings removable. With respect to the claims of this patent, No. 874,174, complainant's expert stated that only one covered a completely operative structure. The other claims are for combinations "which are operative structures when used in conjunction with such other turbine parts as are old and well known in the art." Claim 7 is as follows:

"7. In a turbine, a barrel or casing having inwardly projecting webs supporting a bearing, a removable bushing for said bearing, a turbine wheel having a forwardly projecting shaft within the bushing, a stationary turbine member secured within the casing at the rear of the turbine wheel, and rear nozzle or supply chamber secured at the rear end of the casing, substantially as described."

That claim this court is constrained to hold is invalid, and, that being so, the patent is invalid.

As has been stated, the essential feature of Elliott & Faber patent, No. 983,032, is the extension of the rear bearing of the rotary shaft in or through the stationary turbine member. The court deems it unnecessary to consider this patent at length. It is sufficient to say that the location of a bearing in a stationary part of a machine should not be deemed invention at this late date. It is not necessary to decide that all of the 41 claims of this patent are invalid; but it is proper to hold, and the court does hold, that the defendant cannot be held to be an infringer by the use of the essential feature of the patent which we have considered.

We again take up Elliott patent, No. 983,034. We find in the turbine of the prior art the stationary member was often inserted in its place by being screwed into the casing, the interior of the casing and the circumferential exterior of the stationary member being threaded for that purpose. There was also used a socket member, to which the hose was attached, which was so threaded that it screwed into the casing after the stationary member had been screwed, and helped to hold the same in place. This Elliott patent contemplates that the stationary member may not be threaded, but shall be so constructed that it will fit in against a shoulder in the casing against which it will be held by the pressure of the screw-threaded socket member to which the hose may be attached. In the Prentice & Gregory patent of September 2, 1902, No. 708,254, we find that the stationary part of the motor is not screw-threaded, and that it is seated against an internal shoulder in the casing, and that the stationary member is held in place because the screw-threaded socket member, to which the hose is attached, presses against the same. It is not necessary to determine that all of the 15 claims of this patent, or any of them, are invalid; but it

is important to hold, and the court does hold, that the defendant cannot be charged as an infringer in the use of that construction of the patent which we have found to be the essential feature.

Having reached the foregoing conclusions, it is not necessary to differentiate between the motors sold by the plaintiff and those sold by the defendant. A decree should be entered in favor of the defendant as to the three patents now under consideration, and the plaintiff should be required to pay all the costs which may properly have been incurred by the defendant in the litigation, so far as said three several patents were the subject thereof.

PITTSBURGH WATER HEATER CO. v. BELER WATER HEATER CO.

(District Court, W. D. Pennsylvania. April 15, 1915.)

No. 22.

1. COURTS ⊜347—PLEADING—NEW EQUITY RULES.

The purpose of new equity rules 25 and 30 (198 Fed. xxv, 115 C. C. A. xxv) is to secure brevity and simplicity of allegation in bills and answers, and to that end the profession should lend its aid, by conforming as near as may safely be done to such rules.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⊜347.]

2. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—WATER HEATER.

The Shook patent, No. 993,723, for an instantaneous gas water heater, the essential feature of which is the use of a single gas valve in combination with thermostatic controlling means, *held* void, on the ground that the patentee was not the original and first inventor of such feature, which is disclosed in the Walker patent, No. 886,100.

In Equity. Suit by the Pittsburgh Water Heater Company against the Beler Water Heater Company. On final hearing. Decree for defendant.

Synnestvedt & Bradley, of Pittsburgh, Pa., and S. T. Cameron, of Washington, D. C., for plaintiff.

John H. Roney, of Pittsburgh, Pa., for defendant.

ORR, District Judge. This patent case is now before the court for decision after trial. The nature of the case will be disclosed in the following observations which the court is constrained to make in respect to the bill and answer in the light of the equity rules of the Supreme Court. What may be observed with respect to the pleadings in this case may be applied to many cases which have been brought since the adoption of the new equity rules, for it has become apparent that solicitors in equity, and especially solicitors in patent causes, have hesitated to conform to the provisions of those rules.

[1] Rule 25 (198 Fed. xxv, 115 C. C. A. xxv), which relates to the contents of a bill of complaint, is one which should be recognized by the profession as adapted, not only for the relief of the courts, but for the relief of counsel. Eight lines of the typewritten bill in this case have been deemed necessary to set forth the corporate names

of each party, their citizenship and residence, and that the acts therein complained of were done in this district. Instead of giving "a short and plain statement of the grounds upon which the court's jurisdiction depends," and "a short and simple statement of the ultimate facts upon which the plaintiff asks relief," 28 lines were deemed necessary to aver that George A. Shook, being the original and first inventor of new and useful improvements in instantaneous water heaters, and being, by reason of his conformity and that of said invention with every provision of law relating thereto, entitled to letters patent of the United States, made proper application therefor, with the result that letters patent of the United States, No. 993,723, were issued in due form for the said invention upon May 30, 1911, not, however, to said Shook, but to the plaintiff, in whom title to the said invention had become vested by proper assignments in the meantime, as thereinafter set forth.

Twenty-four lines of the typewritten bill were deemed necessary to aver that by virtue of a written assignment from said Shook to Reynolds C. Frampton, dated December 5, 1908, and recorded in the United States Patent Office on January 4, 1909, in Liber R 80, page 234, Transfer of Patents, and by virtue of a similar assignment from said Reynolds C. Frampton to the plaintiff, dated November 12, 1909, and recorded in the same office and in like manner, November 30, 1909, in Liber T 82, page 409, plaintiff became the exclusive owner of said patent and of all rights and privileges thereby granted, which have been of great commercial value to the plaintiff.

Thirty-four lines were deemed necessary to aver the expenditure of money by plaintiff in carrying on the business of manufacturing water heaters embodying the apparatus of the patent, the acquiescence in and recognition of plaintiff's rights by the public, from which large profits would be made, except for the infringements by the defendant company, which, although well knowing the premises, has since the date of the patent, in violation of plaintiff's rights, at Pittsburgh, in this district, and elsewhere, made and sold water heaters embodying the apparatus of the patent, and particularly the construction recited in claims 4, 5, 14, 20, 21, and 22, and has continued so to do, to plaintiff's great loss and injury.

Eight lines were deemed necessary to aver that defendant has on hand such water heaters, to pray discovery of the extent thereof, and to aver that defendant's acts complained of encouraged others to unlawfully disregard the plaintiff's rights.

Over nine lines were deemed necessary to aver notice to defendant of plaintiff's rights, refusal by defendant to regard such notice, and plaintiff's conformity with the statute in properly marking its products.

That the foregoing may not appear hypercritical, reference is made to McCoy v. Nelson, 121 U. S. 484, 7 Sup. Ct. 1000, 30 L. Ed. 1017, where a bill in equity was held to be in proper form and the requisites of such bill were considered.

It is unnecessary in this case to determine whether or not, since the new equity rules, a plaintiff may safely omit the averments of compliance with all conditions precedent to the grant of a patent, but

it is well to have in mind as a suggestion from the case last cited that, if the bill avers that the patentee or plaintiff "is the original and first inventor of a new and useful improvement and invention, * * * which are fully and particularly described in the letters patent hereinafter mentioned, and which had not been known or used before his said invention," a great deal of verbiage common in the bills in patent causes can be eliminated.

The general averment that an invention had not been known or used before is certainly not helped by limiting such averment to this country, and then averring that it had not been patented or described in this or any foreign country, that it had not been for more than two years prior to the date of his application described or in public use or on sale in this country, and that it had not been abandoned to the public. The detailed averments thus briefly expressed are altogether not any more forceful than the brief averment hereinabove quoted from the case last cited.

The prayers of the bill in this case are such as were common prior to the adoption of the equity rules. They include prayers that the defendant be decreed to pay the costs, and that the court grant a writ of subpœna, and that the defendant be bound to answer, waiving, however, answer under oath.

The equity rules have sufficient provisions as to costs to justify omission of a prayer for the imposition of costs. With respect to the prayer for a subpœna, rule 12 (198 Fed. xxii, 115 C. C. A. xxii) provides that the clerk shall issue the same whenever a bill is filed upon application by the plaintiff. No prayer for process is necessary, because it is not issued by an order of the court, but by the clerk, under the rule. The prayer that the defendant be required to answer is not necessary, except under rule 40 (198 Fed. xxix, 115 C. C. A. xxix) relating to nominal parties, "unless the plaintiff specially require him to do so by prayer," for every defendant, other than a nominal party, is required to answer or take some other step, if he would not have a decree against him. The waiver of an answer under oath seems wholly unnecessary, because the equity rules apparently do not require any answer to be made under oath. It cannot be inferred that an answer should be made under oath, when the bill is not required to be verified by the oath of the plaintiff, except where some special relief pending the suit be required. The answer no longer appears to be the expression of the results of searching the conscience of the defendant. The method pointed out in rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) for procuring discovery by means of interrogatories is now the method of searching the conscience of the opposite party. That rule provides that the answers to the interrogatories shall be in writing under oath and signed by the party. It seems, therefore, a proper inference from the provisions of the equity rules with respect to oaths to portions of the record other than the answer, and the omission of the requirement of an oath to an answer, that an answer in equity need not now be made under oath.

The foregoing observations are more by way of suggestion to the profession than as laying down rules which should govern in the

preparation of a bill. The court is not unmindful of the fact that rule 25 is not an absolute direction of all that a bill should contain, but that it is a statement of what shall be sufficient to sustain a bill. If the matters therein prescribed are contained in the bill, the bill is a good bill, although other matters may be embraced therein. The aim of the rule is brevity and simplicity of allegations in bills, and the profession should lend their aid to such end.

It is natural, when bills in equity are drafted without regard to the equity rules, that answers should be drawn with equal inattention to the provisions of such rules. Without going into the answer in this case at length, it is sufficient to say that it is not in accord with rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), in that it does not set forth "in short and simple terms," the matters of defense. As an illustration it is only necessary to refer to the fact that eight lines of the printed answer are used to reserve to defendant some supposed benefit by reason of the manifest imperfections of the plaintiff's bill. The real defenses to the bill are that Shook was not the first and original inventor and that there was no infringement.

[2] Giving attention now to the merits, we find that the title to the patent in suit is in the plaintiff, and that this court has jurisdiction, because the acts of the defendant which are alleged to infringe the rights of the plaintiff were committed within this district. The only defense which it is necessary to consider is the defense that Shook was not the first and original inventor.

Shook, in the specifications of his patent, sets forth:

"The invention relates to instantaneous water heaters having a dual control of the gas supply, and particularly to the mechanism for automatically governing the gas supply. The invention has for its principal objects: The provision of a simplified apparatus of the character specified, wherein a single valve for controlling the gas supply replaces the plurality of independent valves heretofore considered necessary for this purpose; the provision of a device of the character specified having a single gas valve, wherein the valve may be operated by the thermostatic controlling means independent of the water valve, and may be closed thereby in case the water valve is accidentally stuck open; and the provision of an improved controlling device for the gas valve, wherein the closure of the gas valve in case of accident to the water valve, is more positive than that of the thermostatically controlled gas valves heretofore employed."

The claims of the patent in controversy are as follows:

"4. The combination in a water heater having an inlet and outlet, heating means, and a conduit for supplying gas to the heating means, of a water valve actuated by variations of pressure of the water, a thermostatic controlling means governed by the water of the heater, a valve in the conduit, and means whereby the conduit valve is controlled both from the water valve and from the thermostat.

"5. The combination in a water heater having an inlet and outlet, heating means, and a conduit for supplying gas to the heating means, of a water valve actuated by variations of pressure of the water, a thermostatic controlling means governed by the water of the heater, a valve in the conduit, means whereby the conduit valve is operated from the water valve, means whereby the conduit valve is operated from the thermostatic controlling means, and means whereby the thermostatic controlling means may close the conduit valve without moving the water valve."

"14. In a water heater, the combination of a conduit for water under pressure, a burner for heating the water in said conduit, a valve controlling the

flow of fuel to said burner, means normally holding said valve closed, and devices operated by the flow of water through said conduit and by variations of temperature in said water for controlling said means."

"20. In a water heater, the combination of a conduit for water under pressure, a burner for heating the water in said conduit, a normally seated valve controlling the flow of fuel to said burner, a compound power mechanism adapted to hold said valve closed, a device operated by the flow of water through said conduit for controlling one part of said power mechanism, and a device operated by variations of temperature in said water for controlling the other part of said mechanism.

"21. In a water heater, the combination of a conduit for water under pressure, a burner for heating the water in said conduit, a normally seated valve controlling the flow of fuel to said burner, power mechanism in the form of a plurality of springs adapted to hold said valve closed, a device operated by the flow of water through said conduit for controlling one of said springs, and a device operated by variations in temperature in said water for controlling the other of said springs.

"22. In a water heater, the combination of a conduit for water under pressure, a burner for heating the water in said conduit, a normally seated valve for controlling the supply of fuel to said burner, mechanism for operating said valve, a device actuated by the flow of water through said conduit and a device actuated by variations of temperature in said water, said devices governing the operation of said valve through said mechanism, causing said valve to open when a flow of water is established through said conduit and the water is below a predetermined temperature, but causing it to remain seated or when open to move in a closing direction when the water is above a predetermined temperature."

Instantaneous water heaters were old, and the arrangements for regulating the flow of water and the flow of gas were varied and sometimes quite complex. The use of thermostatic controlling means was old. The essential feature of the Shook patent was the use of the single gas valve, in combination with other well-known elements, and its operation by thermostatic controlling means independent of the water valve.

United States patent No. 886,100, to Walker, under date of April 28, 1908, three years earlier than the date of the patent to Shook, discloses the Shook invention, especially in Fig. 2, attached to and made part of said letters patent. Walker's patent contains a water valve, a single gas valve, and thermostatic means for controlling the gas valve; the gas valve being controlled both from the water valve and thermostatic means. Walker's patent, not only discloses the Shook invention, but it illustrated and described a water heater which has been effectively operated.

In order to meet the earlier date of the Walker patent, the plaintiff endeavored to show, and offered evidence tending to show, that Shook's date of invention was prior to that of Walker's. In undertaking so to do, the burden of proof was necessarily cast upon the plaintiff, and must have been assumed by it. See Clark Tread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 Sup. Ct. 846, 35 L. Ed. 521. The court is constrained to hold that the plaintiff has not sustained the burden. The evidence offered by it tended to show that Shook conceived the device of his patent in the spring of 1907, upon an uncertain date which cannot be placed earlier than the latter part of March. There was no reduction to practice by Shook until some time during the year 1908.

The evidence introduced on the part of the defendant has led the

court to the conclusion that Walker conceived the device of his patent as early as September, 1906, and soon afterwards caused the valves to be removed from a heater of a different type, and had new valves made therefor in accordance with the disclosure of his patent, and found that the same would operate. In March of 1907 he took up with his patent attorneys the matter of procuring a patent for his invention. Walker, at the time he made the invention, was an engineer in the government service, engaged in the improvement of the Ohio river. His disclosure was to two men engaged in the plumbing business, who did work for him in the matter of the making of the new valves. He further disclosed his invention on March 11, 1907, to two of his associates in the United States Engineers' Office at Wheeling, W. Va., who affixed their signatures to his drawing.

So far as it appears, Walker and the persons to whom he disclosed his invention, and who were called as witnesses on behalf of the defendant, have no interest in the defendant company, unless it be inferred that Walker is interested in the result of the litigation because of his priority of invention. On the other hand, the witnesses for the plaintiff in support of Shook's claim for priority seem to be interested in the plaintiff company. Having seen the witnesses and heard them testify, the court is satisfied that Walker was the prior inventor, without giving any consideration to the fact that the burden of proof rested upon the plaintiff.

The plaintiff's counsel criticize severely the construction and use by the defendant of certain heaters involving the Walker construction at the defendant's factory, and urge that they are to be deemed of light value, as being in the nature of tests made by one party in the absence of the other. Their contention, however, is not entitled to great consideration, because the evidence shows that one of the heaters involved, made by the defendant and involving the Walker construction, was operating in the house of a man named Beatty for some months, that the same was operating at the time of the trial, and that no application was made on the part of the plaintiff for an opportunity to examine that heater. It further appears that Beatty was not connected with the defendant in any way.

The court finds as a fact, under all the evidence, that Shook was not the first and original inventor of the essential feature of his patents. In view of this fact, it is unnecessary to compare the structure of the defendant with the structure of the plaintiff. The defendant is using a combination found in the claims of United States patent No. 1,053,370, granted to J. Ellis, on February 18, 1913. There is an arrangement of the essential parts in the Ellis water heater different from the arrangement of essential parts in the plaintiff's heaters. The single gas valve is found in the defendant's heaters, but, as we have seen, they are entitled to use it as against the assignees of the Shook patent by reason of the prior invention of Walker.

The bill must be dismissed, at the costs of the plaintiff. Let a decree be presented.

AUTOSALES GUM & CHOCOLATE CO. et al. v. RYEDE SPECIALTY WORKS.

(District Court, W. D. New York. January 6, 1915.)

PATENTS ⊂328—VALIDITY AND INFRINGEMENT—COIN-OPERATED MECHANISM.

The Pumphrey patent, No. 665,977, for a coin-operated mechanism, claims 5 and 6, *held* valid and infringed. Claim 24, if valid *held* not infringed.

In Equity. Suit by the Autosales Gum & Chocolate Company and the Empire Trust Company, as trustees, against the Ryede Specialty Works, for infringement of claims 5, 6, and 24 of letters patent No. 665,977, for a coin-controlled mechanism, granted to Walter H. Pumphrey January 15, 1901. On final hearing. Decree for complainants.

A. Alexander Thomas, of New York City, for complainants.
Church & Rich, of Rochester, N. Y., for defendant.

MAYER, District Judge. In August, 1900, when Pumphrey filed his application, the slot machine art, if it may be so called, had narrowed to a point where the field was limited to improvements directed to greater simplicity and durability.

"My invention," said Pumphrey, "relates to coin-operated mechanism of a class adapted particularly for use in connection with 'slot machines.' In machines of this character the use of a coin for tripping a lock by its weight or the momentum acquired in its passage through a chute ordinarily necessitates the employment of a locking mechanism, the co-operating parts of which must be extremely light, delicate, and sensitive to insure a proper response under the action of the inserted coin, and as these machines are usually placed out of doors, exposed to all changes in atmosphere and temperature, a disarrangement or break-down of such locking mechanism frequently occurs, causing the machines to be labeled 'Out of order' for a considerable length of time, which thereby increases the cost of maintenance and materially reduces the net earnings. It is the object of the present invention to obviate the difficulties above mentioned by effecting the release of the machine by means of a hand-lever acting through the medium of a coin. The use of such a lever for this purpose provides the requisite power for operating a tripping device of simpler and heavier construction than is ordinarily employed, and thereby renders the same more efficient and capable of withstanding the wear and tear with little or no liability of disarrangement under ordinary conditions, and, furthermore, insures an immediate response and complete operation upon the insertion of a proper coin."

The claims here in controversy are:

"5. In coin-operated mechanism, the combination of a pivoted coin-carrier and a pivoted coin-finder, both mounted upon a movable carrier, and relatively disposed to receive a coin between their adjoining faces, and means for rocking the finder and thereby transmitting motion to the carrier through the medium of the interposed coin.

"6. In coin-operated mechanism, the combination of a trip-lever and a coin-carrier and a coin-finder co-operating therewith through the medium of a coin, a movable carrier common to both the lever and finder, and actuating means for the finder."

"24. In coin-controlled mechanism, the combination of a member to be actuated, a pivoted trip therefor, spring-sustained normally out of operative relation, a coin-carrier, and a pivoted coin-finder co-operating through the me-

dium of a coin to adjust the trip into a path of travel including said member, and means for operating the coin-finder and advancing the trip into engagement with said finder."

Some question arose as to whether the word "carrier," in the last clause of claim 5, meant the "coin"-carrier or the "movable" carrier or support upon which the coin-carrier and the coin-finder are mounted; but an examination of the file wrapper demonstrates clearly that the word in dispute meant the "coin"-carrier.

The prior art concededly includes four patents, to wit: Cochran, No. 440,570, November 11, 1890; Williams, No. 530,148, December 4, 1894; Williams, No. 580,478, April 13, 1897; and Cook, No. 627,685, June 27, 1899.

It is contended that a later Cook patent, No. 664,235, granted December 18, 1900, application for which was filed on February 15, 1900, should also be considered as in the prior art; but this patent must be excluded under the authority of such cases as Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68; Vacuum Engineering Co. v. Dunn, 209 Fed. 219, 126 C. C. A. 313 (Second Circuit, Nov. 11, 1913); Gray Telephone Pay Station Co. v. Baird Mfg. Co., 174 Fed. 417, 421, 98 C. C. A. 353; Diamond Drill & Machine Co. v. Kelly Bros. (C. C.) 120 Fed. 282; Id., 123 Fed. 883, 59 C. C. A. 370.

Apparently the novelty of the invention in suit resides in the pivotal mounting of the operating lever, the pivoting of the trip-lever and its combined coin-carrier, and the pivoting of the finder co-operating with the latter. According to claim 6 of the Pumphrey patent, the coin-carrier is pivoted, while in Cook it is not; and so in claim 6 there is a "movable carrier common to both the lever and finder," while in Cook there is not any construction in which the trip-lever and the coin-finder are mounted upon a common movable support for their proper operation.

Without further elaboration, it may be said that claims 5 and 6 show these elements above noted over previous patents and thus in a new combination. The practical result is that when a coin is deposited, and the lever or push rod is actuated by hand, the coin-finder, coin-carrier, and trip-lever are moved together bodily with the support, whereby the trip-lever is advanced into engagement with the member to be actuated.

As the constant effort in the art was toward simplification of a mechanism composed of many details, this improvement was sufficient to constitute patentable novelty. But, in the effort to cover every conceivable point by making 27 claims, the patentee probably overstepped the bounds in claim 24, and I think it is likely that this claim was anticipated by Cook, No. 627,685. Be that as it may, the claim, when read against defendant's structure, must be strictly construed.

Infringement of claims 5 and 6 seems clear, but not so with claim 24. In defendant's structure the trip-lever *15* is normally in its operative horizontal position, and no movement takes place when the coin is inserted; while in the structure of Pumphrey's patent the converse is true, because the coin-finder engaging the coin in the coin-carrier acts directly thereon to rock the trip-lever upwardly. The patentee

uses the coin as a means of imparting movement to the trip-lever; the defendant uses the coin merely as an abutment to hold the ejector in its normal position preventing it from dropping, pending the initial inward movement of the carrier *5*, until the trip-lever has passed over the bridge piece of the cover plate, the carrier being then supported independently of the coin.

In view of the above differences in the actions of the structure of the patent in suit and of defendant's mechanism, it cannot be held that defendant's ejector *15* is "spring sustained normally out of operative relation." The spring *19* of defendant's mechanism returns the carriage to its outermost position, and when in this position the finder or projection *12* of the finder *9*, to which the lever *14* of the ejector *15* is attached, engages the framework *1*, so that the trip-lever is rocked upwardly into its normal horizontal position. The spring itself has nothing to do with positioning the ejector in the same sense in which the spring *7a* of the Pumphrey patent operates to move the trip lever *7* downwardly, in which position it is "spring-sustained" out of the path of movement of the member to be operated until a coin has been inserted in the coin carrier and the coin is acted upon by the finder.

With a claim entitled to broader scope, this difference in operation might not escape infringement; but, restricting the claim (if valid) to what I think are its proper limits, there is no infringement of this claim.

Complainants may have a decree in accordance herewith, with half costs.

THE A. A. RAVEN.

(District Court, E. D. Pennsylvania. April 5, 1915.)

No. 4.

COLLISION ⇐127—ACTION—MEASURE OF DAMAGES.

In an action to recover damages to a dredge owned by the United States and used for harbor improvement purposes, neither the cost of the harbor work to the government nor its value to the commerce of the port affords such a definite measure of the loss due to the interruption of operations as to be made the basis of a claim for damages or be included in any estimate made of the amount.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 281; Dec. Dig. ⇐127.]

In Admiralty. Suit by the United States against the steamship A. A. Raven. On exceptions to commissioner's report. Overruled.

See, also, 216 Fed. 572.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for the United States.

Conlen, Brinton & Acker, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. The argument upon these exceptions necessarily takes on in large measure the academic form. That submitted to us on behalf of the United States is artful (in the compli-

mentary sense of that term), forceful, and in many of its features irrefutable. It does not follow, however, that its deductions must be accepted. It belongs to that kind of argumentation to whose refutation the capacity of the highest intellect may be unequal, and yet the deductions of which would be rejected by a mere modicum of common sense. The explanation of this lies in the truth that its deductions are essentially prophecies, which may be rejected by the unbelieving, but which nothing but the event will confute. There is no difference in this sense between the "profits which would have been" and the "profits which will be" received, except in the tense of the expression. The farmer whose prize hen or favorite cow has been run down and killed by an automobile, if there were lent to him the skilled advocacy of counsel for the United States, could easily "prove" on the basis of the egg-laying qualities of the hen or the butter fat yield of the cow that he had sustained a loss in the one case of $50 and in the other of $1,000. The argument, too, would be difficult to refute. We hold that measure of the ability of counsel to believe by anticipation that it would be unanswerable. The conclusion would without doubt be accepted by the farmer, and without much doubt by counsel, as verity. Every one, however, knows that the man's farmer neighbors would flock to close a contract to restore the owner's entire loss at the price of 80 cents in the one case and $60 in the other. The man who lends the part of one ear to the seductive logic of a promoter will get an alluring vision of "profits which are to be." He may not be equal to the task, even after the event, of breaking the connection between the succeeding steps in the chain of deductions, but what he surely will have is an abiding knowledge that these cloud visions afford a very unstable foundation upon which to erect a storehouse for his money. As already intimated, a prophecy remains a mere prophecy, and has no other value until it has been fulfilled by the event.

The law recognizes, of course, that in many cases the amount of damages which is to be determined can only be ascertained by events which with respect to the time of injury done are in futuro, and that the extent of loss cannot be in actual fact tested by an event the possibility of which is gone. The law requires, however, the application of some measure which has been tested and applied in the common experience and business affairs of life. The library of a chemist or philosopher is destroyed through the negligence of another. The law can admeasure and will allow as damages the market value of the books destroyed. The loss to science or philosophy or the arts, and even in the probable interrupted gains of the owner, may be well-nigh incalculable. Must the party responsible pay this loss? Moreover, the books may not have been destroyed. They may only be damaged and sent to the bookbinder for repairs. There may be a "proven" enforced inactivity on the part of the owner for a long time. Can he be allowed for this? If so, the loss would probably exceed the market value of his entire library. This would involve the absurdity of allowing a greater compensation for damage to a part than for the destruction of the whole. Obviously, the only compensation which the law can compel is a money compensation. This just as obviously requires for its

admeasurement something which will measure the "pecuniary" loss. The measure to be applied must be a real and "tangible" one. It is in this sense that the criticized expressions "pecuniary" and "tangible" have crept into the law. It is true that the proper measure is at times easily found and applied. At others, there is difficulty encountered. A wagon or other vehicle worth $500 is demolished. The wrongdoer admits liability and promptly hands over to the owner $500. Has he not made good the money loss? The vehicle may have been damaged only, and can be restored to its former value at a cost of $100. There is, however, necessarily to be incurred the expense of taking it to the shop, or other outlay or loss directly involved in the injury and capable of expression in terms of money. These may all be elements of damage, but the final award is the admeasurement of the money loss.

This is a long prelude to the legal merits of this case. The dredge Delaware was damaged by being run into by the Raven. The amount of damage measured in the cost of repairs was about $4,000, and in time lost 40 days. The repairs were made by the government itself, and by the leisurely and conservative methods which governments everywhere have found it necessary to adopt. There is probably some truth in the observation that, if the work had been done by private parties, the cost would have been one-half, and the time consumed one-sixth, of that incurred. Counsel for the United States have asked us to apply a rule of measurement of damages which would show a money result which no one has had the courage to figure out. We know it would be many, very many, times the amount of the direct damage done. Counsel for the United States have been moderate, however, and have reduced the claim to between four and five times the government cost of repairs. Instead of claiming credit to themselves for moderation, we would commend to counsel that they ask themselves whether the fact that the measure which they ask to have applied produces such results ought not in itself induce them to inquire into its soundness? One is almost tempted into wondering on what this claim has fed that it has grown so great. This is the basis of it.

The United States is to be viewed as engaged in a money-making business, in which it has invested a vessel at a cost of $400,000, manned by a crew of highly trained and consequently high-salaried men, having an additional plant equipment running into many thousands of dollars, and engaged in a work whose product has an annual cost value of again many thousands. The fact is, of course, admitted that the United States is not a money-making organization, and that in its improvement of our harbors it is not seeking a direct money profit from the work. It further must be admitted that, although the work it does is not only necessary and highly beneficial, and of immense and indeed incalculable benefit, the value of this flows to the commerce of the country and yields no direct profit to the government which does the work. The value of what it does is not only great, but absolutely immeasurable, in the sense of determining the money loss involved in the cessation of it for a limited time. The fact that such a thing is immeasurable suggests the folly of attempting to measure it.

Counsel argue that value has been lost to the United States at least

equal to the cost of the work. This is, however, a double assumption, the first part of which does not apply to other litigants. A man might, if he chose, build a boat for himself at a cost of $500,000 and spend $50,000 a year in the use of it. He might well argue that he received the value of his expenditures in the pleasure it afforded him to have a boat which was the product of his own hands. If, however, the boat were run down, would the court trying the case be required to allow the owner damages for loss of use on the basis of what it cost him to run his boat, and interest on his investment, in addition to the cost of restoration? If an answer to this question is needed, it can be found in The Conqueror, 166 U. S. 129, 17 Sup. Ct. 510, 41 L. Ed. 937.

The general rule is there can be no allowance for loss of use, unless loss of profits can reasonably be found and there is reasonable proof of the amount. Here neither is present. The decree providing for the ascertainment of the damages in this case was made as a matter of course, without its terms being brought to the attention of the court. Had it been, the measure which the commissioner has applied would have been specifically provided for. He has evidently considered the case with characteristic care and level-headedness, and has made a liberal allowance for all the damage shown.

The exceptions to the report of the commissioner are dismissed, and the report confirmed.

THE JAMESBURG.

(District Court, E. D. Pennsylvania. March 1, 1915.)

No. 37.

COLLISION ⊂=74—MOVING AND MOORED VESSELS.

A collision between a loaded car float being shifted by a tug into an adjoining slip and a tug tied up beyond another tug at the end of the pier *held*, on the evidence, due solely to the fault of the moving tug; it not being satisfactorily shown that she signaled the other tugs to move, and it appearing that unless so warned they were moored in a proper and customary place.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 104; Dec. Dig. ⊂=74.]

In Admiralty. Suit for collision by Charles L. Walker, managing owner of the tug Lizzie Crawford, against the tug Jamesburg. Decree for libelant.

J. Frank Staley and T. Wistar Brown, 3d, both of Philadelphia, Pa., for libelant.

Joseph D. McCoy and John Hampton Barnes, both of Philadelphia, Pa., for respondent.

THOMPSON, District Judge. The collision for which the libelant seeks to recover damages occurred off the end of Pier 10 South Wharves on the Delaware river on the morning of November 18, 1911. The weather was clear, the tide flood, and there was little, if any, wind.

Prior to the collision, the Crawford made fast to the tug Alert, which was tied up to the end of the pier, both vessels lying with bows down the river. When the Crawford tied up, her master went ashore to the offices of the managing owner of the tug, leaving a deck hand, Lingo, in charge, with the engineer, two firemen and cook on board. Lingo was not a licensed tug pilot, but had been following the water for 32 years, had been about tugboats on the Delaware river about 28 years, and during that time had served as deckhand and cook. While the Crawford was lying outside the Alert, the Jamesburg went into the dock between Pier 9 and Pier 10 and made fast to the starboard or up-river side of a car float loaded with two tiers of five freight cars each, for the purpose of taking it into the slip below Pier 10. The Crawford is about 67 feet in length, 17½ feet beam; the Jamesburg 82 feet in length and 18 feet beam, and the car float she had in tow was about 207 feet in length and 35 feet beam. The Jamesburg made fast to the float with one line on the third cleat from the stern, and, after having cleared the corner of the wharf, pushed the float out into the stream. Her master saw the tugs tied to the end of the pier, but proceeded to push the float around, thinking that the Crawford would move out of the way. Seeing that the float was not going to clear the Crawford, he signaled to stop and back, and, while the engines of the Jamesburg were going full speed astern, the float struck the Crawford about amidships on her port side, causing some damage.

The libelant claims that the collision was due to the fault of the Jamesburg: First, in negligent and unskillful handling of the float; and, second, in not keeping a proper and efficient lookout. I do not find the latter claim sustained by the evidence.

The respondent denies fault upon the part of the Jamesburg, and alleges fault upon the part of the Crawford in failing to move away from the end of the pier upon receiving signals from the Jamesburg's whistles. There can be no doubt from the testimony that those in charge of the Jamesburg knew before going into the dock of the presence of the Alert and Crawford at the end of the pier. The witnesses for the respondent all testified that a third vessel, the Minerva, was also tied to the end of the pier above the Alert, and moved away when signals were blown. This evidence is immaterial, excepting as proof that signals were blown, as the movements of the Minerva, if she was there, have no other bearing upon the collision. The witnesses for the respondent testified that the Jamesburg blew warning signals, and that, upon the signals being given, the Alert went off downstream, casting the Crawford adrift, and that the Crawford drifted against the float; while those witnesses for the libelant who were on board the Crawford and a steward, who was on board the Alert, testified that no whistles were blown, that the Alert was fast to the pier, and the Crawford fast to the Alert at the time of the collision.

As the steward of the Alert was an independent witness, not connected with either the Crawford or Jamesburg, his testimony should have considerable weight. The testimony of the master and crew of the Jamesburg is contradicted by a report made by the master of the Jamesburg to the government steamboat inspectors immediately after

the collision, stating that on the morning in question he had collided with the tug Crawford, "which was lying at the end of Pier 10." This statement, made immediately after the collision, is entitled to greater weight than the contradictory testimony given several years after the collision, and after the matter had in all probability been frequently discussed by the master and crew of the vessel.

Upon this conflicting evidence, in view of the weight of the evidence, I find that the Crawford was lying tied up to the Alert at the end of the pier when the collision occurred. If there were no other circumstances in the case, the presumption in favor of the moored vessel would entitle the Crawford to full damages; and, without the force of the presumption, the evidence shows, and the master of the Jamesburg admits, that the float could without any difficulty have been taken further out, pushed downstream, and brought into the dock, without endangering the Crawford.

It is not claimed by the respondent that the Crawford was lying where she had no right to be, as it was shown to be customary for tugs to tie up at the end of Pier 10. It appears, however, from the testimony of all the witnesses for both parties who were questioned upon the matter, that there was an established local custom for tugs lying at the end of the pier to vacate immediately upon being signaled to do so by tugs bringing floats around the pier, as the Jamesburg was doing. All the witnesses for the respondent testified that warning whistles were blown by the Jamesburg while coming out of the dock, while the witnesses for the libelant with equal unanimity testified that they did not hear any whistles. If the signals were blown, the Crawford, in accordance with the custom of local navigation, should have moved away, and this could no doubt have been done if Lingo, the deckhand in charge, was qualified to take her from the pier. While he was not a licensed pilot, it appears that after the collision he took her across the river to shallow water, and consequently could have taken her away from the pier. He was washing the upper deck, in full view of the Jamesburg and float, but testified that he did not see them until the float struck the Crawford. If in his position he had heard the whistles, he would have had his attention immediately called to the presence of the Jamesburg; and if he had had warning in sufficient time, and had not then taken measures to move her out of the way, the Crawford would have been guilty of contributory fault.

The positive testimony that signals were blown would be persuasive, if the weight of the evidence did not force the conclusion that the respondent's witnesses were mistaken upon the question of the movement of the Alert and the question of the Crawford remaining tied up at the time of the collision. If signals were blown, and the Alert and Minerva moved away, there is no explanation of the absence of witnesses from the Alert and Minerva to corroborate the testimony of the master and crew of the Jamesburg. As the weight of the evidence has been found against the respondent's contention, the conclusion must be drawn that no warning signals were blown for the tugs to leave the pier, and therefore there was no neglect to act which would hold the

libelant guilty of contributory fault. The entire fault for the collision must therefore be placed upon the respondent.

A decree will be entered accordingly, with a reference to a commissioner to take testimony and report upon the amount of the libelant's damages.

SPRIGG v. FISHER.

(District Court, D. Maryland. April 29, 1915.)

1. COURTS ⟸292—UNITED STATES COURTS—JURISDICTION—UNFAIR COMPETITION.

A federal court has no jurisdiction of a suit between citizens of the same state for unfair competition carried on otherwise than by the infringement of a registered trade-mark.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 834; Dec. Dig. ⟸292.]

2. TRADE-MARKS AND TRADE-NAMES ⟸57—INFRINGEMENT—DESCRIPTIVE WORDS.

Plaintiff's registered trade-mark used in connection with the sale of toilet paper *held* not infringed by defendant's device used in the same business; there being no similarity, except in the use of certain descriptive words equally open to both parties and to the rest of the world.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 65; Dec. Dig. ⟸57.]

3. TRADE-MARKS AND TRADE-NAMES ⟸53—WORDS SUBJECT TO APPROPRIATION—SCOPE OF TRADE-MARK.

Caution should be exercised in extending either the class of marks or phrases which may be used as technical trade-marks or in giving too broad a construction to a valid trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 61; Dec. Dig. ⟸53.]

4. TRADE-MARKS AND TRADE-NAMES ⟸92—SUITS FOR INFRINGEMENT—DISMISSAL ON MOTION.

While the power should be sparingly exercised, and then only in very clear cases, a bill for infringement of a registered trade-mark may be dismissed on demurrer or on motion, its modern equivalent, when noninfringement is evident on the face of the bill.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 102, 103; Dec. Dig. ⟸92.]

5. COURTS ⟸292—UNITED STATES COURTS—RETAINING JURISDICTION.

Though a court of equity, whose jurisdiction has been invoked to give relief which only such a court is competent to furnish, may sometimes limit its relief to such as might have been obtained at law, in a suit between citizens of the same state for unfair competition and infringement of a registered trade-mark, where it appears that there has been no infringement, the court cannot retain jurisdiction over the cause of action for unfair competition carried on otherwise than by the infringement of a trade-mark.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 834; Dec. Dig. ⟸292.]

In Equity. Suit by Thomas F. Sprigg against Lewis R. Fisher, trading as the Lewis R. Fisher Company. On motion to dismiss. Motion granted.

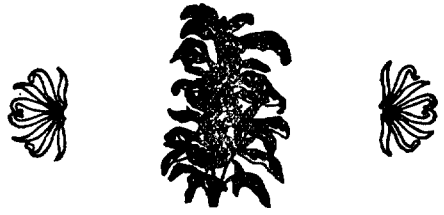
John C. Tolson, of Baltimore, Md., for plaintiff.
Harry N. Baetjer, of Baltimore, Md., for defendant.

ROSE, District Judge. [1] Plaintiff alleges infringement of a registered trade-mark and unfair competition. The defendant has moved to dismiss. All the parties are citizens of Maryland. This court is therefore without jurisdiction of so much of the bill as alleges unfair competition carried on otherwise than by the infringement of a registered trade-mark. Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co., 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710.

[2] The trade-mark as registered is:

JUMBO

WITCH HAZEL



TOILET PAPER

Thoroughly Medicated

EXPRESSLY PREPARED, AND
FOR FINE DRUGGISTS' TRADE.

The defendant's device is:

ROYAL

CARBOLATED



Toilet - Paper

THOROUGHLY MEDICATED

Expressly Prepared for the Select Trade

Positively guaranteed to be free from injurious chemicals. The ANTISEPTIC qualities of this brand have no superior for health and safety. Manufactured expressly for the select trade.



There is no similarity between the two, except in the use of certain descriptive words equally open to both parties and to the rest of the world. If defendant is trying to sell his goods as those of the plaintiff, he has not done so by either using or imitating plaintiff's trade-mark.

[3] The accepted principles of trade-mark law have been supposed to be in some respects rigid. Difficulties in applying them sometimes arise. Hanover Star Milling Co. v. Allen & Wheeler Co., 208 Fed. 513, 125 C. C. A. 515. The litigation which terminated in Thaddeus Davids Co. v. Davids Mfg. Co., 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046, illustrates some of the embarrassments which may result when the Legislature says that trade-marks may be acquired in words or symbols which have not theretofore been subject to exclusive appropriation for such purpose. Such considerations suggest caution in extending either the class of marks or phrases which may be used as technical trade-marks or in giving too broad a construction to a valid trade-mark. It is unnecessary to do the one or the other. A merchant or manufacturer is not solely, or even chiefly, dependent upon a trade-mark for protection against attempts to palm off as his the goods of another. Courts of equity are keen to suppress unfair competition, no matter what guise it assumes.

[4] No case of infringement of a registered trade-mark is disclosed by this bill. Plaintiff admits that bills for the infringement of a patent or a trade-mark may be dismissed upon demurrer, or its modern equivalent of motion, but in his view only when the invalidity of the patent or trade-mark is apparent on the face of the bill. He claims that there are no causes in which such action has been taken merely because, in the opinion of the court, noninfringement is evident. He may be right that such cases are rare, or even nonexistent. It is obviously a power to be sparingly exercised, and then only in very clear cases; but, when it is clearly evident that there has been no infringement, it is the duty of the judge to save the trouble, expense, and delay of further proceedings.

[5] Plaintiff argues, however, that there is another reason for retaining the bill. He has in good faith charged infringement. Over that charge this court has jurisdiction, and it should proceed to pass on all the questions involved. If, after hearing all the evidence, it is satisfied that, while the defendant has not infringed the trade-mark, he has unfairly competed, it should give complete relief by enjoining the further prosecution of such unfair competition. This contention rests upon a confusion between the consequences of limitations upon the powers of courts of equity as such, and the restrictions imposed upon the jurisdiction of the federal courts, whether of law or of equity, by the Constitution and statutes of the United States.

A court of equity, whose jurisdiction has been invoked to give relief which only such court is competent to furnish, may sometimes, after it has heard the whole case, be of opinion that justice and right can be best done by confining the relief given to something which might have been obtained from a court of law. Such relief the chancellor may award, although if the bill originally had sought that, and nothing

more, he must have declined jurisdiction. But a federal court cannot decide a controversy to which the judicial power of the United States does not extend merely because plaintiff has mistakenly assumed that some federal right of his has been infringed. A plaintiff cannot in the federal courts secure redress for unfair competition by a citizen of the same state merely by alleging that such defendant has infringed a registered trade-mark, when in point of fact no such infringement has taken place, and in that respect it is immaterial whether the allegation was made in good or bad faith.

It follows that the motion to dismiss must be granted.

AMERICAN BALL BEARING CO. v. ADAMS.

(District Court, N. D. Ohio, E. D. April 12, 1915.)

No. 190.

1. CORPORATIONS ⟸1—WHAT ARE BODIES CORPORATE—LAW GOVERNING.
   Whether or not an organization is a valid corporation de jure is to be determined by the statutes and decisions of the state where it is organized.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1, 3–6; Dec. Dig. ⟸1.]

2. CORPORATIONS ⟸5—LEGALITY OF ORGANIZATION—QUALIFICATIONS OF CORPORATORS.
   Legal infirmity in parties is as fatal to the validity of an attempted corporate organization as legal infirmity in the purpose of the organization.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 14, 15; Dec. Dig. ⟸5.]

3. CORPORATIONS ⟸14—LEGALITY OF ORGANIZATION—OTHER CORPORATIONS AS CORPORATORS.
   A state statute, authorizing corporations within prescribed limits to become stockholders in other corporations, does not by implication carry a grant of power to corporations to themselves organize other corporations, in which they shall own all the stock.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 16–22; Dec. Dig. ⟸14.]

4. CORPORATIONS ⟸5—LEGALITY OF ORGANIZATION—QUALIFICATIONS OF CORPORATORS.
   The provision of Gen. Code Ohio, § 8625, that "any number of persons, not less than five, desiring to become incorporated, may subscribe, acknowledge and file articles of incorporation," contemplates natural persons, who have an actual and real interest in the corporation to be formed.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 14, 15; Dec. Dig. ⟸5.]

5. CORPORATIONS ⟸5—LEGALITY OF ORGANIZATION—OHIO STATUTE—"HOLDER OF STOCK."
   Gen. Code Ohio, § 8625, et seq., relating to the forming of corporations, provide that articles of incorporation may be filed by five persons; that 10 per cent. of the capital shall be subscribed before the election of directors; that 10 per cent. of the capital subscribed shall be payable at the time of subscription; that no person shall vote on a share of stock on which an installment is due and unpaid, and that the officers and directors must be holders of stock to an amount to be fixed by the by-laws; "holders of stock," as construed by the Supreme Court of the state,

meaning bona fide holders. Three corporations, each interested in motor cars or parts thereof and owning patents, undertook to form a new corporation under the Ohio law, in which they should be equally interested, to hold and handle their several patents. Five persons in the employ of the law firm having charge of the organization signed and filed articles of incorporation, and also subscribed for one share of stock each, and one, as trustee for one of the three organizing corporations, subscribed for enough more to make the required 10 per cent., and such corporation paid in cash the required 10 per cent. of such total subscriptions, but no more. The incorporators paid nothing, and had no pecuniary interest in the corporation. They held a stockholders' meeting, elected themselves directors, and adopted by-laws, and as directors elected officers from their number, and authorized the issuance of stock to the three organizing corporations in payment for patents assigned. They then resigned, one by one, electing representatives of such corporations in their places. *Held*, that such acts did not create a lawfully organized corporation, because (1) the law did not authorize the organization of a corporation by other corporations, which was in fact what was attempted; (2) there was not a bona fide subscription of 10 per cent. of the stock, nor a bona fide payment of 10 per cent. of the amount subscribed; and (3) the incorporators, not being actual and bona fide stockholders, were not authorized by the law to organize the corporation, nor to do the acts which they did.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 14, 15; Dec. Dig. ⊂⊃5.]

6. CORPORATIONS ⊂⊃28—DE FACTO CORPORATIONS—APPLICATION OF DOCTRINE IN FAVOR OF CORPORATION.

Where, in an attempted organization of a corporation, there has not been a substantial compliance with the law, so as to create a de jure corporation, it will be permitted to claim and exercise corporate privileges as a de facto corporation only as between it and parties with whom it has had contract relations, and when considerations of equitable estoppel or public policy justify it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 26, 70; Dec. Dig. ⊂⊃28.]

7. COURTS ⊂⊃354—DISMISSAL ON COURT'S OWN MOTION—INCAPACITY OF COMPLAINANT TO MAINTAIN SUIT.

Where a complainant, suing as a corporation in a federal court of equity, is without legal capacity to maintain the suit as a corporation either de jure or de facto, it is within the power, and is the duty, of the court to dismiss the case, although the question is not raised by the pleadings.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 934; Dec. Dig. ⊂⊃354.]

In Equity. Suit by the American Ball Bearing Company (the Kardo Company substituted as complainant) against Henry J. Adams, dealing as the Reo Motor Sales Company. Suit dismissed.

Edward R. Alexander and Hoyt, Dustin, Kelley, McKeehan & Andrews, all of Cleveland, Ohio, for plaintiff.

Fish, Richardson, Herrick & Neave, of Boston, Mass., and R. A. Parker, of Detroit, Mich., for defendant.

CLARKE, District Judge. This is a suit in equity, in which infringement of letters patent of the United States No. 792,690 is claimed, with the usual prayer for an injunction and an accounting. The

bill was filed on June 25, 1913. On motion of the Kardo Company, claiming to be a corporation of the state of Ohio, an order was entered on October 19, 1914, granting said the "Kardo Company" leave to file a bill in the nature of a supplemental bill, and that it be substituted for the American Ball Bearing Company as plaintiff in the suit.

Such a bill was filed on October 20, 1914, and in this bill the Kardo Company alleged that after the filing of the original bill and the answer, and while the case was pending in this court, to wit, on or about the 28th day of February, 1914, the Kardo Company acquired the entire right, title, and interest in the letters patent in suit from the American Ball Bearing Company. The case came on for final hearing on February 1, 1915, and in the progress of the trial vague suggestions by counsel for the defendant that there was some legal infirmity in the plaintiff, the Kardo Company, and by the counsel for the plaintiff that all was not right with the active defendant in the case, the National Automobile Chamber of Commerce, led the court, of its own motion, to inquire as to the occasion and meaning of such innuendoes. At the suggestion of counsel for the plaintiff, one of them took the witness stand, and stated that he did not think any of the directors of the company were bona fide owners of any shares of the capital stock of the company, but that the real bona fide owners of all of it were the three corporations, the American Ball Bearing Company, the Peerless Motor Car Company, and the Packard Motor Car Company.

After the hearing was concluded, and the court came to a consideration of what its decision should be, the question as to whether the Kardo Company was a lawfully organized corporation, such that it could be a proper party plaintiff in the case, pressed so insistently upon the attention of the court that it was decided to take further testimony upon this point, and accordingly after due notice to all counsel concerned, on March 8, 1915, all parties being represented, the court took further testimony upon this question framed by it, viz.: Is the Kardo Company so organized as a corporation as to make it a proper party plaintiff, competent to present a real and substantial controversy to this court in this cause? On this hearing full opportunity was given, and was availed of, to lay before the court precisely the character of the proposed and actual organization of the Kardo Company. The result of this additional testimony may be stated as follows:

"The three corporations, the American Ball Bearing Company, the Packard Motor Car Company, and the Peerless Motor Car Company, decided to form a corporation under the laws of Ohio, with a capital stock of $1,000,000, in which said corporations were to be equally interested, for the purpose, as stated in the articles of incorporation subsequently filed, of purchasing, leasing, or otherwise acquiring, and of registering, owning, and using inventions, improvements, trade secrets, processes, or interests therein, and applying for and receiving, purchasing, or otherwise acquiring letters patent or patent rights, or interests in or under letters patent, for or upon motors or other vehicles or means of transportation, and for or upon the mechanism, parts of equipment of the same, or the tools or machinery for the manufacture of same, or for selling, granting, or assuming licenses or rights under or in respect of such secrets, processes, inventions, improvements, or patents, and otherwise dealing in respect of or with the same, or either of them, and of

manufacturing, using, and dealing in the vehicles, articles, machinery, equipments, and parts covered by or provided for in said inventions, patents, or improvements, and of doing all things necessary, proper, and incidental to the transaction of said business or any part thereof."

It however appeared from the testimony of Walter C. Baker, a director of the Kardo Company, on the original hearing, that the prime purpose of organizing the Kardo Company was to transfer to it patents which each of the three companies had on automobile axle equipment, which apparently interlaced or overlapped one another, so that, if one company gave a license under the patent which it owned, complaints of infringements and threatened suits straightway arose from one or another of the other companies, and the purpose of the organization was to so place the ownership of these patents in one company, to be organized by the three corporations, that one license could be given on "rear axle patents owned by them."

The evidence further shows that the following steps were taken for the purpose of organizing the Kardo Company as a corporation under the laws of Ohio:

Articles of incorporation were signed on the 21st day of February, 1914, by five men, all in the employ of the law firm in charge of the organization, and none of them connected otherwise than as attorneys with any of the three companies named as parties to the formation of the Kardo Company. These articles of incorporation were filed with the secretary of state on the 24th day of February, 1914. On the same day each of the subscribers to the articles of incorporation subscribed for one share of the capital stock, and one of them subscribed as trustee for the American Ball Bearing Company for 995 shares of the capital stock of the proposed company, agreeing to pay for these shares $9,500 in cash and $90,000 by the transfer of patents by the American Ball Bearing Company to the Kardo Company. It further appears from the evidence that $10,000, being 10 per cent. of the $100,000 of stock subscribed for on February 24, 1914, was on the same day paid for by check of the American Ball Bearing Company, and that no money whatever was paid by any one of the persons named as incorporators of the company.

Abundant formal detail of waiver of notice of opening books of subscription to the capital stock in the manner and to the extent stated, of the filing of a certificate of subscription with the secretary of state, and of a waiver of the notice of the first stockholders' meeting appears in the record. At the first stockholders' meeting on this same day (February 24, 1914) the five incorporators were present and a code of regulations and by-laws was adopted, article 5 of which provides the number of directors shall be five, that the directors must be holders of stock of the company, and that a majority must be citizens of the state of Ohio.

A first directors' meeting was held on the same day, 30 minutes later than the stockholders' meeting, at which meeting four of the lawyers organizing the company were elected to the offices of president, vice president, secretary, and treasurer, and an elaborate resolution was solemnly passed adopting a proposed form of agreement between the

Ball Bearing Company, the Packard, and the Peerless Company, providing for the sale and transfer to the Kardo Company of letters patent by each company, for which each was to receive $200,000 of the capital stock of the Kardo Company. Immediately after this directors' meeting the stockholders reconvened, and a resolution was passed approving the action taken by the directors in approving the contract between the three corporations hereinbefore referred to, and as of the same date a written ratification of everything done by themselves as stockholders and directors of the Kardo Company was signed by the five lawyers who signed the articles of incorporation.

On the 27th day of February a special meeting of the stockholders of the company was called by the same lawyers who signed the articles of incorporation, and at this meeting the regulations were amended by them to make the number of directors six, instead of five. In the afternoon of the same day, the record shows a meeting of the directors of the Kardo Company, at which the five signers of the articles of incorporation and Walter C. Baker were present, and at that meeting the signers of the articles resigned one after another, as directors and officers, and their places were filled by the officers or directors of the three corporations which had united in the purpose to form a company.

The evidence shows, as has been stated, that the only money paid at the time the company was organized was paid by the American Ball Bearing Company. No one of the persons who acted as a stockholder at the first meeting of stockholders of the company, or who acted as director at any of the meetings of directors of the company up to the time of the trial of this case, had paid any money of his own for any stock of the company. The evidence shows that, when each of the persons acting as an incorporator resigned, he transferred the one share of stock which had been issued to him to his successor, but that the successor did not make any payment for such stock.

It also appears in the evidence that, after the question as to the regularity of the organization of the Kardo Company had been raised in this court, the persons who had acted as directors since the election on February 27, 1914, paid, under advice of counsel, each to his company, $100 for the share of stock which had been standing in his name, and by virtue of which he had been acting as a stockholder and director of the company. It also appears from the statement of Mr. Dorn, one of the directors and treasurer of the Kardo Company, that at the time of the organization counsel advised him that in order to act as a director of the company he must have complete and full ownership of at least one share of stock in the company; but the evidence shows, as I have stated, that the share in his name was not paid for until after the first hearing of the case.

No salaries have ever been paid to any of its officers by the Kardo Company. It has done so little business that it has not even employed a bookkeeper, Mr. Dorn saying that there was so little of such work to do that he did it himself without charge. The only office the company has had is that of Mr. Alexander, local patent attorney for the company, and the only business it has done has consisted in becoming a party to this suit and in commencing three other suits for infringe-

ment of patents. While it is said that strong efforts have been made to induce manufacturers of automobiles to take out licenses from the Kardo Company, it had not issued a single license up to the date of the second hearing.

This state of the record presents for decision the question: Is the Kardo Company a corporation de jure or de facto, such that it should be permitted to maintain a suit as party plaintiff in this court?

[1] And, first: Is it a corporation de jure? This is a question which must be answered by the statutes and decisions of Ohio, so far as answer can be found in them. Secombe v. Railroad Co., 23 Wall. 117, 23 L. Ed. 67; Flash v. Conn., 109 U. S. 379, 3 Sup. Ct. 263, 27 L. Ed. 966; Jellenik v. Huron Copper Mining Co., 177 U. S. 13, 20 Sup. Ct. 559, 44 L. Ed. 647. And see Rose's Code Fed. Pro. § 10, pars. (e) and (ee). The law of Ohio provides that:

"Any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge articles of incorporation," etc. G. C. § 8625.

This is obviously a grant of authority to natural persons to organize so as to become invested with corporate franchises; it is not a grant to corporations to so organize. The Ohio law differs from the law of many states, in that the mere filing of articles of incorporation in due form does not create or bring into existence a corporation, notwithstanding the provision of G. C. § 8629, that a certified copy of articles of incorporation shall be prima facie evidence of the existence of the corporation therein named. This is distinctly decided in State ex rel. v. Insurance Co., 49 Ohio St. 440, 31 N. E. 658, 16 L. R. A. 611, 34 Am. St. Rep. 573, the fifth paragraph of the syllabus of which case reads:

"The making and filing, for the purpose of profit, of articles of incorporation in the office of the secretary of state, do not make an incorporated company; such articles are simply authority to do so. *No company exists within the meaning of the statute, until the requisite stock has been subscribed and paid in, and the directors chosen.*"

Before the plaintiff can maintain this action as a de jure corporation, this rule of law requires an affirmative answer to the question:

"Had the Kardo Company a lawfully constituted and elected board of directors, so that it was an 'existing' corporation, when it became a party to this suit?"

Again, the law of Ohio requires that 10 per cent. of the capital stock of the proposed corporation shall be subscribed, and this fact certified by the incorporators to the secretary of state, before an election of directors may be held (G. C. §§ 8633, 8635); that, at the time of making a subscription to the capital stock of a corporation, 10 per cent. of each share subscribed for shall be payable (G. C. § 8632); that no person shall vote on a share of stock on which an installment is due and unpaid (G. C. § 8636); that all directors and executive officers of corporations shall be holders of stock of the company for which they are chosen in an amount to be fixed by the by-laws (G. C. § 8661); and that "holders of stock" means bona fide owners of it, as is decided in

Dueber Watch Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455, in which a corporation issued a certificate of stock to a citizen of Ohio for the purpose of qualifying him as a director, with the agreement that he should retransfer it upon ceasing to be a director. The court says such a transaction was a fraud upon the law, and contravened the declared policy of the state, if Coburn was intended to be a nominal, and not the real, owner in fact of the stock placed in his name.

That these are not merely directory provisions of law, but are mandatory, and must be complied with before a corporation can come into existence under Ohio law, is sufficiently established by Telephone Co. v. Cincinnati, 73 Ohio St. 64, 76 N. E. 392, which decides that:

"Sections 3243 (G. C. § 8632), 3244 (G. C. § 8633) and 3245 (G. C. § 8636), Revised Statutes, taken together, require that an installment of 10 per cent. on each share of stock shall be payable at the time of making the subscription; that as soon as 10 per cent. of the capital stock is subscribed notice for the election of directors may be given; that no person shall vote for director for any share on which any installment is due and unpaid, and the votes of a majority of the number of shares shall be necessary for a choice. Tested by these requirements, the record shows that there had been no legal election of directors, and that the corporation had not been organized in such manner as to entitle it to a decree under section 3461."

Trust Co. v. Floyd et al., 47 Ohio St. 526, 26 N. E. 110, Syl. par. 3:

"The corporate powers, business, and property of corporations formed for profit must be exercised, conducted, and controlled by a board of directors, who cannot be chosen until 10 per cent. of the capital stock specified in the articles of incorporation has been subscribed."

See, also, City of Cincinnati v. Queen City Tel. Co., 2 O. N. P. (N. S.) 349.

The question we are considering being, "Is the Kardo Company a de jure corporation?" the application of Telephone Co. v. Cincinnati, 73 Ohio St. 64, 76 N. E. 392, is not affected by the fact that this decision proceeds upon the basis of the case under consideration being such a one that the Ohio rule in eminent domain cases was applied; this for the reason that, if the question of the validity of the Kardo organization may properly be raised and decided at all, then the standard for showing the validity of its corporate organization would be the same in one case as in another.

Omitting the five shares subscribed for by the attorneys engaged in organizing the company, 10 per cent. of the proposed capital stock of the company was not subscribed for when the first board of directors was chosen. No new board has been since elected, except that as the first members resigned others were named by the first claimed board of directors to fill their places.

When applying these principles of Ohio law to the facts of the case at bar, it should be kept in mind that no court in this country has been more resolute than the Supreme Court of Ohio has been in looking through corporate forms to the conduct of the associated men who desire or who pretend to constitute a corporation, and in declaring that the fiction that such men constitute a legal entity, apart from the natural persons who compose it, shall not be urged, but shall be disregarded when urged, to an extent and purpose not within the reason and policy

which introduced it for convenience in the transaction of its business and of those who do business with it. State ex rel. v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707. In this case last the court says:

"The idea that the corporation is an entity, distinct from the corporators who compose it, has been aptly characterized as 'a nebulous fiction of thought.' * * * When all has been said, it remains that a corporation is not in reality a person or a thing distinct from its constituent parts, and the constituent parts are the stockholders, as much so in essence and in reality as the several partners are the constituent parts of the partnership."

And see Bank v. Trebein, 59 Ohio St. 316, 52 N. E. 834, and Andres v. Morgan, 62 Ohio St. 236, 56 N. E. 875, 78 Am. St. Rep. 712.

Looking now through the forms which the organizers of the Kardo Company cast about themselves, we see five men who never had or intended to have one dollar of interest in the corporation which they were solemnly going through the form of organizing, acting as merest "dummies" in complying with the forms of the Ohio statute, to accomplish by indirection for these corporations, which employed them as attorneys at law, that which they could not accomplish directly for themselves; that neither the signers of the articles of incorporation nor their successors, in name directors of the proposed company, ever had any financial interest whatever in the company, although the Ohio law and even the regulations adopted by the so-called stockholders required that all directors and executive officers of the company must be bona fide owners of at least one share of stock in the company; that, excluding the five shares subscribed for by the lawyers without having any interest in the proposed company, and who never paid anything upon the account of such subscriptions, 10 per cent. of the proposed capital stock was not subscribed for prior to the election in form of a board of directors; that the 10 per cent. which became due and payable on each share subscribed by the organizers was never paid by any one of them, or by their successors, although these men voted these shares, and now claim that they elected a valid board of directors, the election of which was an indispensable prerequisite to the Kardo Company coming into existence as a valid corporation.

Upon this state of facts and of the law, can it be said that the Kardo Company was a lawfully formed and existing de jure corporation under Ohio laws? There was no law in Ohio in 1914 which authorized three corporations to organize a fourth corporation. Yet this is precisely what the American Ball Bearing Company, the Peerless Motor Car Company, and the Packard Motor Car Company attempted to do by going through the forms of organizing the Kardo Company. Not one dollar of money from any source, except from the treasuries of these three companies (indeed, only money from the treasury of the Ball Bearing Company was used for purpose of organization), was applied in payment for Kardo stock, and the men who acted as directors and stockholders were "dummies" in a most perfect sense.

[2, 3] No valid distinction can be drawn between the familiar case

in which an attempted corporate organization is held invalid and void, where there is no law providing for such a corporation as is proposed, and the case where there is no law permitting such promoters as attempt to organize a corporation to do so, even if proper persons might lawfully organize a corporation for the same purpose. Legal infirmity in parties is as fatal as legal infirmity of purpose. Neither can it be soundly said that by the granting of authority to Ohio corporations, within prescribed limits, to lawfully become stockholders in other lawfully organized corporations, there is implied a further grant of power to such Ohio corporations to themselves organize corporations in which they shall own all the stock. The power to own stock in a lawfully organized corporation is too greatly different from the power to create a corporation, and to control it, for the latter to be raised by implication from the former; this without regard to the opportunities for mischief which would be afforded to corporations to divert the corporate capital from the purposes to which it has been devoted, if such an implied power were held to exist. In grants by the public, the general rule of construction is that nothing passes by implication merely. Thompson on Corp. § 304 et seq.

Convinced as I am that not without sheer acceptance of forms and names for realities and facts can this Kardo Company be considered anything but a voluntary association of agents and representatives of the three corporations which conceived the scheme of organizing it, I am clear in the conclusion that there was no lawful authority in Ohio for the creating of a corporation such as the Kardo Company claims to be.

"The modern tendency is to ignore corporate existence in corporations organized merely as a cloak for fraud, and to hold the corporators, including officers and directors, directly liable for its acts. These corporations are usually termed 'dummy corporations.' Concerning them the New York Court of Appeals has said: 'We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth.'" Thomp. Corp. § 1417.

While there is no disposition on the part of the court to impute actual or intended fraud to the parties engaged in this enterprise, yet the law of the case is not different from what it would be if such were the fact. As was held by the Supreme Court of Ohio in Bank et al. v. Trebein, 59 Ohio St. 316, 52 N. E. 834, Syl. 3:

"The good faith of the parties to such a transaction must be determined by its legal effect on the rights of others. If its legal effect works a fraud on their rights, the finding of a court that the parties acted in good faith is simply an erroneous conclusion of law from the facts."

See Trust Co. v. Floyd, 47 Ohio St. 525, 26 N. E. 110.

It seems to me very clear that the action taken in this case by mere attorneys at law of these three corporations to bring into existence the form and name of a corporation, which they should forthwith abandon to the custody and control of the officers and directors of the three corporations, was a fraud upon the law of Ohio, no difference if every step was taken in utmost good faith by the men engaged in it.

[4, 5] I conclude, therefore, that the plaintiff, the Kardo Company,

was not when it appeared in this suit, and was not when this case was tried, a corporation lawfully organized and existing under Ohio laws:

(a) Because there was no law of Ohio permitting three corporations to combine to organize a fourth corporation to serve their purposes.

(b) Because there was not a bona fide subscription of 10 per cent. of the capital stock of the company, nor a bona fide payment of 10 per cent. of the capital stock of it paid in, when the first election of directors was held, as was required by the law of Ohio.

(c) Because the conditions upon which a corporation may be called into existence are prescribed by Ohio law, and they had not then been complied with. This law contemplates that the action prescribed shall be taken by five natural persons having an actual and real interest, at least to the extent of one share of the capital stock, in the assets and in the welfare of the corporation (Hoopes v. Basic Co., 69 N. J. Eq. 679, 61 Atl. 979), and it would be a reproach upon the law for the courts to put their stamp of approval upon so palpable an evasion of this law of Ohio as this record discloses.

[6] But the case has been argued by counsel for the plaintiff in the alternative, claiming that, even if the Kardo Company is not a lawfully organized corporation (and the payment for stock by the persons acting as directors after the question of its validity was started in this court would seem to imply that in the opinion of counsel it is not a corporation de jure), nevertheless the action proved to have been taken constitutes the company a de facto corporation, competent to come into court and assert a claim to affirmative relief against parties who have never dealt with it.

I shall consider of this claim briefly as I may. There is no doctrine in corporation law which lacks more of precision of definition as to the principles upon which it proceeds, or as to what its boundaries are, than does this doctrine of de facto corporations. Courts have almost always contented themselves with deciding the case in hand, without attempting to formulate the general principle within which it fell, and text-book writers have treated the subject as "a wilderness of single instances," which it was hopeless to attempt to classify under general principles of decision.

The only comprehensive discussion of the doctrine of de facto corporations from the point of view of the principles of law involved with which I am acquainted is one by Prof. Edwin H. Warren, found in Harvard Law Review, volume 20, page 456, and volume 21, page 305, and in order that this opinion may not be extended to an undue length, as it proceeds, I shall adopt several of the conclusions of Prof. Warren, which I think sustained by authority and sound thinking, paraphrasing them only to the extent necessary to apply them to the case at bar.

Persons by their own voluntary action may unite to accomplish any lawful purpose; but it is only union under authority of the state, in the manner prescribed by it, that gives to such a union the privileges of de jure incorporation.

Should such a group of men who fail to comply with the law nevertheless enjoy the privileges of incorporation as if they had complied with it? Should they be permitted to affirmatively assert against a

stranger a privilege or right which they do not possess? The courts have answered this question affirmatively in specific cases, all of which proceed, it is believed, on principles either of estoppel or of public policy. In many cases the two overlap and no line of demarcation is discoverable between them.

These decisions develop the doctrine of de facto corporations, and we have it under our law. It is a doctrine without authority or definition in the English courts, which seemingly allow collateral attack upon corporate organization without resulting confusion or inconvenience.

The Supreme Court of the United States in a condensed generalization of the doctrine makes it applicable only (1) where there is in existence a general law under which such a corporation as the one under consideration purports to be might lawfully be organized; (2) when there has been an attempt in good faith to organize thereunder; and (3) when there has been an actual user of the assumed corporate franchise. Even where these conditions are all fulfilled, the courts allow enjoyment of the corporate franchise, where there is not substantial compliance with the regulations of the state, only where considerations of equitable estoppel or of public policy justify it. Upon one or the other of these grounds the decision of each well-considered case applying the doctrine has found its justification.

In the case at bar the parties never contracted together, so that there is no room for application of the doctrine of estoppel, and the question therefore becomes this, viz.: May the group of men, here attorneys at law of three other corporations, or their successors, who have failed to so comply with the Ohio law as to organize a de jure corporation, apply the de facto doctrine for their own benefit against persons who have never dealt with them as a corporation, and be treated by this court as if they had been lawfully authorized to act as a legal unit? A few principles worked out upon full discussion of the decided cases and upon principle by Prof. Warren seem to me to decide this question in the negative.

It is not for courts to create corporations. Ashley v. Ryan, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. Ed. 773. The franchise to be a corporation can be granted only by the Legislature, and for courts to assume that power is to proclaim themselves de facto legislators in order to create de facto corporations. Judicial lawmaking is a sufficiently active cause of complaint against the courts to deter them from unnecessarily inviting further criticism, especially just criticism.

When there is a law under which a corporation might be lawfully organized, and an attempt in good faith is made to organize thereunder, and there is an actual user of the corporate franchise (Tulare Irrigation District v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773), the de facto doctrine will be applied, where the parties to be charged have contracted with the claimed corporation, or where it acts as a conduit for a title to real estate (Society Perun v. Cleveland, 43 Ohio St. 481, 3 N. E. 357), or where the alleged corporation is made defendant in an action in tort. It is believed the well-considered cases do not go beyond the limits thus stated. But such applications

of the doctrine all proceed, as we have said, only on principles of equitable estoppel or of public policy.

It is true that Baltimore, etc., R. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. Ed. 784, seems in a single expression to go farther than the limits thus stated, saying that the facts in that case constituted the plaintiff in error a corporation de facto, "which was all that was necessary to maintain an action against any one, other than the state, who has contracted with the corporation, or *who has done it a wrong.*" But the case called for no such holding, and not one of the cases cited as authority for it involves any question of affirmative seeking of relief by a de facto corporation. If the expression had been "or who has been wronged by it," it would have been pertinent to the case under discussion, and would have been justified by authority. Perhaps this is what the writer intended to say.

The doctrine that the existence of a corporation may not be attacked collaterally is often assumed to be the protection, and also the measure of the rights, of a de facto corporation. But this doctrine cannot properly be used to support the application, to such a case as the one at bar, of the proposition that, if certain persons assume to act as a corporation, all but the state must submit to their usurpation of right. We are dealing with a case where the court finds there is no de jure corporation, because there was no Ohio law under which such parties as attempted to organize the Kardo Company could lawfully become incorporated, and also because, under the construction placed upon the Ohio Statutes by the Supreme Court of that state, there was a failure to perform certain legislative conditions indispensably precedent to the calling into existence of a corporation. For these reasons the case does not fall within the scope of the doctrine as quoted herein from the decision of the Supreme Court of the United States.

I cannot think that any inconvenience there may be in investigating the validity and regularity of the corporate organization of the party plaintiff is a consideration of public policy (no other can exist in the case) of sufficient weight to justify courts in granting to persons who have failed to comply with the law substantially all of the rights which they would have had if they had complied with it. Ohio courts have not found this difficulty insuperable, in a suit by a de facto corporation on a subscription to its stock (Raccoon River Co. v. Eagle, 29 Ohio St. 238), or in eminent domain cases (contrary to the general current of opinion), and generally the doctrine has not been applied where it can be proved that no law existed under which such a corporation as the pretended one could have been organized, or where there was a failure to create a de jure corporation because of lack of good faith (185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773, supra).

Without going more into detail, the Kardo Company, having failed to become a de jure corporation for the reasons in this opinion stated, and having special regard to attitude of Ohio courts towards the fiction of corporate entity, and their refusal to apply the de facto doctrine in many cases in which courts of other states have applied it, I agree with the well worked out conclusion of Prof. Warren that

there is no principle of public policy and no established doctrine of law requiring that, under such facts as this case presents, if a group of men not invested with corporate privilege assume to exercise it, strangers to them must submit to their usurpation of right until the state sees fit to question it, and that therefore the Kardo Company cannot maintain this suit under the de facto doctrine. It is a doctrine to be used as a shield, but not as a sword.

[7] It is further contended that the question as to the capacity of the Kardo Company to maintain this suit cannot be raised and decided by this court, because it is not made by the pleadings in the case. It is enough to say that this is a suit in equity to which both section 37 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1098 [U. S. Comp. St. 1913, § 1019]) and rule 37 of the new equity rules of 1912 (198 Fed. xxviii, 115 C. C. A. xxviii) are applicable, and that under the authority of these, as well as under the general authority of a court to prevent imposition upon its jurisdiction, I have no doubt that it is within the power, and that it is the duty, of this court when it believes, as I believe in this case, that a plaintiff is without legal capacity to maintain a suit before it to proceed no further therein, but to dismiss the case. I cannot assent to the conclusion that a court is so bound by rules of practice that it must enter a judgment in favor of or against a corporate name which it believes has no right in court, either as a corporation de jure or de facto, simply because the parties to the cause may not have made the validity of the corporate powers of the plaintiff an issue by their pleadings.

For the reasons herein stated, I find that the Kardo Company has not legal capacity to maintain this action, and the suit will be dismissed.

PARK SQUARE AUTOMOBILE STATION v. AMERICAN LOCOMOTIVE CO.

(District Court, N. D. New York. March 30, 1915.)

REMOVAL OF CAUSES ⊂⊃14—SUIT BROUGHT IN STATE WHERE NEITHER PARTY RESIDES—"PROPER DISTRICT."

Judicial Code (Act March 3, 1911, c. 231) § 51, 36 Stat. 1101 (Comp. St. 1913, § 1033), provides that civil suits in District Courts of the United States, where jurisdiction is founded only on the fact that the action is between citizens of different states, "shall be brought only in the district of the residence of either the plaintiff or the defendant." Under section 28 (Comp. St. 1913, § 1010), which provides for the removal from state courts of suits of which the federal courts are given original jurisdiction, any such suit between citizens of different states may be removed by the defendant, being a nonresident of the state where the action is brought, into the District Court of the United States "for the proper district." Section 29 (Comp. St. 1913, § 1011), relating to removal procedure, provides that a party entitled to remove may file a petition for the removal of the cause "into the District Court to be held in the district where such suit is pending." *Held*, that a plaintiff, by bringing suit in a state court of a state in which neither the plaintiff nor the defendant resides, cannot deprive the defendant of the statutory right of removal given him by section 28, and that, as the District Court for such district would be with-

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

out jurisdiction in that case, section 29 is inapplicable, and the "proper district" into which the cause is removable is the district of defendant's residence.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 35; Dec. Dig. ⊂⊃14.

For other definitions, see Words and Phrases, Second Series, Proper District.]

At Law. Action by the Park Square Automobile Station against the American Locomotive Company. On motion by plaintiff to remand to the superior court of the state of New Hampshire, and motion by defendant to make a late entry in this court. Defendant's motion granted. Motion to remand denied.

Sawyer, Hardy, Stone & Morrison, of Boston, Mass., and Albert Terrien, of Nashua, N. H., for plaintiff.

Daniel Naylon, Jr., of Schenectady, N. Y., Storey, Thorndike, Palmer & Dodge, of Boston, Mass., and Taggart, Burroughs, Wyman & McLane, of Manchester, N. H., for defendant.

RAY, District Judge. So far as the motion by defendant for late entry is concerned, the motion is granted, as I deem it in the interest of justice. The errors and mistakes sought to be corrected grew out of misapprehension and errors as to the true residence, etc., of the defendant. In fact, no serious opposition is made to the granting of the application.

The motion to remand presents a serious and more difficult question, arising from what appear to be conflicting provisions of the Judicial Code of the United States, more particularly those relating to the bringing of actions in the District Court of the United States and the removal of causes thereto from the state courts.

The jurisdiction of the District Courts of the United States over suits brought therein or removed thereto from the state courts is purely statutory. This jurisdiction is defined, and the Judicial Code prescribes what actions at law brought in the state courts may be removed to the District Courts of the United States. The Judicial Code referred to also prescribes a mode or method of procedure for such removal, or for removal in certain cases. An action at law, where the amount in controversy, exclusive of interest and costs, exceeds $3,000, and the parties thereto are residents of different states, may be brought in the United States District Court of the district in which either the plaintiff or the defendant resides. There are local causes of action and transitory causes of action, and an action of the latter class may be brought by a plaintiff in the District Court of the United States in any district where the defendant is found, provided the plaintiff resides there, or in the District Court of the district where the defendant resides; that is, the plaintiff may go from the state and district of his own residence into the district where the defendant resides in another state, and there bring his action in the United States District Court, provided the required amount is in controversy. The question involved in this case relates to the District Court of the

United States to which causes may or must be removed, if removed at all, and to the question whether a citizen of state A, by suing a citizen of state B in the state court of state C, may prevent removal, or, if not, compel removal to the United States District Court of state C, if removed.

The plaintiff, Park Square Automobile Station, a corporation of the state of Maine, commenced this action in the superior court for Hillsborough county, in the state of New Hampshire, against the American Locomotive Company, defendant, a corporation of the state of New York, where it has its principal offices and place of business, and within the four days within which by rule 10 of the said superior court the defendant was required to file a plea in abatement, if any, the defendant filed its petition to remove the cause from said superior court to the United States District Court of the United States for the Southern District of New York. The attorneys for the defendant then supposed that the defendant had its residence or principal place of business in said Southern district of the state of New York and acted on that assumption. The required bond was given and application was made to the said superior court on the required papers for an order removing the cause. The superior court aforesaid declined to grant the order or surrender jurisdiction. The defendant, it is said, had two remedies, one of which was to appeal from the superior court to the Supreme Court of the state for review of the order denying removal, and the other was to go to trial and raise the question on appeal from any judgment that might be rendered against it. The superior court of the state of New Hampshire declined to proceed with the cause until the question of removability should first be settled by the Supreme Court of the state. Later, the defendant's attorney having learned that the residence and principal office and place of business of the defendant was in the Northern district of New York, and not the Southern district, the defendant moved on petition to amend its former petition, so as to remove the said suit from the superior court of Hillsborough county, state of New Hampshire, to the District Court of the United States for the Northern District of New York, where in fact its residence and principal place of business are.

This petition the state court of New Hampshire allowed, in so far as it had the right so to do, so stating, as of the time when the original petition was filed, but at the same time declined to surrender jurisdiction of the case. The plaintiff thereupon moves to remand the cause to the superior court, assuming that it has been removed to the Northern district of New York, on the ground mainly that the suit could not be removed from the superior court of the state of New Hampshire to the United States District Court for the Northern District of New York, even though that district in the state of New York was the home residence and principal place of business of the defendant corporation.

By chapter 2, § 24, of the Judicial Code (Judiciary Act March 3, 1911, c. 231 [Comp. St. 1913, § 991]), Congress has prescribed the original jurisdiction of the District Courts of the United States as

including, first, (a) all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue; (b) all suits between citizens of the same state claiming lands under grants from different states; and (c) all suits where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 *and* (first) arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority; or (second) is between citizens of different states. The suit now in hand is an action at law and was brought by a corporation of the state of Maine against a corporation of the state of New York, and the sum or value in controversy is, exclusive of interest and costs, largely in excess of the sum or value of $3,000, and such suit is therefore one of which the United States District Court of some district had and has original jurisdiction. The suit must have been brought by the plaintiff against the defendant in the United States District Court of the residence of the defendant, or plaintiff, if brought in the United States court, as we shall see, and is a removable cause, as we shall see, having been brought in the superior court of one of the counties of the state of New Hampshire.

Where Suit Might Have Been Brought.

By section 51 of such Judicial Code of the United States it is provided:

"* * * And except as provided in the six succeeding sections, *no civil suit* shall be brought in any District Court against any person by any *original* process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought *only* in the district of the residence of either the plaintiff or the defendant."

By section 52 of said Judicial Code (Comp. St. 1913, § 1034) it is provided that where a state contains more than one district, and there is but a single defendant (and such is this case), the suit, if *not* of a local nature (this case), must be brought in the district wherein such defendant resides.

It follows that, if this suit had been originally brought in the District Court of the United States, it must have been brought in the District Court of the Northern District of New York, as that is the district in which the defendant then resided and now resides, was incorporated, and had its principal office and place of business, and such suit is not of a local nature. The Northern district of New York would have been *"the proper district"* in which to bring the action. Whether or not that is *"the proper district"* to which removal from the state court is to be made, or may be made, is the question.

To What District Removable.

Chapter 3, §§ 28 to 39, inclusive, of the said Judicial Code (Comp. St. 1913, §§ 1010–1021), deals with the removal of causes from the state courts to the District Courts of the United States, and certain of these sections prescribe what causes may be removed, and others deal

with procedure in case removal is sought. Section 28 of the Judicial Code provides as follows:

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district. And where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the District Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said District Court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause. * * * Whenever any cause shall be removed from any state court into any District Court of the United States, and the District Court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed: Provided, that no case arising under an act entitled 'An act relating to the liability of common carriers by railroad to their employés in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

By this section (section 28) the right of removal of a cause to "the District Court of the United States for *the proper district* by the defendant or defendants therein, being nonresidents of that state," is made absolute. The word "therein" refers to the defendants in the suit, not to the defendants residing or being in the state. It seems evident that it was the intention of Congress to enable a nonresident defendant, sued in a state court by a resident of that or any other state, to remove the cause to the United States District Court of some district, provided the diversity of citizenship and necessary amount in controversy is present.

By section 29, relating to procedure in removable causes, it is provided:

"Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court to be held in the district

where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also, for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

It is contended and urged that the words, "he may make and file a petition * * * for the removal of such suit into the District Court to be held in the district *where such suit is pending,*" not only limits and restricts the right of removal to the United States District Court of the particular state in the courts of which the suit is pending, but to the particular United States District Court of that state held in or including the district of the state within which the suit in the state court was brought and is pending, and that this section 29, relating to the procedure in removing causes from the state court into the United States court, also defines and specifies "the District Court of the United States *for the proper district,*" as those words are used in section 28, as being the District Court of the United States to be held in the district within which the suit was pending in the state court, regardless of the actual residence and domicile of the parties to the suit, or of either of them, and regardless of the District Court of the United States in which suit must have been brought if it had been originally brought in the United States District Court; that is, that the "District Court of the United States for the proper district," so far as bringing the action is concerned if brought in the United States District Court originally, is one thing, and quite different from the "District Court of the United States for the proper district," when removal from the state court to the United States District Court is concerned or in question. If the "District Court of the United States for the proper district" to which a cause brought in the state court may be removed is the United States District Court of the district in the state where the suit is actually brought, regardless of the District Court of the United States in which, under the statute, the suit ought to have been brought, and must have been brought if originally commenced in the United States District Court, then, under the statutes to which attention has been called, a state may provide for the commencement of an action by a nonresident plaintiff against a nonresident in its courts under almost any and all circumstances, and while the defendant may remove such cause into the United States District Court (but this is questionable) he can only remove it into the District Court of the United States of the state in which state suit was brought in the state court, and that particular federal district of such state in which was situate the county or judicial division of the state in which the suit was commenced. In short, the

suit cannot be removed to the District Court of the United States in which it must have been brought if commenced in the federal court, as that, for removal purposes, would not be the "proper district."

It would seem at first blush that "the proper district" for the trial of a cause removed from the state court to the District Court of the United States is the district in which Congress has said that the suit must be brought and tried if brought in the United States District Court in the first instance. But there is no constitutional right to the removal of a cause like this from the state court to the United States District Court (In re Cilley [C. C.] 58 Fed. 977), and Congress has the right and power to provide for the removal of such causes from the state to the United States court, and no legislative or judicial power of a state can thwart, or defeat, or limit, this power of removal (Tennessee v. Davis, 100 U. S. 257, 265, 25 L. Ed. 648, 651; Goldey v. Morning News, 156 U. S. 518, 523, 15 Sup. Ct. 559, 39 L. Ed. 517, 519). While the primary purpose of removal is for the trial of the cause, and it cannot be removed merely for some other purpose (Vannevar v. Bryant, 21 Wall. 41, 22 L. Ed. 476), still, once removed, the jurisdiction of the federal court attaches for all purposes, and the service of the summons in the state court may be set aside and the case dismissed (Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272). The right of removal can only be exercised as provided by some act of Congress. Gumbel v. Pitkin, 124 U. S. 131, 153, 8 Sup. Ct. 379, 388, 31 L. Ed. 374, where it is said:

"It is impossible to transfer suits pending in the state courts into the Circuit Courts (now District Courts) of the United States, except as provided by act of Congress for the removal of such causes."

It is, of course, competent for Congress to provide for the bringing of certain actions in the District Courts of the United States, and specify the District Court in which such action must be commenced and prosecuted. It does not follow, however, that a cause of the same nature, and between the same parties even (not the same cause of action), if brought in the state court and a removable one, must be removed to the United States District Court of the district in which it must have been commenced if originally brought in the District Court of the United States. Removal causes may be tried and disposed of in the District Court of the United States of the district to which Congress has said they shall be removed and tried, even if Congress has said they could not have been brought there originally. The result is, if the plaintiff's contention here is correct, that a plaintiff, by suing a nonresident defendant in the state court of a state in which neither party resides (the parties residing in different states and the amount in controversy being sufficient), compels the defendant, if he removes the cause to the United States District Court, to remove it to a particular District Court in the state where the plaintiff commences his action, and prevents the defendant from removing it to the District Court of the United States in the state of the residence of either the plaintiff or the defendant. Has Congress done this? Is that the intent and true construction of the removal statute? I am of the opinion it was not necessary for Congress to provide a mode or *course of*

procedure in order that causes pending in the state courts may be removed from those state tribunals to the United States courts. If Congress had enacted section 28 of the Judicial Code alone, the right of removal would exist, and the courts, in exercising their jurisdiction and power of removal conferred by such section, could prescribe their own form of procedure. If section 28 stood alone, we would naturally say removal must be to the District Court of the United States of the district where the action could have been originally brought and no other. That would be "the District Court of the United States for the proper district." That would be the proper district in which to bring it, and in which to try it, and it would seem the appropriate and suitable district to which to remove it, if brought in the state court.

By the act of 1887–88, the right of removal was somewhat restricted, and section 2 of the act of 1875 was amended, so as to read as does section 28 of the Judicial Code, except that the words "by the preceding section" are changed to "this chapter," and "Circuit Court" now reads "district court." As to procedure in removal cases, in the acts of 1789, 1866, and 1867 the procedure on removal was given in the same section conferring the right of removal; but in the later act of 1875 the method of removal was prescribed in a separate section. This procedure was somewhat modified by the acts of 1887–88 (25 Stat. 433, 1 Supp. R. S. [2d Ed.] 611 [Comp. St. 1913, § 1010]), amending sections 1, 2, and 3 of the act of March 3, 1875 (18 Stat. 470, c. 137). Section 3 of that act, as amended, provided that a party desiring to remove a suit mentioned in the preceding section might make and file a petition in such suit and in such state court for the removal of the cause into the Circuit Court to be held in the district where such suit was pending, and should make and file a bond therewith, with good and sufficient sureties, for his or their entering in such Circuit Court a copy of the records, etc. Section 3 of the act of 1875 provided that, whenever a party desired to remove a suit from the state court to the Circuit Court of the United States, he might file a petition in the state court "for the removal of such suit into the Circuit Court to be held in the district where such suit is pending," and should make and file a bond, etc. In Hess v. Reynolds, Administrator, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927, it was held that:

"The removal in all cases is into the Circuit Court of the district which embraces territorially the state court in which the suit is pending at the time of the removal, without regard to the place where it originated."

The court said:

"It is argued that the cause should have been removed to the Circuit Court for the Western District of Michigan, instead of the Eastern, because the county of Ionia, in which the suit originated, is in the former. But the language of the removal statute is that suits shall be removed into the Circuit Court of the district where such suits are pending. Undoubtedly this means where they are pending at the time of removal. This suit was not then pending in the Western district of Michigan, but in the county of Jackson, which is in the Eastern district of that state."

Section 639 of the Revised Statutes provided:

"Any suit commenced in any state court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed, for trial, into the Circuit Court, for the district where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section."

This was an express provision for the removal of such a suit from the state court to a particular court, viz., the Circuit Court for the district where such suit was pending, and of course excluded the right of removal to any other Circuit Court. It will be noted that since that time the statute has been so changed that the right of removal is expressly given in one section, while the mode of removal is given in another section, and by the changes made in the removal statutes since the enactment of the quoted section of the Revised Statutes removal is to be made, not to the District Court in a specified district, but to the District Court of the proper district. These changes in my judgment are significant. This court is unable to comprehend why Congress should have limited a plaintiff in bringing his action in the United States court to the district of the residence of either the plaintiff or the defendant, at the same time leaving it open for the plaintiff to bring his suit in the state court of any state where he can find the defendant, and then provide that, in case the defendant seeks removal, he is limited to the District Court of the United States which includes the territory in which is the state court in which the plaintiff elected to bring his action. Such a construction of the existing statutes leaves it open for the plaintiff in many cases to compel the defendant to submit himself to trial either in the state court of a state of which he is not a resident or an inhabitant, or in the District Court of the United States of that state, when he could not have been sued there under the laws of Congress. In short, in many cases the plaintiff, by availing himself of some state statute, may defeat the policy of the federal statute as to the place or jurisdiction in which actions may be brought in the federal court.

In re Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, Wisner, a citizen of the state of Michigan, sued Beardsley, a citizen of the state of Louisiana, in the state court of the state of Missouri within the territory included in the Eastern federal district of said state. Within the time fixed by statute Beardsley filed his petition for removal of the cause from the state court into the United States Circuit Court of the Eastern Division of the Eastern District of Missouri, with the requisite bond. This district included the territory in which the suit in the state court was pending. An order of removal was duly entered, and the transcript of the record duly filed. Motion to remand was duly made by Wisner, and denied. Wisner applied to the Supreme Court of the United States for mandamus, and leave to file was granted. That court held that the motion to remand should have been granted, and that, as the Circuit Court of the United States to which removal was made *had no jurisdiction to proceed with the cause,* mandamus was the proper remedy. The grounds of this de-

cision, as plainly appears from the opinion of Mr. Chief Justice Fuller, and stated by him in his dissenting opinion in the later case of In re Moore, 209 U. S. at page 512, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, overruling the Wisner Case, were that (1) the removal statutes of March 3, 1887 (24 Stat. 552, c. 373), as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866), and which amended sections 1, 2, and 3 of the act of Congress of March 3, 1875 (18 Stat. 470, c. 137), did not confer any jurisdiction on the Circuit Courts of the United States of a given state to hear, try, and determine suits between parties, both being citizens of other states, and not being citizens of the same state, jurisdiction in the United States court being based on diversity of citizenship and amount in controversy; (2) that therefore, the parties being citizens, the plaintiff of Michigan, and the defendant of Louisiana, neither of the state of Missouri, the United States court in the Eastern district of Missouri had *no jurisdiction* of the case. In Re Moore, supra, Mr. Chief Justice Fuller, speaking of the Wisner Case, said:

"In my judgment, section 1, in cases where litigants are citizens of different states, confers jurisdiction only on the Circuit Court of the district of the plaintiff's residence and the Circuit Court of the district of the defendant's residence; and it is not conferred on the Circuit Court of the district of neither of them, and cannot be even by consent. If this were not so, as Mr. Justice Harlan said in Bors v. Preston, 111 U. S. 255 [4 Sup. Ct. 407, 28 L. Ed. 419] 'it would be in the power of the parties by negligence or design to invest those courts with a jurisdiction expressly denied to them,' or where, it may also be said, such jurisdiction was not expressly conferred. This view was expressed in Re Wisner, 203 U. S. 449 [27 Sup. Ct. 150, 51 L. Ed. 264], and although it is true that the proposition need not have been there announced, because in that case it was correctly decided that there was not a consent to the jurisdiction by both parties, yet the rule was so laid down, and the result of the opinion in this case is to disapprove of and overrule In re Wisner, so far as that proposition is concerned. And as I adhere to that view I dissent."

The learned Chief Justice quoted the language of Mr. Justice Gray in Shaw v. Quincy Mining Co., 145 U. S. 444, 446, 12 Sup. Ct. 935, 36 L. Ed. 768, with approval. In concluding the opinion in the Wisner Case, Mr. Chief Justice Fuller said:

"A petition and bond for removal are in the nature of process (quoting Mr. Justice Brewer in Kinney v. Columbia Savings & Loan Association, 191 U. S. 78, 82 [24 Sup. Ct. 30, 48 L. Ed. 103]). They constitute the process by which the case is transferred from the state to the federal court."

He adds:

"When, then, Beardsley filed his petition for removal, he sought affirmative relief in another district than his own."

In the whole opinion in this Wisner Case there is no suggestion that Beardsley could not have removed the cause to the District Court of his residence and state citizenship, except the remark found on page 457 of 203 U. S., and page 152 of 27 Sup. Ct. (51 L. Ed. 264), viz.:

"As it is the nonresident defendant *alone*, who is authorized to remove, the 'Circuit Court for the *proper* district' is evidently the Circuit Court of the district of the residence of the plaintiff."

As the suit might have been brought in the district of the residence of the defendant, this court is of opinion "defendant" is what was in-

tended. Really the Wisner Case decided that Beardsley, by filing his petition for removal into the Circuit Court of the United States for the Eastern District of Missouri, did not waive the objection that he was in effect sued in the wrong district, and also, as heretofore stated, that the Circuit Court of the United States had no jurisdiction, for the reason defendant could not have been sued there, and plaintiff could not have brought his suit there.

It cannot be denied that all the District Courts of the United States have had conferred upon them by the statutes referred to *general jurisdiction* of all suits where there is found diversity of citizenship and requisite amount in controversy. This is plain from the reading of the Judicial Code, and the cases referred to, and the statutes referred to, but now repealed. This general jurisdiction of the subject-matter of the suit (except it be those of a local nature) is not affected by the provisions that suit can only be brought by a plaintiff in a specified district. This right to be sued in a particular district is a personal one, and may be waived by the defendant if sued in the wrong district, or if removal is had to the wrong district—a district which is not "the proper district." Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; Matter of Moore, 209 U. S. 490, 501, 28 Sup. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164. In Matter of Moore, supra, the court held that:

"While consent cannot confer on a federal court jurisdiction of a case of which no federal court would have jurisdiction, either party may waive the objections that the case was not brought in, or removed to, the particular federal court provided by the statute."

At page 501 of 209 U. S., page 588 of 28 Sup. Ct. (52 L. Ed. 904, 14 Ann. Cas. 1164), the court said:

"The contention is that, as this action could not have been originally brought in the Circuit Court for the Eastern District of Missouri by reason of the last provision quoted from section 1, it cannot under section 2 be removed to that court, as the authorized removal is only of those cases of which by the prior section original jurisdiction is given to the United States Circuit Courts. But this ignores the distinction between the general description of the jurisdiction of the United States courts and the clause naming the particular district in which an action must be brought."

In Interior Construction & Improvement Co. v. Gibney, 160 U. S. 217, 219, 16 Sup. Ct. 272, 273 (40 L. Ed. 401), Mr. Justice Gray thus stated the law:

"Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection."

It is evident that the District Court of the Northern District of New York has jurisdiction of the subject-matter of this suit and also

of the defendant, who resides there and is a citizen thereof, having its principal offices and place of business there, where it was incorporated, and it having removed the cause to that district. As the Northern district of New York was "the proper district" for bringing the action, why not the "proper district" into which to remove the cause from the state court? It is conceded that the cause could not have been removed to, and cannot be removed to, the United States District Court of the state of New Hampshire without the consent of both parties, as the action could not have been brought there by either party. That District Court would have jurisdiction, if both parties consented; but they do not. By express provision the Northern district of New York does have original jurisdiction of the subject-matter of the suit and of the defendant. The plaintiff, a corporation of the state of Maine, has sued the defendant, a corporation of the state of New York, in the superior court of the state of New Hampshire, a court whose jurisdiction is bounded by a single county, and its right to so sue is based on a state statute giving the right, for the reason defendant was doing some business there. Diversity of citizenship exists, as does the requisite amount in controversy, over $30,000. Congress, having plenary constitutional power to so enact, has said (section 28, Judicial Code):

"Any suit of a civil nature, at law or in equity * * * [referring to cases arising under the Constitution and laws of the United States], of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. *Any other suit* of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title [this suit, as we have seen], and which are now pending or which may hereafter be brought in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein."

Here is an absolute right of removal given, and there is no exception and no limitation, unless it be that the words "for the proper district" mean, not the district where the suit must have been brought if commenced in the United States District Court, but that particular district to which a method or mode of procedure for removal in another section is stated. In short, it is asserted that, inasmuch as Congress did not provide a mode or method of procedure for the removal of causes from the state court to the United States District Court of the residence of either the plaintiff or the defendant, or any other federal court where plaintiff sues the defendant in a state court of a state where neither party resides, there is no right of removal in such a case. On the one hand, it is held that for the reason the plaintiff could not have brought the case in the United States District Court of the state where he sued in the state court rightfully according to the laws of the state, the defendant in a suit cannot remove the cause into the federal court of that state, neither party residing in that state, even though the United States District Court of that state has general jurisdiction of the cause and the procedure specified in section 29 would allow it; and, on the other hand, it is claimed, and has been held in at least two cases, that as no procedure is provided for the removal of

such a cause so brought in the state court of a state where neither party resides, although the requisite diversity of citizenship and amount in controversy exist, there is no right of removal, and hence a plaintiff nonresident, by electing to sue a nonresident of the particular state in such state court, being enabled to do so by the laws of such state, absolutely deprives the defendant of the right of removal to the District Court of the United States. Is this equal protection of the laws? Is it necessarily true that "the proper district" is the one to which the procedure clause says the defendant "may" petition to have the cause removed? If this be true, Mr. Chief Justice Fuller and the entire Supreme Court of the United States were in error as to the meaning of the words "the proper district" used in the prior removal acts of Congress, and used in the same connection as in the present Judicial Code.

There has, thus far, been a diversity of holdings on this question by the District Courts of the United States. In St. John v. United States Fidelity & Guaranty Co. (D. C.) 213 Fed. 685, Judge Rose (District of Maryland) held that a case brought in a state court of the state of Montana against a corporation of the state of Maryland by a citizen of the state of Wyoming could not be removed into the United States District Court of the state of Montana, or into the United States District Court of the state of Maryland, the residence and place of incorporation and business of the defendant, as neither the plaintiff nor the defendant resided in the state of Montana, where the suit was brought in the state court. In short, that court held that in such a case the right of removal does not exist, notwithstanding the provisions of section 28 of the Judicial Code, because of the procedure provisions of section 29.

In Stewart v. Cybur Lumber Co. (D. C.) 211 Fed. 343, Judge Toulmin (Southern District of Alabama) held that in such a case, while defendant could not remove the cause from the state court to the District Court of the state in which the suit was brought, as neither party resided there, he could remove it to the District Court in the state of his residence.

In Keystone Development Co. v. American Locomotive Co. (court of common pleas of Alleghany county), on petition of defendant for removal from the Pennsylvania state court to the Northern district of New York, the plaintiff was a corporation of the state of Arizona, and defendant a corporation of the state of New York, and Judge Carpenter held (not reported) that such removal was proper, and, writing an opinion, granted the order of removal.

In Mattison v. Boston & Maine Railroad Co. (D. C.) 205 Fed. 821. this court said that, inasmuch as the courts had held that a defendant could not remove a cause brought in the state court of a state of which neither party was a resident to the United States District Court of that state, the proper United States District Court to which removal should have been made was that of the residence of the defendant or plaintiff, and the cause having been commenced in the state court of the state of New York, of which state neither the plaintiff nor the defendant was a resident, and removed to the United States District

Court of the Northern District of New York, in which district the suit was brought in the state court, remanded the cause. It was not necessary, in deciding the case, to go into the question here presented, as the cases are quite uniform in holding that the cause was improperly removed to the United States District Court of the Northern District of New York. See, also, Louisville and N. R. Co. v. Western Union Tel. Co. (D. C.) 218 Fed. 91.

If the procedure clauses in section 29 of the Judicial Code are to fix and determine "the proper district" into which a cause may or must be removed, if removed, I do not see why a cause brought in the state court of a particular state of which neither the plaintiff nor the defendant are citizens or residents may not be removed into the District Court of the United States of that state in which the action is brought, regardless of the residence of the parties thereto. Section 28 says that:

"Any other suit of a civil nature, at law or in equity, of which * * * District Courts of the United States are given jurisdiction by this title, and which are now pending, or which may hereafter be brought in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."

General original jurisdiction of all suits, where there is diversity of citizenship and the requisite amount in controversy, is given to the United States District Courts, as we have seen, and as has been decided by the Supreme Court of the United States again and again. The provision that such a suit must be brought in a particular district, that of the plaintiff or the defendant, "does not touch the general jurisdiction of the court over such a cause between such parties," but is for the protection of parties, and "affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege." Interior Construction & Improvement Co. v. Gibney, supra, 160 U. S. 217, 219, 16 Sup. Ct. 272, 40 L. Ed. 401. It is not essential to this power of removal that either party reside in the state where the suit is brought in the state court. It is a case within the general jurisdiction of the United States District Courts, and may be removed from the state court to the United States District Court. So says the statute, and there is no exception or limitation, provided there be diversity of citizenship and the requisite amount in controversy. If plaintiff resides in state A, defendant in state B, and the suit is brought in the state court of state C, there is diversity of citizenship. This means that the plaintiff and defendant are not residents or citizens of the same state. Section 29 provides in explicit terms, and makes but one exception:

"Whenever *any* party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time, * * * for the removal of such suit into the District Court to be held in the district where such suit is pending," etc.

The proceedings having been entered, etc., the parties are to plead, and then "the cause shall then proceed in the same manner as if it had

been originally commenced in the said District Court." Here is no limitation or suggestion of limitation to suits brought in the court or courts of a state where one of the parties thereto resides. Its terms apply to any and all suits brought in the state courts where there is shown by the pleadings diversity of citizenship and the requisite amount or value in controversy. If, then, section 29 determines the "proper district," it is that District Court of the United States "to be held in the district where such suit is pending" in the state court, and all suits are included, except those sought to be removed for local influence or prejudice.

There is a clause in section 53 of the Judicial Code (Comp. St. 1913, § 1035) which is a part of chapter 4, relating to "District Courts —Miscellaneous Provisions," and which clause reads as follows:

"In all cases of the removal of suits from the courts of a state to the District Court of the United States such removal shall be to the United States District Court in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of United States courts, shall be deemed to refer to the terms of the United States District Court in such division."

In a note to this section found in Hopkins' Judicial Code, page 80, it is said:

"This section supersedes a number of previous sections applicable to particular divided districts."

Construed strictly, this clause of section 53 of the Judicial Code would indicate that all suits removed from the courts of a state must be removed to the District Court of the United States in which the county is situated from which the removal is made. This provision, however, applies to the District Courts of those judicial districts having more than one division, and requires that, when a cause is removed to a district which has more than one division, the removal shall be to the division in which the county is situated from which the removal is made, provided, of course, that the removal is made to a district embracing the geographical division of the state in which the suit was brought in the state court. It could have no application where removal is made to a District Court of the United States other than the one embracing geographically the county in which the suit was pending in the state court.

It may be argued, however, with great force, that, reading sections 29 and 53 together, it is plain that Congress intended that the removal of causes in all cases not otherwise specifically provided for must be to the United States District Court in which is situated the court or judicial district or division from which the removal is made. This court would so hold, but for the numerous decisions that a cause cannot be removed from a state court to a District Court of the United States other than that where one of the parties to the suit resides or of which such party is a citizen. This court is of the opinion that it was not intended by Congress, in enacting the various provisions referred to and quoted from, to deprive a defendant of the right to remove the cause wherein he is made a party to the United

States District Court of some district, when the plaintiff sees fit to go into a state of which neither party is a resident and there, availing himself of the state laws, brings an action in the state court.

It is impossible for this court to understand that it was intended by Congress to leave it within the power of a plaintiff to deprive the defendant in a suit brought by such plaintiff of the right to remove the cause into the United States court for trial by going into a state of which neither party is a resident or citizen and there commence his action, when he could not so deprive the defendant of the right of removal by bringing his suit in the state of the residence of either the plaintiff or the defendant. The statutes relating to the removal of causes should be construed to prevent this result, if possible.

The conclusion is that this cause was rightfully removed from the superior court of the county of Hillsborough, state of New Hampshire, to the United States District Court for the Northern District of New York, and the motion to remand is therefore denied. There will be orders accordingly.

RALLI et al. v. SOCIETA ANONIMA DI NAVIGAZIONE a VAPORE "G. L. PREMUDA."

(District Court, S. D. New York. March 31, 1915.)

1. SHIPPING ⟸197—GENERAL AVERAGE—LIABILITY OF CARGO TO CONTRIBUTE —NEGLIGENCE OF SHIP.

Under the maritime law as recognized and enforced in England, Germany, and the United States, general average is payable by cargo, notwithstanding negligence of the ship which occasioned the peril, if the charter party or bill of lading contains a clause exempting from negligence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 623; Dec. Dig. ⟸197.]

2. COLLISION ⟸144—LOSS OF OR INJURY TO CARGO—DAMAGES RECOVERABLE UNDER ENGLISH LAW.

Under the English admiralty law, in case of collision for which both ships were in fault, owners of cargo in one can recover only one-half their damages from each of the colliding vessels.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 296; Dec. Dig. ⟸144.]

3. SHIPPING ⟸195—GENERAL AVERAGE—RECOVERY BACK OF CONTRIBUTION.

A general average adjustment is not analogous to an account stated, and the fact that a contribution in general average has been paid does not preclude the one paying it from recovering it back, when because of subsequent events equitable considerations require its repayment.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 618-621; Dec. Dig. ⟸195.]

4. SHIPPING ⟸195—GENERAL AVERAGE CONTRIBUTION TO COLLISION DAMAGE—RECOVERY FROM OTHER VESSEL—RIGHT OF CARGO CONTRIBUTOR TO RECOVER BACK.

Under the English law general average contributions are not regarded as a part of the damage recoverable in a suit for collision; and where, in a suit for collision in an English court, both vessels were found in fault, and each recovered half its actual damage from the other, one which had been in part reimbursed for such damage by general average

contributions from the cargo, although protected from direct liability for its own half of such contributions by an exemption clause against negligence in its bill of lading, from considerations of natural justice, will not be permitted to retain the portion recovered from the other ship, but is liable to the cargo owners therefor.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 618-621; Dec. Dig. ⊂⊃195.]

In Admiralty. Suit by Lucas Eustratio Ralli and Anthony Alexander Vlastro against the Societa Anonima di Navigazione a Vapore "G. L. Premuda." Decree for libelants.

Burlingham, Montgomery & Beecher, of New York City (Roscoe H. Hupper, of New York City, of counsel), for libelants.

Lorenzo Ullo, of New York City, for respondent.

MAYER, District Judge. The controversy here to be determined is both novel and interesting, and counsel agree that there are no cases to be found in the books in which the question under consideration has been presented or discussed.

The facts are undisputed. Libelants are merchants doing business under the name of Ralli Bros. and have an office in Manhattan, New York City, while respondent is an Austrian corporation, with an office at Trieste, Austria, and is the owner of the steamship Aristea, of 2,159 tons net register. On October 28, 1909, respondent chartered the Aristea to Ralli Bros., who loaded the steamer at Karachi, India, with a general cargo destined for London and Hamburg, part of which they owned, and the remainder of which was shipped for the account of others. The charter party, executed at London, contained a clause of exemption from negligence in the following language:

"Strandings and collisions and all losses and damages caused thereby are also excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners. * * *"

It also provided:

"All questions of average to be settled according to the custom of the York-Antwerp rules, 1890, by average adjusters to be mutually agreed by the owners and charterers."

Bills of lading issued in a common form likewise contained a negligence clause identical with that of the charter party. The Aristea proceeded to London, discharged part of her cargo, and had started on her voyage to Hamburg early in March, 1910, when, while passing down the Thames, she collided with the steamship Groningen, and sustained damages which made it necessary for her to, and she did, return to London as a port of refuge.

For the common benefit of the Aristea and her cargo, sacrifices were made and expenses were incurred which, under the stipulations of the charter party and bills of lading, became the subject of general average. Thereafter a general average statement and adjustment was duly prepared by average adjusters at Hamburg, and pursuant thereto Ralli Bros. contributed, in general average, on account of the cargo

of which they were owners, the sum of 10,766.97 marks, and there was contributed in general average by other cargo owners (who have assigned to Ralli Bros. all their rights with respect to the recovery here sought) the sum of 12,672.25 marks. The contribution of the ship and freight was 3,830.88 marks. The general average adjustment did not include any items of damage sustained by the cargo.

Subsequently a suit and cross-suit were brought in England in the Probate, Divorce, and Admiralty Division of the High Court of Justice, between the owners of the Aristea and of the Groningen, to recover damages by reason of the collision. The English court held both vessels to blame, and condemned each to pay half the damages of the other. The damages of the Aristea were fixed at £3,962.17.9, plus interest and costs of £136.14.91. This sum did not include any items of damage to the cargo of the Aristea, nor any contribution in general average either by the Aristea or her cargo. The damages of the Groningen were fixed at £6,877.5.4, and the damages as between the Aristea and the Groningen were adjusted by the settlement of the balance between the halves of the two amounts above mentioned; respondent paying to the owners of the Groningen the difference between half the Aristea's damages and half the Groningen's damages.

The damages thus allowed to the Aristea and her owners, and collected from the Groningen and her owners, included items of damage sustained by the Aristea which had been included in the general average statement and adjustment, and on account of which Ralli Bros. and the other owners of cargo of the Aristea contributed general average as hereinbefore set forth. In the total amount of the items dealt with as damages against the Groningen, there is included an amount corresponding to £924.18.1 of general average character. Respondent's recovery or allowance of half thereof as damages from the Groningen and her owners amounted to £462.9.1, and plus interest and costs of £31.18.3, to a total of £494.7.4.

Upon this state of facts the parties have stipulated that:

"The only issue and question involved is whether the libelants, by virtue of the general average contributions of cargo owners on account of loss and damage sustained by the Aristea, are entitled to recover an amount proportionate to that which was of a general average character, and which was included in the damages collected by the Aristea and her owners from the Groningen."

It should be noted at the outset that certain of the relations and rights of the parties, prior to the commencement of the action at bar, had been settled in accordance with certain principles.

[1] It is immaterial whether the general average adjustment was governed by the law of England (the collision having occurred there), or of Germany (the average adjustment having been made there), or of the United States (this being the forum of the present litigation), for in each jurisdiction general average is payable by cargo, notwithstanding negligence of the ship, if the charter party or bill of lading contains a clause (such as here) exempting from negligence. That proposition was clearly held in The Carron Park, 15 Prob. Div. 203, 207, and later (1900) approved in Milburn v. Jamaica Fruit Importing

& Trading Company of London, 9 Aspinall's Mar. Law Cas. (N. S.) 122. In that case Smith, L. J., said:

"Lord Watson, in Strang, Steel & Co. v. Scott & Co., 61 L. T. Rep. 597, 6 Asp. Mar. Law Cas. 419, 14 App. Cas. 601, sums up the position as follows: He says: 'When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which immediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved. * * * In any question with them he is a wrongdoer. * * * He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavor to rescue property which was imperiled by his own tortious act.' The allegation of the plaintiffs, the shipowners, is that, if there had been inserted in the bills of lading an exception as to negligence of the master, which usually is the case, there would then, as between themselves and the cargo owners, have been no negligence or default of the master, for this would have then been excepted. Mr. Carver, for the defendants, on the other hand, asserts that the introduction of such an exception into the bills of lading would have made no difference whatever, for he says that general average is not the creature of contract. In this I agree, for the foundation of a general average claim is ordinarily, not that of contract, but is founded upon a loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo in the time of peril, and which must be borne proportionately by all who are interested. See, per Lawrence, J., in Birkley v. Presgrave, 1 East, 220, 228. Brett, M. R., in Burton v. English, 49 L. T. Rep. 768, 5 Asp. Mar. Law Cas. 187, 12 Q. B. Div. 218, 221, says that the right to contribution comes 'from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved.' But, although general average is not the creature of contract, this does not settle the question in the present case, for what the contract of carriage is becomes an important factor when considering, not whether a general average claim for contribution has arisen, but in considering, assuming that such a claim has arisen, whether it can be taken away by the cargo owner showing that, as between him and the shipowner, the latter, to use Lord Watson's words, has been a wrongdoer. To create the shipowner a wrongdoer as regards the cargo owner, there must be the breach of some duty, and if by agreement between the two it has been agreed that it shall be no breach of duty for the master to be guilty of negligence—in other words, that as between the two the negligence of the master shall be always excepted—it cannot be said that it is a breach of duty towards the cargo owner for the master to be guilty of that which the cargo owner and shipowner have agreed shall be no breach of duty at all. This appeal raises the question whether The Carron Park, 63 L. T. Rep. 356, 6 Asp. Mar. Law Cas. 543, 15 P. Div. 203, decided by Sir James Hannen in the year 1890, is good law. * * * This decision of Sir James Hannen has been acted upon in practice in this country ever since it was given, and we are asked now to overrule it. * * * I believe The Carron Park, ubi supra, is in accord with the law of England relating to general average in this country."

Sieveking, in his German Law of Carriage Goods by Sea (London, 1907), pp. 174, 175, says:

"It does not matter whether the peril leading to a general average sacrifice or expense is an act of God, or was caused by the negligence or fault of master, crew, or any other person. The sacrifices or disbursements voluntarily made in order to avert the common danger remain acts voluntarily done for this purpose, and are therefore allowable in general average. But there lies an action against the person having committed the fault, and, if this person be the master or a member of the crew, the owner is liable, on account thereof, to the extent of ship and freight. If, therefore, the owner sues for general

average contribution, his claim will be dismissed on the plea that he or his employés have, through their own fault, caused the danger to arise. But, if the owner has exonerated himself from his liability for faults or errors committed by his servants, these errors or faults are as foreign to him as if the danger had arisen from an act of God. Such a defense, therefore, will be invalidated by setting up the negligence clause, and judgment will be given for the plaintiff. The judgment of the Hanseatic High Court of Appeal, dated October 15, 1904, reversed the decision of the court below; their decision being afterwards confirmed in the Court of the Empire on April 12, 1905. 1905, H. 12 and 86, § 702."

And, finally, in the United States, the same conclusion was announced in The Jason, 225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969.

[2] The collision, however, having taken place in English waters, the rights of all concerned in respect of damages arising from the collision depend upon the English Law. The rules applicable both to vessel and cargo are stated by Carver in his Carriage by Sea (5th Ed.) at page 922 et seq., as follows:

"704. Where both vessels have been in fault in bringing about the collision, the rule is that the liability of the stranger ship, or those responsible for her management, is for one-half only of the damage occasioned to the goods. * * * And it is now clear that the fact that the collision was in part due to negligence of those in charge of the carrying ship does not stand in the way of a claim by the cargo owners against the other ship in fault. And at common law the right of the cargo owner would be to a full compensation. But by the rules of law administered in the Court of Admiralty, where both vessels are to blame, even though not in equal degrees, the whole loss sustained by their owners is apportioned equally between the two. .Each party becomes liable to pay to the other one-half of the damage which he has sustained. And this rule has been extended to the claim of an owner of cargo in one of the vessels. He is allowed to claim for half his loss, and no more, against the other vessel. It is true, as I think, that the owner of the cargo is to be considered a perfectly innocent person, and that, as a plaintiff, he does not stand in the same position as the owner of one of two delinquent ships; and if that were the sole ground upon which the owner of the ship would only recover one-half, it might well be that the owner of the cargo would recover the whole; but this is not exactly the view taken by the admiralty law. It endeavors, whether wisely or not I do not say, to administer more equitable justice, and, where both parties are delinquent, to give a moiety of the loss, or to divide the whole loss, it being impossible to ascertain the proportionate culpability. I apprehend that, carrying out this principle according to its practice, the Court of Admiralty would say: 'You, the innocent owner of a cargo, proceeding against one only of two delinquent ships, shall recover only a moiety of the damage, because we can affix to the vessel proceeded against only a moiety of the blame, and you shall be left, with respect to the other half of your loss, to your remedy against the other vessel, which we hold to be equally delinquent.' It may be true that this principle is not altogether reconcilable with the rules and practice of common law, and much might be said as to the equity of its operation and effect; but still I think that this resolution of the question is not conformable to the case of Hay v. Le Neve, and other cases; and therefore my decree must be that the plaintiffs do recover a moiety of the damage only. The Milan, 31 L. J. Adm. at page 112. By section 25, subsec. 9, of the Judicature Act, 1873, it is provided that, 'in any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail.'"

Thus, under the English law applicable to a "both to blame" case, cargo, though innocent of fault, may recover only one-half of its dam-

ages from each of the two colliding vessels, although in the United States the entire damage may be recovered from either vessel. The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993; The Atlas, 93 U. S. 302, 23 L. Ed. 863.

Under our law general average contributions are regarded as part of the damage. The Energia (D. C.) 61 Fed. 222, affirmed 66 Fed. 604, 13 C. C. A. 653; Erie & Western Transportation Co. v. City of Chicago, 178 Fed. 42, 51, 101 C. C. A. 170. But under English law such contributions are not regarded as part of the damage to be recovered from the wrongdoer. This was held by Jeune, J., in The Marpessa, [1891] Prob. Div. 403, and I see nothing in The Minnetonka, [1905] Prob. Div. 206, to the contrary.

Bearing these rules in mind, the situation is that, on account of damage loss and expense sustained by the Aristea because of a collision, the owners of cargo shipped on her were obliged to contribute to her loss. The cargo owners could collect one-half of the physical damage to their cargo from the Groningen, but they could not collect anything from the Aristea because of the "negligence" clause. The Groningen and the Aristea having paid each to the other one-half of the other's damage (by settlement of account), and the Aristea having thus received back from the Groningen part of the loss for which the cargo owners had contributed to some extent, the cargo owners now ask that the Aristea return to them their just proportion.

Primarily, it is well to dispose of two contentions urged against recovery: (a) Because in the settlement of collision damage the balance was against the Aristea, and therefore she was required to pay the Groningen an amount over and above that which the Groningen was called upon to pay her; and (b) because the account between the vessels was settled and closed and cannot now be reopened.

As to (a), it is clear, on principle, that it is of no consequence how the account is settled, or in whose favor the balance stands. If A. owes B. $100, and B. owes A. $25, and, in settlement, A. pays B. $75, it seems elementary that, although A. must pay B., he nevertheless received the equivalent of $25.

[3] (b) There is no question akin to an account stated. The correctness of the general average adjustment, or its constituent items, is not questioned nor attacked. The fact that the general average contribution is paid does not make any difference. A court of admiralty acts as a court of equity (O'Brien v. Miller, 168 U. S. 287, 297, 18 Sup. Ct. 140, 42 L. Ed. 469), and in equity the transaction is not finally closed until complete justice is done.

[4] What, then, it may be asked, is the principle upon which the relevant items of payment may be picked out of the general average contribution, and these sums paid back to libelants?

The suggestion is offered that an analogous principle may be found in the obligation of indemnity arising in cases of marine insurance, where subrogation gives the indemnifying insurer the right to all damages recovered from the wrongdoer; the theory being that subrogation is an equitable arrangement incident to all contracts of indemnity and to all payments on account thereof. Castellane v. Preston, 11 Q. B. D.

380, 388; Phœnix Ins. Co. v. Erie & Western Transpt. Co., 117 U. S. 312, 321, 6 Sup. Ct. 750, 29 L. Ed. 873.

But, while it is desirable to find anchorage in a definite principle, courts of admiralty, historically and traditionally, have been able to meet new questions with two broad purposes: One, to do that which natural justice dictates; and the other, to develop along lines whereby, as Mr. Coe observes in his admirable handbook (Law and Practice of General Average in the United States, Privately Printed, New York, 1912):

"In the interest of commerce * * * the master should be encouraged to make, at the right time, the sacrifice best for all the interests concerned, and should not be trammeled by considerations of benefit to a particular interest."

(1) To define "natural justice" is to beg the question, for it is the attempt of honorable men to do that which is fair, and what is fair is a question of standards and conduct, about which men may differ. In the text-books and the cases there is much discussion as to whether the right to contribution is founded on natural justice or is to be regarded as in the nature of an implied contract; but the most helpful approach to a question of that character is illustrated by Brett, M. R., in Burton v. English, 49 L. T. Rep. 768, 5 Asp. Mar. Law Cas. 187, 12 Q. B. Div. 218, 221 (quoted in Milburn v. Jamaica, supra), and by Bowen, L. J., in the same case, and by Mr. Justice Gray in Ralli v. Troop, 157 U. S. 386, 394–397, 15 Sup. Ct. 657, 39 L. Ed. 742, as follows:

Bowen, L. J., in Burton v. English:

"In the investigation of legal principles, the question whether they arise by way of implied contract or not often ends by being a mere question of words. General average contribution is a principle which comes down to us from an anterior period in our history, and from the law of commerce and the sea. When, however, it is once established as part of the law, and as a portion of the risks which those who embark their property upon ships are willing to take, you may, if you like, imagine that those who place their property on board a ship on one side, and the shipowner who puts his ship by the quay to receive the cargo on the other side, bind themselves by an implied contract which embodies this principle, just as it may be said that those who contract with reference to a custom impliedly make it a part of the contract. But that way, though legally it may be a sound way, nevertheless is a technical way of looking at it. This claim for average contribution, at all events, is part of the law of the sea, and it certainly arises in consequence of an act done by the captain as agent, not for the shipowner alone, but also of the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo."

Mr. Justice Gray, in Ralli v. Troop:

"There has been much discussion in the books as to whether the right to a general average contribution rests upon natural justice, or upon an implied contract, or upon a rule of the maritime law, known to and binding upon all owners of ships and cargoes. But the difference has been rather as to forms of expression than as to substantial principles or legal results. Mr. Justice Clifford, speaking for this court, stated, in several cases, as the basis of general average, that natural justice requires that where two or more parties are engaged in a common sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger, or incurs extraordinary expenses to promote the general safety of the associated interests, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure."

So, likewise, it may be pointed out in the case at bar that, by whatever name the principle may be called, fair dealing requires that the Aristea shall return to the cargo owners that which was contributed and for which the Aristea has been reimbursed. If, for instance, the Aristea had first collected half her damages from the Groningen, and then sought to collect the entire amount of the same items by way of general average contribution from the cargo owners, she certainly would not have found any support in the courts upon any theory in the maritime law or in equity.

(2) The morale of the sea demands that the master shall think only of the right thing to do. Johnson v. Chapman, 19 C. B. (N. S.) 563; The Star of Hope, 9 Wall. 203, 19 L. Ed. 638. There may often be cases where the judgment as to fault of collision may be pronounced long after the general average is adjusted, and if masters know that the ship may benefit at the expense of the cargo, it is but human that, from loyalty to their owners and in the excitement of a perilous moment some may act for the benefit of the ship to the detriment of the cargo. "The moral tendency of the well-known commercial usage is to induce the master to exercise an independent judgment in the emergency for the benefit of all concerned." The Star of Hope, 9 Wall. 203, 19 L. Ed. 638. And the result thus hoped for is as important as the just settlement of controversies arising out of a disaster.

The conclusions here arrived at have support in the practice of average adjusters, as testified to by Mr. Brengle, an average adjuster of large experience. While Mr. Brengle's testimony is not binding in this case, it is useful as argument, and as such is of some persuasive value. And, further, as the case is one of first impression, it is unnecessary to speculate how the question might be disposed of in other jurisdictions, although I am unable to find anything in English or German law inconsistent with the view here expressed. Sieveking, supra, page 172 et seq.

As set forth in Exhibit G, the account stands as follows:

Items of general average allowed			£462. 9. 1
Add proportion of interest			31.18. 3
			£494. 7. 4
Divided thus:			
General average on cargo insured per Ralli Bros.	Mks. 10,766.97	receives	£195. 3.10
General average on cargo insured by buyers	Mks. 12,672.25	receives	229.14. 7
	Mks. 23,439.22	receives	£424.18. 5
General average applying to ship and freight	Mks. 3,830.88	receives	69. 8.11
	Mks. 27,270.10	receives	£494. 7. 4

The ship will, of course, retain £69.8.11, but libelants are entitled to recover the sum of £424.18.5 (with interest), being the apportionment for contribution of cargo in general average.

A decree in accordance herewith may be proposed on two days' notice.

WALLING et al. v. PORTER GILDERSLEEVE CO.

PORTER GILDERSLEEVE CO. v. WALLING et al.

(District Court, S. E. D. Pennsylvania. May 4, 1915.)

Nos. 83, 85.

SHIPPING ⊂=54—CHARTER—SINKING OF BARGE—LIABILITY OF HIRER.

The sinking of the bow section of a hinge barge, while lying at a pier, *held*, under the evidence, to have been due to unseaworthiness, for which the owner could not recover from the hirer; but the subsequent sinking of the stern section, which was tied up at a bulkhead, during the falling tide, *held* due to the negligence of the hirer, who had full charge, in not mooring her properly and with sufficient line.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221; Dec. Dig. ⊂=54.]

In Admiralty. Suit by Elmer E. Walling and Helen M. Oliver, owners of the barge R. S. Oliver, against the Porter Gildersleeve Company, with cross-libel. Decree for libelants for part damages.

George P. Rich, of Philadelphia, Pa., for owners.
Howard M. Long, of Philadelphia, Pa., for hirers.

DICKINSON, District Judge. The differences between the parties to this litigation are the outcome of relations which began with the request of the Porter Gildersleeve Company to Walling et al. for the hire of a barge. The Gildersleeve Company were hauling oyster shells. The barge had previously been used for the lightering of coal in the harbor. Owing to labor troubles existing at the time, the owners of the barge were unable to supply a master for the boat. The Gildersleeve Company thereupon suggested that they had a man of experience whom they could put in charge of the boat. The man thus put aboard was to be paid by the owners, through an arrangement by which the hirers were to pay him $55 per month and deduct this from the hire of the boat. The bargain was made orally over the telephone. It was confirmed, however, by letters from the owners, recapitulating the points of the agreement reached, which were that the hiring was for two weeks or longer at $5 per day; the Gildersleeve Company was to put a man on board the boat, see that she was given proper attention, and returned to the owners in good condition, with an added stipulation as to the payment of the man in charge of the boat.

The boat involved is the R. S. Oliver. She is a hinge boat; the two sections being known as the bow and stern, or forward and aft, sections. The agreement referred to was made October 9, 1913. The confirming letters followed on the same date and on the following day. On October 24th the owners wrote, requesting the return of the boat on October 27th following. The letter does not appear to have reached the Gildersleeve Company, but they received a similar request by telephone. They were not then ready to return the boat, and with the owners' acquiescence kept her, without any definite re-

turn date being fixed. On October 28, 1913, the bow section sank at the Vine Street wharf. The stern section sank in Rancocas creek on November 5th. The owners claim for the consequent damage to the boat. The proctors of the respective parties are in substantial accord upon the obligations which rest upon owners and hirers. The principles of law upon which these rest are that a warranty of seaworthiness and fitness for the general purposes of the intended use, when known, as was the case here, is implied on the part of the owner, and that the owner incurs the risk of loss of or injury to the boat incident to its use, and not due to the negligence of the hirer, when in his use or under his management and control, and that the hirer is answerable for damages to the boat resulting from his negligence.

The controversy between the parties here is over the facts from which the causes of the mishaps to the two sections of the boat appear. The owners attribute the sinking of the boat to the negligence of the hirers, and the hirers ascribe the cause to the unseaworthiness and unfit condition of the boat. Fitness is a relative term, whose meaning is to be found in the special conditions to which it is applied. Results are not always the best tests of causes. Frequently, however, they do fairly give rise to presumptions. Like inferences may also spring from general conditions. If, for instance, a boat be moored in a safe harbor, free from dangers of the sea and risks of navigation, and is found shortly afterwards filled with water, without any other cause for her sinking appearing, the natural inference would be that she was in a leaking condition. A boat like her in other respects, recently in use and therefore presumptively seaworthy, if left in a position in which she would strand at low water and be left by the tide so badly listed as that she would fill before she was floated on the flood tide, and thus found sunk, under such circumstances a like natural inference would be that her sinking was due to want of care in mooring her in such a place. The mind of any one seeking the causes of these sinkings could not rest easily under any other conclusions than those suggested above, unless there was something in the circumstances as disclosed by the histories of what led up to the results to give other adequate explanations of the disaster.

These general observations are specially applicable to the controversy between these parties. The bow section of this boat sank at the Vine Street wharf. She had been taken there for the purpose of being loaded with oyster shells. The place at which she was being loaded is protected on every side, except from the southeast. No expectation of danger to the boat from any cause in such a place would arise except possibly from a severe southeaster. Even a southeast storm which suggested danger would be an unusually severe one. There is absolutely nothing in the evidence to account for the sinking of the boat, other than her leaky condition. The only other cause for her filling suggested is that ferryboats left and arrived at a ferry slip on the south side of the place where the boat was made fast, and that she was there subjected to the swell from these ferryboats, involving a danger from which reasonable care and forethought would have protected her. When it is remembered that this boat was of a

size and used for lightering purposes in the harbor, it is clear that the fact that she filled cannot be ascribed to any such cause as that suggested. The captain of a barge of this size, who refused to take his boat up to or to leave her overnight at the Vine Street wharf (protected as the place is by piers extending out in the river on the south and north side), because of the danger of her being swamped by the swell from the ferryboat entering or departing from the adjacent slip, would be branding his boat as unseaworthy. There would be scarcely a day in which he could use her in the harbor in which he would not encounter a bigger swell than any ferryboat would make in such a place.

It is impossible to find any other cause for the bow section of the boat filling than that assigned by the evidence on behalf of the hirers, to the effect that this section of the boat was leaky and no adequate means were provided aboard of her for keeping her free. The finding, therefore, follows that this bow section sank from no cause ascribable to any negligence on the part of those at that time in charge of it.

The stern section was taken to a landing in Rancocas creek. This is, of course, a tidal stream. There was sufficient water to float the barge at high water. When the tide fell the boat was bound to ground, and at dead low water she was lying practically on the bare mud. The bed of this creek, as of streams of like character where there are bulkheads constructed at the sides of the stream, is cut by the action of the water into something approaching a V-shape, with the apex in the center of the bed of the stream and with the banks very steeply shelving from the bulkhead constructions on the sides. There is, of course, a bed of greater or less width in the middle of the stream. It is clear, therefore, that a boat, if moored alongside of the bulkhead, must have sufficient slack in her mooring lines to permit the boat to pay off from the wharf as the tide falls, and in this way reach a safe resting place when the tide is down and the boat grounds. A boat in such a place, if kept close moored to the bulkheads of the wharf, will, when she grounds, ground on the shelving bank, with the result that she will be on such a list that, if she be an open boat, the next flood tide will pour in over her gunwales and fill her before it will float her.

This general description of the to be expected will serve as an explanation of the filling of this stern section, and as no other explanation is in sight the conviction rests upon the mind that this was the cause of the boat sinking. The evidence supports this finding. This barge is an open boat for all practical purposes. She was decked over at what may be termed the bow, and at the stern sheets, and on each side of her. The idea of her construction in this respect may be best described by analogy to what are called washboards, which are at times put upon open boats of small size. This deck, however, was nothing like water-tight. The deck seams were open to an extent justifying the expression that she was as open on deck as a sieve. Except in this respect there is no evidence of such a leaky condition of this stern section as to account for the sinking. The open condition of such decks as the boat had did not render her unsea-

worthy for the purposes for which she was hired and used. The decks were not there for the purpose of protecting the boat from seas, but were there to facilitate going about the boat and for loading and unloading. Her real protection from having her decks awash was in her freeboard. Any sea which would have reached her deck would be sufficient to have swamped her, had her decks been watertight.

The cause to which the sinking of this stern section is above ascribed involves the finding that the swamping of this section was due to the negligence of the hirer, and not to the unseaworthy condition of this section of the boat. The general conclusions reached, therefore, are that the owners are entitled to recover from the hirers the damages resulting from the sinking of the stern section of the boat, but not of the bow section. The amount of the money loss to the owners ascribable to the damage to this after section of the barge is somewhat difficult of ascertainment, because the apportionment of the damage to each of the two sections of the boat was not in mind when the evidence of the damage was introduced. It can, however, be found with substantial accuracy.

There are two cases before the court—a libel by the owners, of the boat and a cross-libel by the hirers. Their legal merits have been discussed and disposed of as if they constituted one case. The hire of the boat has not been paid. The libelants are entitled to recover for the hire of the boat and for the damage to the stern section. The finding that the sinking of the bow section was not due to the negligence of the cross-libelants does not necessarily call for a further finding that they can recoup the loss of the cargo by a recovery from the owners. The boat had been in their charge for several weeks. They knew her condition. They risked the cargo which they put aboard of her and the incurring of the expenses to which they were subjected with their eyes open to the consequences. The loss which has befallen them they brought upon themselves. Indeed, they have had a narrow escape from a finding that in view of the condition of the boat, of which they had knowledge, they showed want of due care in loading her as deep and in the manner they did. The findings therefore are:

1. The sinking of the stern section of the boat R. S. Oliver was due to the negligence of the Porter Gildersleeve Company, and the libel to this extent is sustained.
2. Damages are awarded libelants in the sum of $247.
3. Libelants are awarded costs.
4. The cross-libel is dismissed.

Decrees embodying these findings may be submitted.

UNITED STATES ASPHALT REFINING CO. v. TRINIDAD LAKE PETROLEUM CO. Limited (two cases).

(District Court, S. D. New York. January 23, 1915.)

Nos. 58-115, 58-121.

1. COURTS ⟸372—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.
An agreement in a contract that differences arising thereunder shall be submitted to arbitration relates to the remedy, and the question whether such an agreement is enforceable is governed by the law of the forum, and where that is a federal court the law of decision in the state is not controlling.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. ⟸372.]

2. CONTRACTS ⟸127—LEGALITY OF PROVISIONS—AGREEMENT TO ARBITRATE DISPUTES ARISING UNDER CONTRACT.
A provision in a charter party made in London that "any dispute arising under this charter shall be settled in London by arbitration, * * * and this decision shall be binding upon both parties," is an agreement for arbitration applying to the entire contract, and, while valid under the English Arbitration Act of 1889, under the rule laid down in the decisions of the Supreme Court it is void in a federal forum.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 608-615; Dec. Dig. ⟸127.]

In Admiralty. Suits by the United States Asphalt Refining Company against the Trinidad Lake Petroleum Company, Limited. On motions by defendant to stay prosecution of the suits until further order of the court. Denied.

Norman B. Beecher, of New York City, for the motions.
Herbert Barry and James K. Symmers, of New York City, opposed.

HOUGH, District Judge. One of these actions is brought for the alleged breach of the charter party of the steamship Russian Prince, and the other for a similar breach of a like charter party relating to the steamship Roumanian Prince. Libelant is a corporation of South Dakota. Respondent was the chartered owner of the steamships above named. It is a British corporation, and the vessels are of British registry.

The charter parties by which libelant took the steamers from respondent were made in London, and granted libelant the right to use the vessels in any lawful traffic in most parts of the world. As matter of fact the steamers were employed between Trinidad and United States ports until the outbreak of war in August, 1914, when it is alleged that the vessels were wrongfully withdrawn from charterer's service. These actions in personam were begun with clause of foreign attachment, and appearance enforced by seizure of funds within this jurisdiction. Before any steps in the actions other than appearing and giving security for the seized property had been taken, these motions were made.

The charter party of each steamer contained the following very ordinary clause:

"19. Any dispute arising under this charter shall be settled in London by arbitration, the owners and charterers each appointing an arbitrator, and the two so chosen, if they do not agree, shall appoint an umpire, the decision of whom shall be final. Should either party refuse or neglect to appoint an arbitrator within 21 days of being required to do so by the other party, the arbitrator appointed may make a final decision alone, and this decision shall be binding upon both parties. For the purpose of enforcing any award, this agreement shall be made a rule of court."

There can be no doubt that this was a submission to arbitration, and for that reason was a contract between the parties to this action; District of Columbia v. Bailey, 171 U. S. at page 171, 18 Sup. Ct. 868, 43 L. Ed. 118; citing Whitcher v. Whitcher, 49 N. H. 176, 6 Am. Rep. 486. It is equally plain that under the law of the place of the contract—i. e. England—this arbitration agreement was at the time of making the charter parties entirely valid, and any endeavor to do exactly what libelant has done by bringing these suits would have been restrained by the English courts, acting under authority of the English Arbitration Act of 1889 (chapter 49, 52–53 Victoria). See, also, Manchester Ship Canal Co. v. Pierson & Son [1900] 2 Q. B. 606; Austrian Lloyd Co. v. Gresham, etc., Society [1903] 1 K. B. 249.

The contentions of the parties litigant may therefore be summed up as follows: Respondent urges that the contract for arbitration contained in the charter parties was valid and enforceable when and where it was made, and must consequently be enforced everywhere, unless some positive rule of the law of the forum prevents such recognition and enforcement. Libelant asserts that, whether the contract was or was not good at the time and place of making, it has always been invalid under the law of the United States and most of the states thereof, with the admitted and asserted result that an American may make a solemn contract of this nature in England and repudiate it at will in America with the approbation of the courts of his own country.

There has long been a great variety of available reasons for refusing to give effect to the agreements of men of mature age, and persumably sound judgment, when the intended effect of the agreements was to prevent proceedings in any and all courts and substitute therefor the decision of arbitrators. The remarkably simple nature of this libelant's contract breaking has led me to consider at some length the nature and history of the reasons adduced to justify the sort of conduct, by no means new, but remarkably well illustrated by these libels.

It has never been denied that the hostility of English-speaking courts to arbitration contracts probably originated (as Lord Campbell said in Scott v. Avery, 4 H. L. Cas. 811)—

"in the contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction."

A more unworthy genesis cannot be imagined. Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule than upon its excellence or reason:

"It is not necessary now to say how this point ought to have been determined if it were res integra—it having been decided again and again," etc. Per Kenyon. J., in Thompson v. Charnock, 8 T. R. 139.

There is little difference between Lord Kenyon's remark and the words of Cardozo, J., uttered within a few months in Meacham v. Jamestown, etc., R. R. Co., 211 N. Y. at page 354, 105 N. E. at page 656:

"It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary."

Nevertheless the legal mind must assign some reason in order to decide anything with spiritual quiet, and the causes advanced for refusing to compel men to abide by their arbitration contracts may apparently be subdivided as follows:

(a) The contract is in its nature revocable.

(b) Such contracts are against public policy.

(c) The covenant to refer is but collateral to the main contract, and may be disregarded, leaving the contract keeper to his action for damages for breach of such collateral covenant.

(d) Any contract tending to wholly oust the courts of jurisdiction violates the spirit of the laws creating the courts, in that it is not competent for private persons either to increase or diminish the statutory juridical power.

(e) Arbitration may be a condition precedent to suit, and as such valid, if it does not prevent legal action, or seek to determine out of court the general question of liability.

The Doctrine of Revocability.

This seems to rest on Vynior's Case, 8 Coke, 81b, and is now somewhat old-fashioned, although it appears in Oregon, etc., Bank v. American, etc., Co. (C. C.) 35 Fed. 23, with due citations of authority; and in Tobey v. County of Bristol, 3 Story, 800, Fed. Cas. No. 14,065, it is treated at great length.

The Public Policy Doctrine.

No reason for the simple statement that arbitration agreements are against public policy has ever been advanced, except that it must be against such policy to oust the courts of jurisdiction. This is hardly a variant of the reasoning ascribed by Lord Campbell to the "courts of ancient times":

"Such stipulations [for arbitration] are regarded as against the policy of the common law, as having a tendency to exclude the jurisdiction of the courts." Hurst v. Litchfield, 39 N. Y. 377.

"Such agreements have repeatedly been held to be against public policy and void." Prince Co. v. Lehman (D. C.) 39 Fed. 704, 5 L. R. A. 464.

The above are two examples of the cruder forms of statement; but of late years the higher courts have been somewhat chary of the phrase "public policy," and in Insurance Co. v. Morse, 20 Wall. 457, 22 L. Ed. 365, Hunt, J., quotes approvingly from Story's Commentaries, thus:

"Where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not, any more than a court of law, interfere to enforce the agreement, but will leave the parties to their own good pleasure in regard to such agreements."

But neither the court nor the commentator pointed out any other method by which an arbitration agreement could be against the policy of the law, unless it were by seeking to divest the "ordinary jurisdiction of the common tribunals of justice."

Having built up the doctrine that any contract which involves an "ouster of jurisdiction" is invalid, the Supreme Court of the United States has been able of late years to give decision without ever going behind that statement. Thus in Insurance Co. v. Morse, supra, it is said:

"Agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."

In Doyle v. Continental Insurance Co., 94 U. S. 535, 24 L. Ed. 148, the case last cited is distinctly reaffirmed. The lower courts have followed, and in Perkins v. United States, etc., Co. (C. C.) 16 Fed. 513, Wallace, J., said:

"It is familiar doctrine that a simple agreement inserted in a contract, that the parties will refer any dispute arising thereunder to arbitration, will not oust courts of law of their ordinary jurisdiction."

Even a partial ouster was held "evidently invalid" when inserted in a bill of lading, in The Etona (D. C.) 64 Fed. 880, citing Slocum v. Western Assurance Co. (D. C.) 42 Fed. 236, and the Guildhall (D. C.) 58 Fed. 796.

The Doctrine That the Covenant to Refer is Collateral Only.

This idea is set forth with his customary clearness by Jessel, M. R., in Dawson v. Fitzgerald, 1 Ex. D. 257. It was repeated in Perkins v. United States, etc., Co., supra, and accepted in Crossley v. Connecticut, etc., Co. (C. C.) 27 Fed. 30. The worthlessness of the theory was amply demonstrated in Munson v. Straits of Dover (D. C.) 99 Fed. 787, affirmed 102 Fed. 926, 43 C. C. A. 57, where Judge Brown, accepting without query or comment the doctrine that any agreement which completely ousted the courts of jurisdiction was specifically unenforceable, found himself unable to award more than nominal damages for the breach of the collateral agreement. The opinion for affirmance (102 Fed. 926, 43 C. C. A. 57) is written by Wallace, J., who had himself pointed out in Perkins v. United States, etc., Co., supra, that the action for breach of the collateral agreement to refer was a remedy against the contract breaker who sued when he had promised not to. Comment seems superfluous upon any theory of law (if law be justice) that can come to such conclusions.

The Theory That Arbitration Agreements Violate the Spirit of the Laws Creating the Courts.

This is the accepted doctrine in New York, as shown in Meacham v. Jamestown, etc., Railroad, supra. Yet it is surely a singular view of

juridical sanctity which reasons that, because the Legislature has made a court, therefore everybody must go to the court.

The Theory That a Limited Arbitration, Not Ousting the Courts of Jurisdiction, May be Valid.

This is thought to be the doctrine of Delaware, etc., Co. v. Pennsylvania, etc., Co., 50 N. Y. 265, and it is plainly accepted by the Supreme Court of the United States. Hamilton v. Liverpool, etc., Insurance Co., 136 U. S. at page 255, 10 Sup. Ct. 945, 34 L. Ed. 419, shows the familiar proviso in an insurance policy by which the *amount* of loss or damage to the property insured shall be ascertained by arbitrators or appraisers, and further that, until such an award should be obtained, the loss should not be payable and no action should lie against the insurer. This makes the appraisal or partial arbitration a condition precedent to suit. Gray, J., said:

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country."

In Hamilton v. Home Insurance Co., 137 U. S. at page 385, 11 Sup. Ct. at page 138, 34 L. Ed. 708, the same learned Justice said (of a somewhat similar proviso in an insurance policy):

"If the contract * * * provides that no action upon it shall be maintained until after such an award, * * * the award is a condition precedent to the right of action."

But persons who would thus far avail themselves of compulsory arbitration must be careful, for it has been said:

"While parties may impose, as a condition precedent to applications to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. * * * Such stipulations are repugnant to the rest of the contract and assume to divest courts of their established jurisdiction. As conditions precedent to an appeal to the courts, they are void." Stephenson v. Insurance Co., 54 Me. 70, cited in Insurance Co. v. Morse, supra.

Finally, in Guaranty, etc., Co. v. Green Cove, etc., R. R. Co., 139 U. S. at page 142, 11 Sup. Ct. at page 514, 35 L. Ed. 116, Brown, J., considered a proviso in a mortgage to the effect that a sale by the trustee should be "exclusive of all other" methods of sale, and he laid down the law thus:

"This clause, * * * is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which (as is settled by the uniform current of authority) cannot be done."

This decision was filed in 1890. The latest opinion in this circuit known to me is Gough v. Hamburg, etc., Co. (D. C.) 158 Fed. 174, where Adams, J., lays down the rule without comment that any limitation upon the jurisdiction of courts contained in a contract is void.

Whatever form of statement the rule takes, the foregoing citations show that it always amounts to the same thing, viz.: The courts will scarcely permit any other body of men to even partially perform judi-

cial work, and will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators, unless compelled to such action by statute. Even such cases as Mittenthal v. Mascagni, 183 Mass. 19, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 404, show no more than a belated acceptance of the right to confine litigation by contract to a particular court, for even that opinion does not recognize the right of mankind to contract themselves out of all courts.[1]

The English Arbitration Act, supra, is such a statute. It has compelled the courts of that country to abandon the doctrine that it is wrong or wicked to agree to stay away from the courts when disputes arise. It is highly characteristic of lawyers that, when thus coerced by the Legislature, the wisdom of previous decisions begins to be doubted. In Hamlyn v. Talisker Distillery [1894] App. Cas. 202, Lord Watson said:

"The rule that a reference to arbitrators not named cannot be enforced does not appear to me to rest on any essential considerations of public policy. Even if an opposite inference were deducible from the authorities by which it was established, the rule has been so largly trenched upon by the *legislation* of the last 50 years * * * that I should hesitate to affirm that the policy upon which it was originally based could now be regarded as of cardinal importance."

Neither the Legislature of New York nor the Congress has seen fit thus to modernize the ideas of the judges of their respective jurisdictions.[2]

[1] The question presented by these motions is to be regarded as one of general law; i. e., one wherein the courts of the United States are not bound to follow or conform to the decisions of the state jurisdiction in which they may happen to sit. This was intimated by Dallas, J., in Mitchell v. Dougherty, 90 Fed. 639, 33 C. C. A. 205, and explicitly held in Jefferson Fire Insurance Co. v. Bierce (C. C.) 183 Fed. 588.

Furthermore the question is one of remedy, and not of right. Such was substantially the holding in Mitchell v. Dougherty, supra; and in Stephenson v. Insurance Co., supra, it is pointed out that:

"The law and not the contract prescribes the remedy; and parties have no more right to enter into stipulations against a resort to the courts for their remedy, in a given case, than they have to provide a remedy prohibited by law."

Finally it has been well said by Cardozo, J., in Meacham v. Jamestown, etc., R. R. Co., supra, that:

"An agreement that * * * differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum."

It follows that the final question for determination under these motions is whether the law as laid down by the Supreme Court of the

[1] For a comparison of earlier cases in Massachusetts with the English cases, see an article on "Arbitration as a Condition Precedent," 11 Harvard Law Rev. 234.

[2] It has not seemed necessary to pursue this subject beyond the courts of the United States, New York, and Massachusetts; but, with the possible exception of Pennsylvania, the result would not, I think, be different.

United States permits the enforcement as a remedy of the arbitration clause contained in a contract, assuming that such clause (as here) is intended to oust the courts and all courts of their jurisdiction.

[2] I think the decisions cited show beyond question that the Supreme Court has laid down the rule that such a complete ouster of jurisdiction as is shown by the clause quoted from the charter parties is void in a federal forum. It was within the power of that tribunal to make this rule. Inferior courts may fail to find convincing reasons for it; but the rule must be obeyed, and these motions be severally denied.

In re ASSOCIATED TRUST.

(District Court, D. Massachusetts. October 8, 1914.)

No. 21114.

BANKRUPTCY ⇐70—WHO MAY BE ADJUDGED BANKRUPTS—"UNINCORPORATED COMPANY"—TRUSTS.

A trust association, created by an instrument of trust providing that the property acquired shall be held and managed by a trustee, but the capital of which is contributed by certificate holders who have power to elect a trustee in case of vacancy, each share having one vote, also to amend the declaration of trust, increase the number of shares, and by a three-fourths vote terminate the trust, is an "unincorporated company" within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (Comp. St. 1913, § 9588), and under said section is subject to adjudication as a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⇐70.

For other definitions, see Words and Phrases, First and Second Series, Association.]

In Bankruptcy. In the matter of The Associated Trust, alleged bankrupt. On motion to dismiss petition. Motion denied.

Hewitt & Williams, of Boston, Mass., for petitioning creditors.

John Noble, Jr., of Boston, Mass., for objecting creditors.

MORTON, District Judge. This involuntary petition in bankruptcy is against "The Associated Trust, a voluntary association and unincorporated company maintaining its principal place of business in Boston, district aforesaid, operating there, and Charles A. Digney, Judd Dewey, and Forris W. Norris, all of Boston, as trustees of said The Associated Trust," and it prays that "The Associated Trust and Charles A. Digney, Judd Dewey, and Forris W. Norris, as trustees of The Associated Trust," may be adjudicated bankrupt. The questions now before the court arise on a plea and certain answers, which raise the point whether the respondent is subject to adjudication under the Act. The facts are settled by the stipulation of the parties. The petition does not allege that the respondent is a partnership, either of the trustees or of the shareholders, nor that it is a corporation within the broad definition of the Bankruptcy Act. Adjudication is not sought on either of those grounds. "Voluntary associations" are not specifically referred to in the Bankruptcy Act, which apparently treats them as

partnerships. The principal questions are (1) whether the respondent is an "unincorporated company"; and, if not, (2) whether the respondents Digney, Dewey, and Norris are subject to adjudication as trustees, and not as individuals.

As to (1): The respondent is a Massachusetts real estate trust, a form of business organization which is not uncommon in this state and is very uncommon elsewhere. 21 Yale Law Journal, 311. Its character is to be determined by the law of Massachusetts, where it is located. Re Hercules Atkin Co. (D. C.) 133 Fed. 813. The legal character of trusts resembling the respondent has several times arisen in the Massachusetts courts, generally upon questions of taxation, and the court has been called upon to decide whether they were to be taxed as partnerships, or as ordinary trusts. In some cases, such organizations have been held to be partnerships (Williams v. Johnson, 208 Mass. 544, 552, 95 N. E. 90), and in others to be strictly trusts (Williams v. Milton, 215 Mass. 1, 102 N. E. 355). The distinction between the two turns upon the provisions of the trust agreement or declaration. In cases where, by the declaration of trust, the shareholders are given substantial control of the management of the trust property, the trust is held to be a partnership; in cases where shareholders have no such control, the trust is held, for the purposes of taxation, to be of the same sort as the usual testamentary trust, and not to be a partnership. No middle ground is found in the Massachusetts decisions. The respondent therefore contends that it is either a strict trust, having no separate entity which can be adjudicated, or that it is a partnership, and that in neither case can a decree of adjudication be made upon this petition.

The words "unincorporated company" are not found in any Massachusetts statute which has been considered in connection with these organizations. Their meaning in the Bankruptcy Act is by no means certain. The word "unincorporated" is clear; the word "company" in this connection is much less definite. It would seem to imply an association of individuals, not partners, carrying on business under a distinct name, and having common rights inter se, but having no individual ownership in the joint property, no individual control over the business in which their joint capital is embarked, and no direct individual liability for the company's debts. Its use in connection with the word "unincorporated" would seem to imply that the organization should have some of the attributes usually found in corporations.

The character of the respondent is to be gathered from the trust deed. Under it, the trustee declared that he would take and hold in trust money paid to him by other persons to the amount of $1,000,000, for which he would issue transferable certificates having a face value of $100, entitled to interest, and to participate in surplus earnings, and also entitled to borrow from the trust 60 per cent. of the face value of the certificate, and after five years to receive from the trust in cash the face value of the certificate upon the surrender thereof. The trustee is given very broad powers as to the management of the property in which the trust funds are invested, with the right to determine what part of the income shall be divided and what shall be retained as surplus. He has no power to bind any of the certificate holders; and

they have no power to interfere directly in the management of the property, and no title to it. A "board of directors" is provided for, who may be appointed by the trustee and are removable by him; their duties are merely to advise the trustee; they are negligible as to the questions here raised. Up to this point there would seem to be nothing in the organization differentiating it under the Massachusetts decisions from what may be called an ordinary trust; that is, the beneficiaries, cestuis, or certificate holders (whichever they may be called), have no interest in the trust property and no right of joint action for control of it. They are in substance like beneficiaries in a trust under a will. There is no organization having a distinct entity apart from the trustee.

But the declaration of trust also provides that, if the trustee resigns, the certificate holders may, at a meeting called for the purpose, elect a new trustee (paragraph 16); that vacancies in the trusteeship may be filled by election by a majority vote of the certificate holders at meetings duly called (paragraph 17); that at such meetings a majority of the outstanding shares shall constitute a quorum, and that each share shall be entitled to one vote which may be cast by proxy (paragraph 29); that upon notice in the manner provided special meetings of the certificate holders may be called by the trustee, and shall be called on written application of three or more certificate holders having not less than 20 per cent. of the outstanding shares (paragraphs 28, 31, 32); that the certificate holders by a three-quarters vote of the outstanding shares may determine the trust (paragraph 33), increase the number of shares, and amend the declaration of trust (paragraph 36).

It thus appears: (1) that the respondent has a capital contributed by the certificate holders. (2) That future managers are to be chosen by the certificate holders. (3) That the character, scope, and size of the enterprise may be changed by the certificate holders, and that it may be terminated by them. (4) That these rights and powers are given to the certificate holders in the instrument by which the Associated Trust is constituted.

The absolute powers of termination and amendment give the certificate holders, as it seems to me, the ultimate control of the business of the trust whenever they choose to take that power into their hands. They have not yet done so; but the character of the organization is to be gauged rather by the powers of the certificate holders, than by the extent to which those powers have as yet been exercised. The analogy between the respondent organization and a corporation is apparent. The certificate holders clearly possess many of the most characteristic powers of stockholders. If the expression "unincorporated company" in the Bankruptcy Act does not describe such an organization as the respondent, it is difficult to see what meaning can be given to those words. To hold the respondent a partnership within the Bankruptcy Act would lead to results never contemplated by anybody, and would impose upon the certificate holders obligations which neither they nor the creditors of the trust supposed existed. It would be a very unjust result. To hold that the respondent is not an organization, and is nothing more than a strict trust, is almost as far from the fact as to hold it to be a partnership. These certificate holders voluntarily united into

a business organization, in which they invested their money under a contract by which they acquired certain individual rights against the trustee, and certain other rights to be exercised by joint action of all the certificate holders. "Unincorporated company" seems to me exactly to describe what the respondent is.

I therefore am obliged to hold that the plea and the motions to dismiss contained in the answer cannot be sustained, and that the respondent is subject to adjudication.

The result reached makes it unnecessary to consider the second question above stated.

THE LUCIA.

(District Court, S. D. Florida. March 25, 1915.)

SALVAGE ⊂=30—FLOATING STRANDED STEAMSHIP—AMOUNT OF COMPENSATION. On Sunday morning the Austrian steamship Lucia went aground on a sand bar five miles from Egmont Key, off the Florida coast. Being unable to release herself that day, on Monday morning the tug Coney was authorized by the captain to float her, and after working the most of that day and the next, and jettisoning a part of her cargo, she was floated late Tuesday afternoon and proceeded to her port under her own steam. The ship was in peril because of the danger of storms, but during the time of the operations the weather was calm, and neither the tug nor crew were in any special danger. The ship was worth $300,000 and the tug $30,000, having a crew of 10. *Held*, that the service was one of salvage, but not of a high order, and that the tug was entitled to a salvage award of $4,000, one-fourth to the crew.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 72–74; Dec. Dig. ⊂=30.]

In Admiralty. Suit for salvage by Charles R. Weibe, master of the tug Coney, against the Austrian steamship Lucia. Decree for libelant.

Peter O. Knight, of Tampa, Fla., for libelant.
Geo. P. Raney, of Tampa, Fla., for respondent.

CALL, District Judge. In this cause Charles R. Weibe, master of the steam tug Edgar F. Coney, on behalf of himself, the crew, and owners of the steam tug Coney, files his libel claiming salvage from the Austrian steamship Lucia. The claimants in their answer deny that the service rendered was a salvage service. The cause in due course was referred to a commissioner, and the testimony taken, covering many typewritten pages.

From this testimony it would appear that on Sunday morning, March 22, 1914, shortly after daylight the Austrian steamship Lucia, while steaming very slow, went aground on a sand bar four or five miles from Egmont Key, and inside of the deep sea buoy. The ship was aground from the bow to about amidships in the sand. The tug Coney, while taking in a schooner, sighted the ship aground, and after taking the schooner to a safe place dropped her and went to the steamship and offered her services, which were refused. Subsequently on

that day the tug towed the schooner to Tampa, some 40 or 45 miles away, and returned to Egmont Key Sunday night. Monday morning, March 23d, after some time, the ship gave the tug a line over her stern and the tug pulled on her for some time, probably an hour, at highwater, about 12 o'clock, without accomplishing any results. The tug then returned to Tampa and procured fuel and water, and returned Monday night or early Tuesday morning to the ship and early in the morning, after daylight, one of the owners of the tug went aboard the ship. On Monday, before pulling on the ship, the captain of the tug had refused to enter into a contract with the captain of the ship for "no cure no pay."

On Tuesday, when the part owner went aboard the ship, a letter was written, either by the part owner of the tug or the captain of the ship, to the master of the tug, and signed by the master of the ship, authorizing the tug to float the ship. This was Tuesday, the 24th, but dated the 23d. Whereupon some 200 tons of cargo was jettisoned and some 350 tons of fresh water pumped from the ship's tanks. The tug Coney lay alongside the ship for some time with her engines working, with the intent to dredge the sand away and to keep the cargo jettisoned (phosphate) from setting alongside. She also ran out the ship's anchor to deep water. About 6 o'clock Tuesday afternoon, at high water, the tug took a line from the bow of the ship and commenced to pull, the engines of the ship going ahead at full speed, and at the same time pulling on the anchor that had been run by the tug. The ship began to move, and after some little time was gotten off into deep water, where she was anchored for the night, and next day under her own steam proceeded to her destination, Port Tampa.

The point where the ship grounded was exposed, being some four or five miles from Egmont Key, in the Gulf of Mexico, and had a heavy wind from the northwest or southerly direction arisen, been liable to serious danger.

There is some dispute as to the velocity of the wind while the ship was aground, but a careful review of the testimony convinces me that at no time did the velocity of the wind exceed 20 or 25 miles an hour, and this was on Sunday and decreased during Monday and Tuesday.

There are claims of danger to the tug and crew alleged in the libel and attempted to be substantiated in the testimony, and also claims of the roughness of the water, etc.; but the circumstance that the tug was able to lie alongside of the ship for three or four hours on Tuesday with lines from her bow and stern would seem to settle the question of the weather, for, had the water been very rough, the tug would have been pounded to pieces against the side of the ship; and also the soundings around the ship were taken out of a small boat, flat-bottomed.

The jettisoning of the cargo, etc., was done by the crew of the ship, aided by her machinery. The value of the Coney was about $30,000, and the value of the Lucia was in the neighborhood of $300,000. There were some ten men composing the crew of the tug. It seems clear that, at the point where the Lucia was aground, it was sand bot-

tom; but this sand was shifting sand—that is sand easily moved by the waves, tides and currents. It is spoken of by some of the witnesses as quicksand, but I think the meaning is clear.

I find that the service rendered by the tug was salvage, but of the lowest grade. There was no risk of property, peril to life or limb, unusual expense, gallantry, courage or heroism. The Hesper Case, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175.

The Supreme Court in The Blackwall, 10 Wall. 1, 19 L. Ed. 870, lays down the rule for fixing compensation in salvage cases:

(a) Labor expended by the salvors in rendering the salvage service.
(b) The promptitude, skill, and energy displayed in rendering the service.
(c) The value of the property employed by the salvors, and the danger to which it is exposed in the service.
(d) The risk incurred by the salvors in saving the imperiled property.
(e) The value of the property saved.
(f) The degree of danger from which the property is saved.

As before stated, I cannot find from this testimony any great degree of danger to the property used by the salvors nor to the persons employed in the service. The property saved, the Lucia, was in a certain amount of danger, for, as has been well said, ships are intended to float, and when one goes aground there is always danger attendant. She is out of her element. The Lucia was in danger, therefore, and I think the service rendered by the Coney was more than mere towage service. But I fail to find in this case the elements that would authorize a large award for the service rendered.

Compensation for salvage service is more than mere quantum meruit, and is allowed, in a sum that will not only recompense the parties engaged in the service, for the time and labor expended, but also that others may be induced to risk property, life, and limb and save property and life from the dangers of the sea. While this is true, the amount awarded should not be excessive, and thus amount to a further imposition upon property already in distress, nor an inducement to persons to make exorbitant and unconscionable demands on the rescued property, nor in such an amount as to excite the cupidity of the rescuers or others when called on to render like services.

I recognize that on account of the dangerous currents around the Florida reefs and the menace of these reefs to shipping and navigation in those waters, the allowance of salvage to license workers have been larger, in those waters, than usually allowed, but in the instant case the considerations that induced these large awards are entirely wanting.

Taking into consideration the position of the Lucia, the time and labor of the tug and crew, the condition of the weather, I find that $4,000 is an adequate allowance for the tug and crew for the services rendered the Lucia, said amount to be divided, three-fourths to the owners of the tug and one-fourth to the crew, to be apportioned among them according to the rules of this court.

The costs of this proceeding will be first paid from the amount above allowed. It will be so ordered.

UNITED STATES v. RAVERAT.

(District Court, D. Montana. March 22, 1915.)

No. 111.

ALIENS ⊂⊃71½, New, vol. 7 Key-No Series—NATURALIZATION—CANCELLATION OF CERTIFICATE.

The provision of Rev. St. § 2165 that to authorize the admission of an alien to citizenship it must be made to appear to the satisfaction of the court that during his five years' residence in the United States he had "behaved as a man of good moral character," imports that to be qualified for citizenship he must have been in fact, as well as in behavior, of good moral character; and where an alien admitted under said law was not so in fact, but was at the time engaged in an immoral and illegal business, his admission was fraudulently and illegally procured, within the meaning of Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (Comp. St. 1913, § 4374), whatever the evidence may have been, and his certificate is subject to cancellation thereunder.

Proceeding by the United States against Leon Eugene Lucien Raverat for cancellation of certificate of citizenship. Decree of cancellation.

B. K. Wheeler, U. S. Atty., of Butte, Mont., and H. G. Murphy, Asst. U. S. Atty., of Helena, Mont., for the United States.

William Meyer, of Butte, Mont., for respondent.

BOURQUIN, District Judge. At San Francisco in 1896 defendant was admitted to citizenship. In 1912 this proceeding to cancel his certificate of citizenship was begun. The allegations are that said certificate was illegally and fraudulently procured, in that when admitted to citizenship, and for five years next prior thereto, defendant was not of good moral character, that he was a "pimp," habitually consorting and living with like persons and prostitutes, and that he was a person of grossly immoral character. The answer is of denials only.

The evidence, as it should be to deprive defendant of the benefit of a decree of a court of record and of the inestimable boon of American citizenship, is of quality and quantity that inspires confidence and produces conviction that when defendant was admitted to citizenship, and for several years next prior thereto, he conducted a saloon with lodging house above in the sporting district of San Francisco; that the patrons of the saloon in the main were of the sporting class; that defendant sublet "cribs" to prostitutes for the purpose of their calling (he nevertheless did it, even if it was directly his partner's act); that these and other cribs in adjacent alleys were connected with said saloon by annunciator bells, which, rung, secured attendance from employés of the saloon to supply liquor to the cribs and to call police in case of disorder; that crib inmates roomed in defendant's lodging house; and that to outward appearance defendant's business and conduct were of good order. The laws of California made it a misdemeanor to let tenements for purposes of prostitution, and the latter calling has always been under the ban of common law.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Aliens are admitted to citizenship upon their solicitation, and not of right, but of favor. They must possess the qualifications and perform the conditions for admission prescribed by Congress. Amongst these at the time of defendant's admission were that it should be made to appear to the satisfaction of the court that the alien had resided in the United States for five years "and that during that time he has behaved as a man of a good moral character." Section 2165, R. S. This imports that, to be qualified for citizenship, the alien must be in fact as well as in behavior of good moral character.

Behavior is taken as sufficient evidence of a good moral character, but it is not believed, as indicated in Hopp's Case (D. C.) 179 Fed. 562, that Congress intended it should be conclusive evidence, precluding inquiry into the alien's actual moral character. Surely substance, and not shadow, was the ultimate qualification and test. (Under the present law [34 Stat. 596] even beliefs, thoughts, internal acts, may disqualify.) Be that as it may, however, it needs no analysis and no argument to demonstrate that when admitted to citizenship, and for years prior thereto, defendant neither was nor had behaved as a man of a good moral character. His business and conduct violated ethics and law, and were of long-continued immorality. He was an accessory of outcasts of society in their offenses against morals and law. If, as he testifies, he told the court his business and its location, "answered all questions truthfully, and concealed nothing," it is nevertheless clear that he must have satisfied the court as the statute commands, and as we must presume until the contrary appears, that his behavior was that of a man of a good moral character. Therein the evidence was false, the court was deceived, defendant in conduct and character was not qualified for and entitled to citizenship, and so the decree and certificate were fraudulently procured. The result would be the same if the court received no evidence in relation thereto, but in a nonadversary proceeding, as it was, perfunctorily decreed admission. See Johannessen's Case, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066; Albertini's Case (D. C.) 206 Fed. 135. So, likewise, if the evidence was truthful, and as herein, and the court accepted it as demonstrative of behavior like unto a man of a good moral character; for in such proceedings, more administrative than judicial, and ex parte, the government is not concluded by the court's errors.

This suit is long delayed. Circumstances might exist wherein reformation might be a defense, or might serve to invoke laches, even against the sovereign's suit. Had they existed, doubtless this suit would not have been brought, for it would serve no good purpose, or they would have been pleaded herein. Reasons may be indicated by the indorsement upon defendant's photo, introduced and read in evidence without objection, viz.:

"Prop. tenderloin saloon, 128 S. Wyoming St., Cor. Mercury St., Butte. 10—26—09."

A decree of cancellation will be entered.

TERMINAL SHIPPING CO. v. HAMBERG et al.

(District Court, D. Maryland. April 29, 1915.)

1. ADMIRALTY ⟹65—BREACH OF CONTRACT—LOSS OF PROFITS.
Whether a libelant is entitled to recover for loss of profits by reason of the refusal of respondent to perform a contract depends on the facts as shown by the evidence, and the question should not be determined on the pleadings alone.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 515–518; Dec. Dig. ⟹65.]

2. ADMIRALTY ⟹13—JURISDICTION—"MARITIME CONTRACT."
A contract to perform stevedoring services is maritime, and a court of admiralty has jurisdiction of a suit in personam to recover damages for breach of an executory contract by which libelant was employed to do such work.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 164–176; Dec. Dig. ⟹13.]

In Admiralty. Suit by the Terminal Shipping Company against Hans Hamberg, manager, and the Rederiaktieb Hermodia, now or lately owners, of the Swedish steamship Bertha. On exceptions to libel. Overruled.

George Forbes, of Baltimore, Md., for libelant.
Harry N. Abercrombie, of Baltimore, Md., for respondents.

ROSE, District Judge. This is a libel in personam with a clause of foreign attachment. It sets up a contract between the respondents and the libelant, by which the latter until December 31, 1915, was to do all stevedoring work required by the respondents' vessels at the port of Baltimore, except when some charter otherwise provided. It alleges that the Bertha arrived at this port, but that its master declined to permit the libelant to do the stevedoring work, although it tendered its services and had rigged up its gears and was ready and willing to perform. It is asserted that by such refusal the libelant lost $75, that being the amount of profit which it says it would have made, had it done the work under the contract and been paid the contract price.

To this libel the respondents have excepted, and on two grounds: First, that the cause of action is not within the jurisdiction of a court of admiralty; and, secondly, that the damages sought to be recovered are purely speculative.

[1] There are cases in which recovery may be had for loss of profits. Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 745, 117 C. C. A. 503. Under other circumstances they cannot be. De Ford v. Maryland Steel Co., 113 Fed. 72, 51 C. C. A. 59. Whether in this case they can be will depend upon the facts as they may be shown in evidence. The question should not be determined on the face of the pleadings alone.

The second exception will therefore be overruled.

[2] The breach of an executory contract does not, ordinarily, at least, give the injured party a maritime lien upon the ship, and therefore a libel filed in rem may not be filed to recover therefor. Schooner

Freeman v. Buckingham, 18 How. 182, 15 L. Ed. 341; Scott v. Ira Chaffee (D. C.) 2 Fed. 401. It has also been decided that executory contracts to furnish all provisions that certain ships may require at a particular port, or all coal that they will need at that place, are not maritime contracts, and that admiralty has no jurisdiction, even in personam, to award damages for their breach. Diefenthal v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft (D. C.) 46 Fed. 397; Steamship Overdale Co., Ltd., v. Turner (D. C.) 206 Fed. 339. In the case last cited it was pointed out that a contract to buy coal or provisions is not in its nature maritime, and does not become so until the coal or the stores are furnished to the ship.

The libelant in this case says that a contract to do stevedoring work on a ship calls for a service which can never be otherwise than maritime. Whatever may have been the original difference of opinion on the subject, it is now clearly settled that stevedoring services are maritime. Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157. Respondent replies that the contract is executory, and that for a breach of such a contract there is no remedy in the admiralty.

The reasoning, if not the express language, of Justice Story on circuit in Andrews v. Essex Fire & Marine Ins. Co., 1 Fed. Cas. 889, goes far to justify this contention. In a number of cases in which a right of action in rem has been denied, doubt has been expressed as to whether there was any jurisdiction even in personam. The Seven Sons (D. C.) 69 Fed. 271. On the other hand, the jurisdiction in personam has been expressly sustained in a case on all fours with this. The Allerton (D. C.) 93 Fed. 219. The Circuit Court of Appeals for the Seventh Circuit has upheld such jurisdiction where the breach complained of was that of an executory contract for towing. Boutin v. Rudd, 82 Fed. 685, 27 C. C. A. 526.

The question seems to have been foreclosed in this circuit by the decision of the Circuit Court of Appeals in Baltimore Steam Packet Co. v. Patterson, 106 Fed. 736, 45 C. C. A. 575, 66 L. R. A. 193. It was there distinctly held that for the failure of a shipper to furnish cargo which he had bargained to ship recovery may be had in the admiralty upon a libel in personam.

It follows that the first exception must also be overruled.

MEMORANDUM DECISIONS

AMERICAN BONDING CO. OF BALTIMORE et al. v. SIMPLEX ELECTRICAL CO. et al. (Circuit Court of Appeals, Ninth Circuit. April 15, 1915.) No. 2566. Error to the District Court of the United States for the Second Division of the Northern District of California. Lilienthal, McKinstry & Raymond, Denson, Cooley & Denson, A. C. Skaife, W. H. Chapman, and A. J. Treat, all of San Francisco, Cal., for plaintiffs in error. Willard P. Smith and B. B. Blake, both of San Francisco, Cal., for defendant in error Simplex Electric Co. Walter D. Mansfield and Milton Newmark, both of

San Francisco, Cal., for defendant in error Crane Co. Henry G. W. Dinkelspiel and J. M. Thomas, both of San Francisco, Cal., for defendant in error H. W. Johns-Manville Co.

PER CURIAM. Pursuant to stipulation filed April 15, 1915, cause entered dismissed by the clerk under the provisions of rule 20, without costs to any of the parties.

CRITES v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 3, 1915.) No. 4257. In Error to the District Court of the United States for the Eastern District of Oklahoma. A. F. Moss, of Tulsa, Okl. (H. B. Martin, of Tulsa, Okl., on the brief), for plaintiff in error. Carter Smith, Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., on the brief), for the United States. Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge

HOOK, Circuit Judge. Crites was convicted of the offense of introducing and carrying intoxicating liquor from without the state of Oklahoma into that part of the state which was formerly Indian Territory, contrary to Act March 1, 1895, c. 145, § 8, 28 Stat. 697. We do not think the evidence sufficient to justify the conviction. The sentence is reversed, and the cause is remanded for a new trial.

FREE SEWING MACH. CO. et al. v. MAUND. (Circuit Court of Appeals, Fifth Circuit. April 5, 1915.) No. 2702. Appeal from the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge. W. A. Blount, F. B. Carter, and A. C. Blount, Jr., all of Pensacola, Fla., J. Bowers Campbell, of Marianna, Fla., Fred T. Myers, of Tallahassee, Fla., and C. L. Wilson, of Marianna, Fla., for appellants. Wm. C. Hodges and W. J. Oven, both of Tallahassee, Fla., for appellee. Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The decree of the trial court, dismissing the petition of creditors, was rendered July 23, 1914, and the F. A. Ames Company filed its petition to intervene on August 4, 1914. It follows that, when the cause was disposed of, the F. A. Ames Company was not a party to the proceeding, and therefore had no standing in court. Besides, it has no standing here, since it is not a party to the appeal, nor does it complain, by assigning error, of the ruling of the court. In dismissing the petition of the creditors, the trial court was right, and the decree is affirmed. Affirmed.

HIDEKUNI IWATA v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. June 7, 1915.) No. 2612. Appeal from the District Court of the United States for the Northern Division of the Southern District of California. Lewis H. Smith, of Fresno, Cal., for appellant. Albert Schoonover, U. S. Atty., and Clyde R. Moody, Asst. U. S. Atty., both of Los Angeles, Cal., for the United States.

PER CURIAM. On motion of counsel for appellant, and pursuant to stipulation of counsel for respective parties filed therefor, appeal dismissed, at the cost of the appellant.

HOPKINS v. GILBERT et al. (Circuit Court of Appeals, Fourth Circuit. February 18, 1915.) No. 1332. Appeal from the District Court of the United States for the District of North Carolina, at Asheville. F. A. Sondley and Theodore F. Davidson, both of Asheville, N. C., and C. B. Ellis, of Washington, D. C., for petitioner. Marshall W. Bell, of Murphy, N. C., and James H. Merrimon, of Asheville, N. C., for respondents.

PER CURIAM. On motion to amend and correct judgment entered by this court in case No. 1134 and to recall mandate. Motion granted. See, also, 204 Fed. 196.

L. E. WATERMAN CO. v. STANDARD DRUG CO. et al. (Circuit Court of Appeals, Sixth Circuit. May 14, 1915.) No. 2615. Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio. Suit in equity by the L. E. Waterman Company against the Standard Drug Company for the infringement of trade-mark. Decree for complainant, granting a permanent injunction. Subsequently a rule entered against defendant and Sol Teller as its agent to show cause why attachment should not issue against them for contempt for violation of the injunction was discharged, but on appeal the order was reversed. 202 Fed. 167. On a second hearing a similar order was entered, from which complainant appeals. Affirmed. Walter B. Raymond, of New York City, for appellant. T. H. Bushnell and J. A. Chamberlain, both of Cleveland, Ohio, for appellees.

PER CURIAM. This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, Eastern Division, and was argued by counsel; and the appellant having, in our view of the present record, failed to show that appellee Teller was an officer, agent, servant, or employé of the Standard Drug Company, or was otherwise so identified with the company as to justify the conclusion that he was under its control, at any of the times in question herein, the decree below will have to be affirmed, as it hereby is, with costs.

SELLERS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 3, 1915.) No. 4240. In Error to the District Court of the United States for the Eastern District of Oklahoma. Eck E. Brook, of Muskogee, Okl. (W. N. Brook, of Muskogee, Okl., on the brief), for plaintiff in error. Carter Smith, Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., on the brief), for the United States. Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. Sellers was indicted, convicted, and sentenced for introducing and carrying intoxicating liquor from outside the state of Oklahoma into that part of the state that was formerly Indian Territory, contrary to Act March 1, 1895, c. 145, § 8, 28 Stat. 697. The gist of the offense is the carrying of the liquor in interstate commerce into the prohibited district. It is not coterminous with the offense under the state law. The mere possession and sale of intoxicating liquor there will not, without more, warrant a conviction under the statute. Chambliss v. United States, 218 Fed. 154, 157, 162 C. C. A. 112. Aside from that there was practically no evidence against the accused. The sentence is reversed, and the cause remanded for a new trial.

WESTINGHOUSE ELECTRIC & MFG. CO. v. KUPPER et al. (Circuit Court of Appeals, Third Circuit. May 29, 1915.) No. 1898. Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge. W. G. Carr, of Pittsburgh, Pa., for appellant. Henry Orth, Jr., of Washington, D. C., for appellees. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. Agreeing with Judge Orr that the first claim of the Bormann patent is valid and has been infringed by the appellant, we see no need to add anything to his opinion reported in 212 Fed. at page 184. The decree is affirmed.

END OF CASES IN VOL. 222.